Agenda E-20 (Summary)
Rules of Practice
and Procedure
March 1990

SUMMARY OF THE

REPORT OF THE JUDICIAL CONFERENCE COMMITTEE

ON RULES OF PRACTICE AND PROCEDURE

The Committee on Rules of Practice and Procedure recommends that the Judicial Conference take the following action:

The remainder of the report is for information and the record.

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REPORT OF THE JUDICIAL CONFERENCE

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE

TO THE CHIEF JUSTICE OF THE UNITED STATES, CHAIRMAN, AND MEMBERS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES:

Your Committee on Rules of Practice and Procedure has not met since the last session of the Conference. We have, however, corresponded concerning the proposed amendments to the Rules of Criminal Procedure.

I. Amendments to the Rules of Criminal Procedure

The Advisory Committee on the Federal Rules of Criminal Procedure has submitted to your Committee a proposed amendment to Criminal Rule 41(a) and new Criminal Rule 58, with conforming amendments to Criminal Rules 5 and 54. The proposed amendment to Rule 41(a) would provide a mechanism for the issuance of a warrant in a district for a person or property that is moving into or through the district or might move outside the district while the warrant is sought or executed. It would also clarify the authority of Federal magistrates to issue search warrants for property that is relevant to certain criminal investigations being conducted in a district and, although located outside the United States, that is in a place where the United States may lawfully conduct a search.

Proposed new Rule 58 would replace the "Rules of Procedure for the Trial of Misdemeanors before United States Magistrates" with a single rule of criminal procedure. Although the proposed rule would make a number of technical changes, no substantive change to the current procedures for the trial of misdemeanors is intended. The new rule would simply provide a more succinct and accessible statement of these procedures. If new Rule 58 is approved, conforming technical amendments are necessary to Rules 5 and 54.

The proposed amendment to Rule 41(a) and new Rule 58 have been submitted for public comment and appropriate minor changes made in response thereto. Your Committee approves the proposed amendment to Rule 41(a), new Rule 58, and conforming amendments to Rules 5 and 54.

The above-proposed amendments to Criminal Rules 5, 41(a), and 54, and new Criminal Rule 58 are set out in Exhibit A and are accompanied by Advisory Committee notes and a report explaining their purpose and intent.

Recommendation:

That the Judicial Conference approve amendments to Rules 5, 41(a) and 54, and new Rule 58 of the Federal Rules of Criminal Procedure and transmit them to the Supreme Court for its consideration with the recommendation that they be approved by the Court and transmitted to Congress pursuant to law.

II. Resolution Endorsing Use of Rules Enabling Act for amendment of Rule 24, Federal Rules of Criminal Procedure

The Advisory Committee on the Federal Rules of Criminal Procedure has informed your Committee that Congress is considering, as part of S. 1171, a bill to

implement the President's drug control strategy, an amendment to Rule 24(b) to equalize the number of peremptory challenges available to the defense and the prosecution. This bill passed the Senate on October 5, 1989, but has not passed the House. As discussed below, the Advisory Committee has proposed a similar amendment for circulation to the bench and bar. Your Committee agrees that the use of the Rules Enabling Act should normally be the appropriate means of amending the Rules of Practice and Procedure, particularly where, as here, the Advisory Committee has responded to the congressional interest in the subject by initiating an amendment through the normal rules amendment process. Accordingly, your Committee recommends that the Conference endorse a resolution reiterating that view and advising Congress that the issue is currently under consideration by the Advisory Committee on Criminal Rules.

Recommendation:

That the Judicial Conference resolve to advise Congress that, in its view, the Rules Enabling Act is the appropriate vehicle for the amendment of Rule 24(b), Federal Rules of Criminal Procedure, and to advise Congress of the currently pending amendment of Rule 24(b) under consideration by the Advisory Committee on the Rules of Criminal Procedure.

III. Publication of Proposed Amendments to the Federal Rules of Criminal Procedure

The Advisory Committee on the Federal Rules of Criminal Procedure has submitted to your Committee proposals to amend Rules 16(a)(1)(A), 24(b), and 35(a)

of the Federal Rules of Criminal Procedure and Rule 404(b) of the Federal Rules of Evidence.

The proposed amendment to Rule 16(a)(1)(A) would slightly expand the disclosure requirements of Rule 16 by directing the government to disclose to the defense any written record containing any relevant oral statements made by the defendant in response to interrogation.

The proposed amendment to Rule 24(b) would equalize the number of peremptory challenges to each side in a criminal prosecution: 20 challenges in capital cases, six challenges in felony cases, and three challenges in misdemeanor cases. The court would have discretion to permit multiple defendants to exercise additional challenges, but the number permitted the government could not exceed the total number available to the defendants.

The proposed amendment to Rule 35(a) would extend the time within which the court could consider certain government motions for reductions of sentence based on the defendant's cooperation. The government could make and the court could consider such reductions involving information not earlier available to the defendant one year or more after imposition of sentence.

The proposed amendment to Rule 404(b) of the Federal Rules of Evidence would add a requirement that the government, upon request of the defendant, give notice of the general nature of evidence of other crimes, wrongs or acts it intends to use for purposes sanctioned by that rule. Such notice would be provided in advance of trial, unless the court excuses pretrial notice for good cause shown.

Your committee has considered these proposed amendments and has approved their circulation for comment to the bench and bar.

IV. Proposed Amendments to the Federal Rules of Civil Procedure Pending Comment

The Advisory Committee on the Federal Rules of Civil Procedure has previously submitted to your Committee proposals to make significant amendments to the Civil Rules. Most of those amendments were approved for publication by your Committee at its July 1989 meeting; some had been approved earlier. Hearings on these proposals were held on January 9 in San Francisco and February 2 in Chicago.

One of the most significant proposals is the amendment to Rule 4. This rule would be almost entirely re-written to serve eight purposes: (1) to provide suitable alternative means of notifying defendants in any judicial district of action pending in any other district; (2) to permit nationwide exercise of personal jurisdiction in federal question cases unless Congress otherwise provides; (3) to clarify and extend the cost-saving practice of securing waivers of actual service of process; (4) to achieve greater national uniformity in the rule; (5) to call attention to the Hague Convention and other pertinent treaties; (6) to reduce the risk that a plaintiff may lose a meritorious claim against the United States for failure to serve process properly on it; (7) to allow the United States to effect service more economically; and (8) to reorganize a frequently amended rule to make it more coherent. Rule 4.1 would be a new rule. It contains only matter eliminated from the old Rule 4 to secure greater textual clarity.

Rule 5 would be revised in two respects. First, the revision would authorize the use of electronic or other advanced methods of service of papers on opposing parties and counsel. Second, it would foreclose the local practice in some districts of requiring the clerk to reject for filing instruments that do not conform to specified standards.

Rule 12 would be amended to strike an unnecessary and disharmonious reference to state law, and to conform the rule to the amended Rule 4. Rule 14 would be amended to assure that third-party defendants are provided with copies of pleadings previous to third-party complaints. Rule 15 would be amended to prevent parties against whom claims are made from taking unjust advantage of otherwise inconsequential pleading errors to sustain a limitations defense. It would compel a different result in cases like Schiavone v. Fortune, 106 S.Ct. 2379 (1986). A proposed amendment to Rule 16(b) is proposed with respect to the time for scheduling. The present rule requires that this be done within 120 days after filing, but it is possible that the defendant may not have been served by then. The Advisory Committee proposes that the time for scheduling be within 60 days after service of an opposing party. The proposed revision of Rule 16(d) is derivative from the proposals to be made with respect to Rules 50, 52, and 56. The proposed amendment to Rule 24 would merely conform the rule to a controlling statute requiring notice to a state Attorney General when the constitutionality of state legislation is challenged.

Two revisions of Rule 26 are proposed. The first is to subdivision (a) and would create a preference for internationally agreed methods of discovery when such methods are available. The second revision would add a paragraph to subdivision (b)

to impose on parties asserting privileges a duty to disclose as much information as can be disclosed without compromise of such privileges. Rule 28 would be revised to make effective use of the Hague Convention on the Taking of Evidence Abroad.

Rule 30 would be revised to facilitate the use of videotape and other modern methods of recording testimony at depositions. The revised rule would authorize the party taking the deposition to designate the method of recording. Any other party could provide additional recordings by other means at the other party's expense. Other technical changes are made to accommodate to this principle. The proposed amendment to Rule 34 conforms to a proposal made with respect to Rule 45; it provides for a subpoena to compel non-parties to produce documents and things and to submit to inspections on premises. The proposed amendment to Rule 35 reflects changes in the rule made by Congress in 1988 to provide for mental examinations by clinical psychologists. The purpose of the proposed revision to Rule 38 is to remove a possible inconsistency in the present rules with respect to the failure of a party to file a jury demand as required by Rule 5. Rule 41 would be revised to delete the provision for its use as a method of evaluating the sufficiency of the evidence presented at trial by a plaintiff. This language would be replaced by a new provision found in Rule 52(c) that would be more broadly useful. The proposed revision to Rule 44 would take advantage of the Hague Public Documents Convention. The rule would also be amended to delete references to specific jurisdictions no longer subject to the sovereignty of the United States.

Rule 45 would be completely re-written. The aims of revision are (1) to clarify and enlarge the protections afforded non-parties who are subject to subpoenas; (2) to facilitate access outside the deposition procedure to documents and things in the possession of non-parties; (3) to facilitate service of subpoenas at places distant from the district in which the action is pending; (4) to enable the court to compel a witness found within its state to attend trial; and (5) to clarify the text of the rule.

The proposed revision to Rule 47 would eliminate the institution of the "alternate" juror. This, together with the amendment of Rule 48, would permit all jurors who sit through the case to participate in the verdict. In addition to providing that all jurors who hear the evidence would be permitted to participate in the verdict, Rule 48 would be revised to conform the rule to existing practice in requiring at least six jurors.

Rule 50 would be revised for several purposes. One is to enable the court to render judgment at any time during a jury trial when it becomes clear a party is entitled to such judgment. A second is to abandon familiar terminology that carries the burden of anachronisms suggested by the text of the present subdivision 50(a). A third is to articulate the standard for entry of judgment as a matter of law with sufficient clarity that an uninstructed reader of the rule can gain some understanding of its function. The standard is not changed from the present law. In addition, Rule 52 would be amended to add subdivision (c) authorizing the court to enter judgment at any time during a non-jury trial when it becomes clear a party is entitled to such judgment. This provision is a companion to the proposed revision of Rule 50. The

two proposals are also reflected in the language that would be added to Rule 16. Their shared purpose is to reduce the number of long trials. Judges using these devices as intended may schedule the course of a trial in such manner as to reach first any dispositive issues on which either party is likely to fail to carry a burden of production or proof.

The proposed amendment to Rule 53 would impose on special masters the duty to distribute their reports to the parties. This would reduce dependence on the office of the clerks to perform this service.

Rule 56 would be substantially re-written. The purposes of this revision are to (1) enlarge the availability of the device of summary establishment of fact provided in subdivision (d) of the present rule; (2) provide for the summary establishment of law to control further proceedings; (3) assure a party opposing summary action of reasonable opportunity for discovery; (4) integrate this rule with Rules 50 and 52; and (5) provide guidance on several troublesome issues arising under the present rule. Some unnecessary text has been deleted from the rule, notably the former subdivisions (a) and (b). This revision shares the purposes of the revisions of Rules 50 and 52 in providing means to reduce the compass of dispute. Where those rules are designed to confine long trials, this rule is designed to confine protracted discovery. Like the proposed revision of Rule 50, this proposed Rule 56 would articulate the standard for the rule, explaining the relation between this rule and Rules 50 and 52, and the burdens of production and proof. This is not a revision of those standards, but should make the rule more accessible to users. The revised rule specifies the requirements imposed on both the moving and non-moving parties, and is more explicit than the

present rule in providing for the use of evidentiary materials to make a "pretrial record."

The proposed revision to Rule 63 would facilitate the use of substitute judges, especially in long bench trials. Rule 72 would be amended to eliminate discrepancy in the present rule in measuring the time for objection to a magistrate's action. The proposed revision of Rule 77 would conform that rule to a proposed revision of the Federal Rules of Appellate Procedure that will enable the district courts to deal with the increasingly frequent problem of a losing party receiving no notice of an unfavorable judgment from which an appeal might be taken. Finally, proposed amendments to Admiralty Rules C and E would conform those rules to Rule 4 as amended in 1983.

The Advisory Committee will meet on June 6-8, 1990, to consider the comments received and expects to submit many of the amendments to your committee soon thereafter.

Respectfully submitted,

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Agenda E-20
Exhibit A
March 13-14, 1990

PRELIMINARY DRAFT
OF PROPOSED AMENDMENTS
TO THE
FEDERAL RULES OF CRIMINAL PROCEDURE

Rule 41. Search and Seizure

(a) AUTHORITY TO ISSUE WARRANT. ~~A search warrant authorized by this rule may be issued by a federal magistrate or a judge of a state court of record within the district wherein the property or person sought is located, upon request of a federal law enforcement officer or an attorney for the government.~~ Upon the request of a federal law enforcement officer or an attorney for the government, a search warrant authorized by this rule may be issued (1) by a federal magistrate, or a state court of record within the federal district, for a search of property or a person within the district, (2) by a federal magistrate

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*New matter is underlined; matter to be omitted is lined through.

for a search of property or person either within or outside the district if the property or person is within the district when the warrant is sought but might move outside the district before the warrant is executed, and (3) by a federal magistrate for a search of property outside the United States if the property is lawfully subject to search and seizure by the United States and is relevant to a criminal investigation in the district in which the warrant is sought.

* * * * *

COMMITTEE NOTE

Rule 41(a). The amendment to Rule 41(a) serves several purposes. First, it furthers the constitutional preference for warrants by providing a mechanism whereby a warrant may be issued in a district for a person or property that is moving into or through a district or might move outside the district while the warrant is sought or executed. Second, it clarifies the authority of federal magistrates to issue search warrants for property that is relevant to criminal investigation being conducted in a district and, although located outside the United States, that is in a place where the United States may lawfully conduct a search.

The amendment is not intended to expand the class of persons authorized to request a warrant and the language "upon request of a federal law enforcement officer," modifies all warrants covered by Rule 41. The amendment is intended to make clear that judges of state courts of

record within a federal district may issue search warrants for persons or property located within that district. The amendment does not prescribe the circumstances in which a warrant is required and is not intended to change the law concerning warrant requirements. Rather the rule provides a mechanism for the issuance of a warrant when one is required, or when a law enforcement officer desires to seek a warrant even though warrantless activity is permissible.

Rule 41(a)(1) permits anticipatory warrants by omitting the words "is located," which in the past required that in all instances the object of the search had to be located within the district at the time the warrant was issued. Now a search for property or a person within the district, or expected to be within the district, is valid if it otherwise complies with the rule.

Rule 41(a)(2) authorizes execution of search warrants in another district under limited circumstances. Because these searches are unusual, the rule limits to federal magistrates the authority to issue such warrants. The rule permits a federal magistrate to issue a search warrant for property within the district which is moving or may move outside the district. The amendment recognizes that there are inevitable delays between the application for a warrant and its authorization, on the one hand, and the execution of the warrant, on the other hand. The amendment also recognizes that when property is in motion, there may be good reason to delay execution until the property comes to rest. The amendment provides a practical tool for federal law enforcement officers that avoids the necessity of their either seeking several warrants in different districts for the same property or their relying on an exception to the warrant requirement for search of property or a person that has moved outside a district.

The amendment affords a useful warrant procedure to cover familiar fact patterns, like the one typified by United States v. Chadwick, 433 U.S. 1 (1976). In

Chadwick, agents in San Diego observed suspicious activities involving a footlocker carried onto a train. When the train arrived in Boston, the agents made an arrest and conducted a warrantless search of the footlocker (which the Supreme Court held was invalid). Under the amended rule, agents who have probable cause in San Diego would be able to obtain a warrant for a search of the footlocker even though it is moving outside the district. Agents, who will not be sure exactly where the footlocker will be unloaded from the train, may execute the warrant when the journey ends. See also United States v. Karo, 468 U.S. 705 (1984) (rejecting argument that obtaining warrant to monitor beeper would not comply with requirement of particularity because its final destination may not be known); United States v. Knotts, 460 U.S. 276 (1983) (agents followed beeper across state lines). The Supreme Court's holding in Chadwick permits law enforcement officers to seize and hold an object like a footlocker while seeking a warrant. Although the amended rule would not disturb this holding, it provides a mechanism for agents to seek a probable cause determination and a warrant before interfering with the property and seizing it. It encourages reliance on warrants.

The amendment is not intended to abrogate the requirements of probable cause and prompt execution. At some point, a warrant issued in one district might become stale when executed in another district. But staleness can be a problem even when a warrant is executed in the district in which it was issued. See generally United States v. Harris, 403 U. S. 573, 579, 589 (1971). And at some point, an intervening event might make execution of a warrant unreasonable. Cf. Illinois v. Andreas, 463 U.S. 765, 772 (1983). Evaluations of the execution of a warrant must, in the nature of things, be made after the warrant is issued.

Nor does the amendment abrogate the requirement of particularity. Thus, it does not authorize searches of premises other than a particular place. As recognized by the Supreme Court in Karo, supra, although agents may

not know exactly where moving property will come to rest, they can still describe with particularity the object to be searched.

The amendment would authorize the search of a particular object or container provided that law enforcement officials were otherwise in a lawful position to execute the search without making an impermissible intrusion. For example, it would authorize the search of luggage moving aboard a plane.

Rule 41(a)(3) provides for warrants to search property outside the United States. No provision for search warrants for persons is made lest the rule be read as a substitute for extradition proceedings. As with the provision for searches outside a district, supra, this provision is limited to search warrants issued by federal magistrates. The phrase "relevant to criminal investigation" is intended to encompass all of the types of property that are covered by Rule 41(b), which is unchanged by the amendment. That phrase also is intended to include those investigations which begin with the request for the search warrant.

It now appears that at least some searches and seizures by federal officers outside the territory of the United States are governed by the fourth amendment. See generally Saltzburg, The Reach of the Bill of Rights Beyond the Terra Firma of the United States, 20 Va. J. Int'l L. 741 (1980). Prior to the amendment of the rule, it was unclear how federal officers might obtain warrants authorizing searches outside the district of the issuing magistrate. Mil. R. Evid. 315 provided guidance for searches of military personnel and nonmilitary property in a foreign country, but had no civilian counterpart. See generally S. Saltzburg, L. Schinasi, & D. Schlueter, Military Rules of Evidence Manual 274-95 (2d ed. 1986). The amended rule provides necessary clarification as to how a warrant may be obtained when law enforcement officials are required to, or find it desirable to obtain a warrant. The amendment does not address the question of when the Constitution requires

a warrant. See generally United States v. Verdugo-Urquidez, 856 F.2d 1214 (9th Cir. 1988), cert. granted, ---- U.S. ----, 109 S. Ct. 1741 (1989).

The amendment permits warrants to be issued when the United States may lawfully conduct a search outside the United States. The determination that a search may lawfully be conducted might require an assessment not only of United States law, but also the law of a foreign nation. See United States v. Verdugo-Urquidez, supra; United States v. Patterson, 812 F.2d 486 (9th Cir. 1987).

Rule 58. Procedure for Misdemeanors and Other Petty Offenses

(a) SCOPE

(1) In General. This rule governs the procedure and practice for the conduct of proceedings involving misdemeanors and other petty offenses, and for appeals to judges of the district courts in such cases tried by magistrates.

(2) Applicability of Other Federal Rules of Criminal Procedure. In proceedings concerning petty offenses for which no sentence of imprisonment will be imposed the court may follow such provisions of these rules as it deems appropriate, to the extent not inconsistent with

this rule. In all other proceedings the other rules govern except as specifically provided in this rule.

(3) Definition. The term "petty offenses for which no sentence of imprisonment will be imposed" as used in this rule, means any petty offenses as defined in 18 U.S.C. § 19 as to which the court determines, that, in the event of conviction, no sentence of imprisonment will actually be imposed.

(b) PRETRIAL PROCEDURES.

(1) Trial Document. The trial of a misdemeanor may proceed on an indictment, information, or complaint or, in the case of a petty offense, on a citation or violation notice.

(2) Initial Appearance. At the defendant's initial appearance on a misdemeanor or other petty offense charge, the court shall inform the defendant of:

(A) The charge, and the maximum possible penalties provided by law, including payment

of a special assessment under 18 U.S.C. § 3013, and restitution under 18 U.S.C. § 3663;

(B) the right to retain counsel;

(C) unless the charge is a petty offense for which appointment of counsel is not required, the right to request the assignment of counsel if the defendant is unable to obtain counsel;

(D) the right to remain silent and that any statement made by the defendant may be used against the defendant;

(E) the right to trial, judgment, and sentencing before a judge of the district court, unless the defendant consents to trial, judgment, and sentencing before a magistrate;

(F) unless the charge is a petty offense, the right to trial by jury before either a magistrate or a judge of the district court; and

(G) if the defendant is held in custody and charged with a misdemeanor other than a petty offense, the right to a preliminary examination in accordance with 18 U.S.C. § 3060, and the general circumstances under which the defendant may secure pretrial release.

(3) Consent and Arraignment.

(A) TRIAL BEFORE A MAGISTRATE. If the defendant signs a written consent to be tried before the magistrate which specifically waives trial before a judge of the district court, the magistrate shall take the defendant's plea. The defendant may plead not guilty, guilty, or with the consent of the magistrate, nolo contendre.

(B) FAILURE TO CONSENT. If the defendant does not consent to trial before the magistrate, the defendant shall be ordered to appear before a judge of the

district court for further proceedings on notice.

(c) ADDITIONAL PROCEDURES APPLICABLE ONLY TO PETTY OFFENSES FOR WHICH NO SENTENCE OF IMPRISONMENT WILL BE IMPOSED. With respect to petty offenses for which no sentence of imprisonment will be imposed, the following additional procedures are applicable:

(1) Plea of Guilty or Nolo Contendere. No plea of guilty or nolo contendere shall be accepted unless the court is satisfied that the defendant understands the nature of the charge and the maximum possible penalties provided by law.

(2) Waiver of Venue for Plea and Sentence. A defendant who is arrested, held, or present in a district other than that in which the indictment, information, complaint, citation or violation notice is pending against that defendant may state in writing a wish to plead

guilty or nolo contendre, to waive venue and trial in the district in which the proceeding is pending, and to consent to disposition of the case in the district in which that defendant was arrested, is held, or is present. Unless the defendant thereafter pleads not guilty, the prosecution shall be had as if venue were in such district, and notice of the same shall be given to the magistrate in the district where the proceeding was originally commenced. The defendant's statement of a desire to plead guilty or nolo contendere is not admissible against the defendant.

(3) Sentence. The court shall afford the defendant an opportunity to be heard in mitigation. The court shall then immediately proceed to sentence the defendant, except that in the discretion of the court, sentencing may be continued to allow an investigation by the probation service or submission of additional information by either party.

(4) Notification of Right to Appeal. After imposing sentence in a case which has gone to trial on a plea of not guilty, the court shall advise the defendant of the defendant's right to appeal including any right to appeal the sentence. There shall be no duty on the court to advise the defendant of any right of appeal after sentence is imposed following a plea of guilty or nolo contendere, except that the court shall advise the defendant of any right to appeal the sentence.

(d) SECURING THE DEFENDANT'S APPEARANCE; PAYMENT IN LIEU OF APPEARANCE.

(1) Forfeiture of Collateral. When authorized by local rules of the district court, payment of a fixed sum may be accepted in suitable cases in lieu of appearance and as authorizing the termination of the proceedings. Local rules may make provision for increases in

fixed sums not to exceed the maximum fine which could be imposed.

(2) Notice to Appear. If a defendant fails to pay a fixed sum, request a hearing, or appear in response to a citation or violation notice, the clerk or a magistrate may issue a notice for the defendant to appear before the court on a date certain. The notice may also afford the defendant an additional opportunity to pay a fixed sum in lieu of appearance, and shall be served upon the defendant by mailing a copy to the defendant's last known address.

(3) Summons or Warrant. Upon an indictment or a showing by one of the other documents specified in (b)(1) of probable cause to believe that an offense has been committed and that the defendant has committed it, the court may issue an arrest warrant or, if no warrant is requested by the attorney for the prosecution, a summons. The showing of probable cause shall be made in writing upon oath or under penalty for perjury,

but the affiant need not appear before the court. If the defendant fails to appear before the court in response to a summons, the court may summarily issue a warrant for the defendant's immediate arrest and appearance before the court.

(e) RECORD. Proceedings under this rule shall be taken down by a reporter or recorded by suitable sound equipment.

(f) NEW TRIAL. The provisions of Rule 33 shall apply.

(g) APPEAL.

(1) Decision, Order, Judgment or Sentence by a District Judge. An appeal from a decision, order, judgment or conviction or sentence by a judge of the district court shall be taken in accordance with the Federal Rules of Appellate Procedure.

(2) Decision, Order, Judgment or Sentence by a Magistrate.

(A) INTERLOCUTORY APPEAL. A decision or order by a magistrate which, if made by a

judge of the district court, could be appealed by the government or defendant under any provision of law, shall be subject to an appeal to a judge of the district court provided such appeal is taken within 10 days of the entry of the decision or order. An appeal shall be taken by filing with the clerk of court a statement specifying the decision or order from which an appeal is taken and by serving a copy of the statement upon the adverse party, personally or by mail, and by filing a copy with the magistrate.

(B) APPEAL FROM CONVICTION OR SENTENCE. An appeal from a judgment of conviction or sentence by a magistrate to a judge of the district court shall be taken within 10 days after entry of the judgment. An appeal shall be taken by filing with the clerk of court a statement specifying the judgment from which an appeal is taken, and by serving a copy of

the statement upon the United States Attorney, personally or by mail, and by filing a copy with the magistrate.

(C) RECORD. The record shall consist of the original papers and exhibits in the case together with any transcript, tape, or other recording of the proceedings and a certified copy of the docket entries which shall be transmitted promptly to the clerk of court. For purposes of the appeal, a copy of the record of such proceedings shall be made available at the expense of the United States to a person who establishes by affidavit the inability to pay or give security therefor, and the expense of such copy shall be paid by the Director of the Administrative Office of the United States Courts.

(D) SCOPE OF APPEAL. The defendant shall not be entitled to a trial de novo by a judge of the district court. The scope of the appeal shall be the same as an appeal

from a judgment of a district court to a court of appeals.

(3) Stay of Execution; Release Pending Appeal. The provisions of Rule 38 relating to stay of execution shall be applicable to a judgment of conviction or sentence. The defendant may be released pending appeal in accordance with the provisions of law relating to release pending appeal from a judgment of a district court to a court of appeals.

COMMITTEE NOTE

This new rule is largely a restatement of the Rules of Procedure for the Trial of Misdemeanors before United States Magistrates which were promulgated in 1980 to replace the Rules for the Trial of Minor Offenses before United States Magistrates (1970). The Committee believed that a new single rule should be incorporated into the Rules of Criminal Procedure where those charged with its execution could readily locate it and realize its relationship with the other Rules. A number of technical changes have been made throughout the rule and unless otherwise noted, no substantive changes were intended in those amendments. The Committee envisions no major changes in the way in which the trial of misdemeanors and petty offenses are currently handled.

The title of the rule has been changed by deleting the phrase "Before United States Magistrates" to indicate that this rule may be used by district judges as well as

magistrates. The phrase "and Petty Offenses" has been added to the title and elsewhere throughout the rule because the term "misdemeanor" does not include an "infraction." See 18 U.S.C. § 3559(a). A petty offense, however, is defined in 18 U.S.C. § 19 as a Class B misdemeanor, a Class C misdemeanor, or an infraction, with limitations on fines of no more than $5,000 for an individual and $10,000 for an organization.

Subdivision (a) is an amended version of current Magistrates Rule 1. Deletion of the phrase "before United States Magistrates under 18 U.S.C. § 3401" in Rule 1(a) will enable district judges to use the abbreviated procedures of this rule. Consistent with that change, the term "magistrate" is amended to read "the court," wherever appropriate throughout the rule, to indicate that both judges and magistrates may use the rule. The last sentence in (a)(1) has been amended to reflect that the rule also governs an appeal from a magistrate's decision to a judge of the district court. An appeal from a district judge's decision would be governed by the Federal Rules of Appellate Procedure. Subdivision (a)(2) rephrases prior language in Magistrate Rule 1(b). Subdivision (a)(3) adds a statutory reference to 18 U.S.C. § 19, which defines a petty offense as a "Class B misdemeanor, a Class C misdemeanor, or an infraction" with the $5,000 and $10,000 fine limitations noted supra. The phrase "regardless of the penalty authorized by law" has been deleted.

Subdivision (b) is an amended version of current Magistrates Rule 2. The last sentence in current Rule 2(a) has been deleted because 18 U.S.C. § 3401(a), provides that a magistrate will have jurisdiction to try misdemeanor cases when specially designated to do so by the district court or courts served by the Magistrate.

Subdivision (b)(2) reflects the standard rights advisements currently included in Magistrates Rule 2 with several amendments. Subdivision (b)(2)(A) specifically requires that the defendant be advised of all penalties which may be imposed upon conviction, including

specifically a special assessment and restitution. A number of technical, nonsubstantive, changes have been made in the contents of advisement of rights. A substantive change is reflected in subdivision (b)(2)(G), currently Magistrates Rule 2(b)(7), and (8). That rule currently provides that, unless the prosecution is on an indictment or information, a defendant who is charged with a misdemeanor other than a petty offense has a right to a preliminary hearing, if the defendant does not consent to be tried by the magistrate. As amended, only a defendant in custody has a right to a preliminary hearing.

Subdivision (b)(3)(A) is based upon Magistrates Rule 2(c) and has been amended by deleting the last sentence, which provides that trial may occur within 30 days "upon written consent of the defendant." The change is warranted because the Speedy Trial Act does not apply to petty offenses. See 18 U.S.C. § 3172(2). Subdivision (b)(3)(B), "Failure to Consent," currently appears in Magistrates Rule 3(a). The first sentence has been amended to make it applicable to all misdemeanor and petty offense defendants who fail to consent. The last sentence of Rule 3(a) has been deleted entirely. Because the clerk is responsible for all district court case files, including those for misdemeanor and petty offense cases tried by magistrates, it is not necessary to state that the file be transmitted to the clerk of court.

Subdivision (c) is an amended version of current Magistrates Rule 3 with the exception of Rule 3(a), which, as noted supra is now located in subdivision (b)(3)(B) of the new rule. The phrase "petty offense for which no sentence of imprisonment will be imposed" has been deleted because the heading for subdivision (c) limits its application to those petty offenses. The Committee recognizes that subdivision (c)(2) might result in attempted forum shopping. See, e.g., United States v. Shaw, 467 F.Supp. 86 (W.D. La. 1979), affm'd, 615 F.2d 251 (5th Cir. 1980). In order to maintain a streamlined and less formal procedure which is consistent with the remainder of the Rule, subdivision (c)(2) does not

require the formal "consent" of the United States Attorneys involved before a waiver of venue may be accomplished. Cf. Rule 20 (Transfer From the District for Plea and Sentence). The Rule specifically envisions that there will be communication and coordination between the two districts involved. To that end, reasonable efforts should be made to contact the United States Attorney in the district in which the charges were instituted. Subdivision (c)(4), formerly Rule 3(d), now specifically provides that the defendant be advised of the right to appeal the sentence. This subdivision is also amended to provide for advising the defendant of the right to appeal a sentence under the Sentencing Reform Act when the defendant is sentenced following a plea of guilty. Both amendments track the language of Rule 32(a)(2), as amended by the Sentencing Reform Act.

Subdivision (d) is an amended version of Magistrates Rule 4. The amendments are technical in nature and no substantive change is intended.

Subdivision (e) consists of the first sentence of Magistrates Rule 5. The second sentence of that Rule was deleted as being inconsistent with 28 U.S.C. § 753(b) which gives the court discretion to decide how the proceedings will be recorded. The third sentence is deleted to preclude routine waivers of a verbatim record and to insure that all petty offenses are recorded.

Subdivision (f) replaces Magistrates Rule 6 and simply incorporates by reference Rule 33.

Subdivision (g) is an amended version of Magistrates Rule 7. Because the new rule may be used by both magistrates and judges, subdivision (g)(1) was added to make it clear that the Federal Rules of Appellate Procedure govern any appeal in a case tried by a district judge pursuant to the new rule. Subdivision (g)(2)(B), based upon Magistrates Rule 7(b), now provides for appeal of a sentence by a magistrate and is thus consistent with the provisions of 18 U.S.C. § 3742(f). Finally, subdivision (g)(3) is based upon Magistrates Rule 7(d)

but has been amended to provide that a stay of execution is applicable, if an appeal is taken from a sentence as well as from a conviction. This change is consistent with the recent amendment of Rule 38 by the Sentencing Reform Act.

The new rule does not include Magistrates Rules 8 and 9. Rule 8 has been deleted because the subject of local rules is covered in Rule 57. Rule 9, which defined a petty offense, is now covered in 18 U.S.C. § 19.

Rule 5. Initial Appearance Before the Magistrate

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(b) MISDEMEANORS AND OTHER PETTY OFFENSES. If the charge against the defendant is a misdemeanor or other petty offense triable by a United States magistrate under 18 U.S.C. § 3401, the magistrate shall proceed in accordance with ~~the~~ Rule 58. ~~the Rules of Procedure for the Trial of Misdemeanors Before United States Magistrates.~~

Rule 54. Application and Exception

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(b) PROCEEDINGS.

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(4) Proceedings Before United States Magistrates. Proceedings involving misdemeanors and other petty offenses are governed by Rule 58 ~~the Rules of Procedure for the Trial of Misdemeanors before United States Magistrates~~.

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(c) APPLICATION OF TERMS.

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"Petty offense" is defined in 18 U.S.C. § ~~1 (3)~~ 19.