Agenda F-19 (Summary)
Rules
September 1993

SUMMARY OF THE

REPORT OF THE JUDICIAL CONFERENCE COMMITTEE

ON THE RULES OF PRACTICE AND PROCEDURE

The Committee on the Rules of Practice and Procedure recommends that the Conference:

1. Approve the proposed amendments to Rules 1, 3, 5, 5.1, 9, 13, 21, 25, 26.1, 27, 28, 30, 31, 33, 35, 38, 40, 41, and 48 of the Federal Rules of Appellate Procedure and transmit them to the Supreme Court for its consideration with the recommendation that they be adopted by the Court and transmitted to Congress pursuant to law.....pp. 2-5

2. Approve the proposed amendments to Rules 8002 and 8006 of the Federal Rules of Bankruptcy Procedure and transmit them to the Supreme Court for its consideration with the recommendation that they be adopted by the Court and transmitted to Congress pursuant to law.....p. 6

3. Approve the proposed amendments to Rules 16, 29, 32, and 40 of the Federal Rules of Criminal Procedure and transmit them to the Supreme Court for its consideration with the recommendation that they be adopted by the Court and transmit to Congress pursuant to law.....pp. 6-9

4. Approve the proposed amendments to Rule 412 of the Federal Rules of Evidence and transmit the proposal to the Supreme Court for its consideration with the recommendation that it be adopted by the Court and transmitted to Congress pursuant to law.....pp. 10-11

5. Not approve the adoption of proposed Guidelines for Filing by Facsimile in their present form.....pp. 13-14

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

NOTICE

NO RECOMMENDATION PRESENTED HEREIN REPRESENTS THE POLICY OF THE JUDICIAL CONFERENCE UNLESS APPROVED BY THE CONFERENCE ITSELF.

Agenda F-19
Rules
September 1993

REPORT OF THE JUDICIAL CONFERENCE

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE

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

Your Committee on Rules of Practice and Procedure met in Washington, D.C. on June 17-19, 1993. All members of the Committee attended the meeting. Philip B. Heymann, Deputy Attorney General, attended part of the meeting, with Messrs. Roger Pauley and Dennis G. Linder representing him in his absence. The Reporter to your Committee, Dean Daniel R. Coquillette and the Secretary to the Committee, Peter G. McCabe, also participated in the meeting.

Also present were Judge Kenneth F. Ripple, Chair, and Professor Carol Ann Mooney, Reporter, of the Advisory Committee on Appellate Rules; Judge Edward Leavy, Chair, and Professor Alan N. Resnick, Reporter, of the Advisory Committee on Bankruptcy Rules; Chief Judge Sam C. Pointer, Jr., Chair, and Dean Edward Cooper, of the Advisory Committee on Civil Rules; Judge William Terrell Hodges, Chair, and Professor David A. Schlueter, Reporter, of the Advisory Committee on Criminal Rules; and Judge Ralph K. Winter, Jr., Chair, and Dean Margaret A. Berger, Reporter, of the Advisory Committee on Evidence Rules.

NOTICE

NO RECOMMENDATION PRESENTED HEREIN REPRESENTS THE POLICY OF THE JUDICIAL CONFERENCE UNLESS APPROVED BY THE CONFERENCE ITSELF.

Also present were John K. Rabiej, Chief, Rules Committee Support Office of the Administrative Office of the United States Courts; Professor Mary P. Squiers, Director of the Local Rules Project; and Bryan Garner and Joseph F. Spaniol, Jr., consultants to the Subcommittee on Style. Other staff from the Administrative Office and the Federal Judicial Center as well as various members of the public also attended the meeting as observers.

I. Amendments to the Federal Rules of Appellate Procedure.

The Advisory Committee on the Rules of Appellate Procedure submitted to your Committee proposed amendments to Appellate Rules 1, 3, 5, 5.1, 9, 13, 21, 25, 26.1, 27, 28, 30, 31, 32, 33, 35, 38, 40, 41, and 48 together with Committee Notes explaining their purpose and intent. The proposed amendments were circulated to the bench and bar for comment in December 1992. A scheduled public hearing on the proposed amendments was canceled because no one requested to testify.

The proposed amendments to Rules 3, 5, 5.1, 13, 21, 25(e), 26.1, 27, 30, 31, and 35 would establish national standards controlling the number of copies of documents that must be filed with the court of appeals, subject to local court approved variations. The amendments were derived from the work of the local rules project.

The provision prescribing the title of the rules, now found in Rule 48, would be transferred to Rule 1. The proposed changes to Rule 9 would accommodate appeals by the government from a court order releasing a defendant prior to trial or after judgment of

conviction. The changes would also require a party seeking review to provide the court with a copy of the district court's order, its statement of reasons, and a transcript of the release decision, if the appellant challenges the factual basis of the court's decision.

The proposed amendments to Rule 25(a) would prohibit a clerk from refusing to accept papers for filing because of form deficiencies. The provision is similar to Civil Rule 5(e) and proposed Bankruptcy Rule 5005(a).

Under revised Rule 25(d), the proof of service would include the address to which papers were mailed or to which they were delivered. Your Committee voted to eliminate the proposed provision in Rule 25(d) regarding the clerk's duty to file papers absent proper acknowledgement or proof of service. The provision appeared unnecessary and could cause confusion. The proposed amendments to Rule 28 would require the appellant to include a summary of argument in the brief.

The proposed amendments to Rule 32 would affect the form and format requirements governing appellate briefs. They would also clarify the limits on the length of a brief. Your Committee voted to defer transmission of the proposed amendments to Rule 32 and approve republication of the rule to focus public comment on the appropriate standards to measure the length of a brief, i.e., the average number of words or characters per page.

Rule 33 would be revised to authorize the court to require parties to attend appeal conferences and address any matter that may aid in the disposition of the proceedings, including

simplification of the issues and the possibility of settlement. The proposed amendments would authorize the court to designate a judge or other person to preside over the appeal conference.

The proposed amendments to Rule 38 would require a court to provide notice and an opportunity to respond before imposing sanctions for the filing of a frivolous appeal. Your Committee was concerned that it would burden a court if it were required to give notice in each instance. Thus, the Committee voted to change the proposal to require that the notice be given either by the court or by the moving party in a separately filed motion.

Rule 40 would be revised to lengthen the time for filing a petition for rehearing in civil cases involving the United States. The proposed amendments to Rule 41 would make conforming changes consistent with other rule changes involving the time for the issuance of the mandate of the court. In addition, the changes would require parties to file a proof of service at the same time a motion for a stay of mandate is filed.

The title provision in Rule 48 would be moved to Rule 1, and an entirely new provision on masters would be inserted in its place. The proposed amendments to Rule 48 would authorize a court to appoint a special master to make recommendations on ancillary matters, e.g., application for fees or eligibility for Criminal Justice Act status on appeal.

The proposed amendments to the Federal Rules of Appellate Procedure, as recommended by your Committee, appear in Appendix A together with excerpts from the Advisory Committee report

summarizing the comments received, the committee's review of the issues presented, and the changes made in the published draft.

> **Recommendation:** That the Judicial Conference approve proposed amendments to Appellate Rules 1, 3, 5, 5.1, 9, 13, 21, 25, 26.1, 27, 28, 30, 31, 33, 35, 38, 40, 41, and 48 and transmit them to the Supreme Court for its consideration with the recommendation that they be adopted by the Court and transmitted to Congress pursuant to law.

The Advisory Committee also submitted proposed amendments to Appellate Rules 4, 8, 10, 21, 25, 32, 35, and 41, and recommended that they be published for public comment. The proposed amendments to Rules 4, 8, 10, and 25 are technical or represent conforming changes. Rule 21 would be revised to establish procedures governing an application for a writ of mandamus directed to a trial judge. It would eliminate the trial judge's name from the application. It would also authorize pro forma representation for the trial judge unless the trial judge desires personal representation or the court directs otherwise. Proposed amendments to Rules 32, 35, and 41 would treat a request for a rehearing in banc the same as a petition for a panel rehearing with respect to the finality and tolling of judgment period for filing a petition for writ of certiorari.

Your Committee voted to circulate the proposed amendments to the bench and bar for comment. The timing of the publication was left to the discretion of the Advisory Committee.

III. Amendments to the Federal Rules of Bankruptcy Procedure.

The Advisory Committee on Bankruptcy Rules submitted proposed amendments to Bankruptcy Rules 8002 and 8006 together with Committee Notes explaining their purpose and intent. The proposed amendments were circulated to the bench and bar for comment in December 1992. The scheduled public hearing on the amendments was canceled because no one requested to testify.

The proposed amendments to Rules 8002 and 8006, along with conforming changes to the Appellate and Civil Rules, are intended to designate a single event that initiates tolling periods in the Appellate, Bankruptcy, and Civil Rules for certain post-trial motions. Your Committee voted to make several stylistic changes to the proposed amendments. An excerpt from the Advisory Committee report and the proposed amendments, as amended, are set forth in Appendix B.

> **Recommendation:** That the Judicial Conference approve the proposed amendments to Bankruptcy Rules 8002 and 8006 and transmit them to the Supreme Court for its consideration with a recommendation that they be adopted by the Court and transmitted to Congress pursuant to law.

III. Amendments to the Federal Rules of Criminal Procedure.

The Advisory Committee on Criminal Rules submitted to your Committee proposed amendments to Criminal Rules 16, 29, 32, and 40 together with Committee Notes explaining their purpose and intent. The proposed amendments were circulated for public comment in late December 1992 on an expedited four-month timetable to coincide with the timetable for amendments to Evidence Rule 412. A public

hearing on the proposed amendments was held in Washington, D.C. on April 22, 1993.

The Advisory Committee received a substantial number of comments on the proposed amendments to Criminal Rule 32, particularly from probation officers who were concerned about the time deadlines imposed on the completion of presentence reports. In light of these concerns, the Advisory Committee eliminated the reference to the specific time set for the completion of a presentence report and substituted the existing provision, which requires the report to be completed before the sentence is imposed "without unreasonable delay." Specific time periods regulating other stages of the sentencing process, however, were retained in the proposed amendments. The Advisory Committee also retained the proposed amendment's presumption that a probation officer's sentencing recommendation be disclosed to the parties, despite the recommendation of the Committee on Criminal Law to retain the current rule's presumption against disclosure.

The Advisory Committee made several other changes to the original draft regarding the responsibilities and authority of probation officers during the sentencing process. Among other things, the changes would provide defendant's counsel with a reasonable opportunity, instead of an entitlement, to attend any interview with a probation officer, and they would authorize a probation officer to arrange, rather than to require, meetings with defendant's counsel. In addition, your Committee made stylistic changes to the proposed amendments.

Your Committee agreed with the Advisory Committee's conclusion that a victim allocution provision in Rule 32 was unnecessary because a court now has the discretion to permit a victim to speak at sentencing. Mandating victim allocution might lead to greater victim frustration because of the sentencing guidelines restrictions, which limit the impact of a victim's statement. Your Committee, however, eliminated as unnecessary several sections of the Committee Note, which would have explained in detail these and other reasons for not including the victim allocution provision in the Rule.

The proposed changes to Rules 16, 29, and 40 are relatively minor. The proposed change to Rule 16 would explicitly extend the discovery and disclosure requirements of the rule to organizational defendants. The changes to Rule 29 would permit the reservation of a motion for a judgment of acquittal made at the close of the government's case in the same manner as the rule now permits for motions made at the close of all the evidence. Changes to Rule 40 would clarify the authority of a magistrate judge to set conditions of release in those cases where a probationer or supervised releasee is arrested in a district other than the district having jurisdiction.

The proposed amendments to the Federal Rules of Criminal Procedure, as recommended by your Committee, appear in Appendix C together with an excerpt from the Advisory Committee report.

Recommendation: That the Judicial Conference approve proposed amendments to Criminal Rules 16, 29, 32, and 40 and transmit them to the Supreme Court for its consideration with the recommendation that they be adopted by the Court and transmitted to Congress pursuant to law.

The Advisory Committee also submitted proposed amendments to Criminal Rules 5, 10, 43, and 53, and recommended that they be published for public comment. The proposed amendment to Rule 5 would exempt from the Rule's requirements prosecutions initiated under the Unlawful Flight to Avoid Prosecution (UFAP) statute, because a United States attorney rarely prosecutes defendants under the statute. UFAP is used primarily to assist state law enforcement officers in apprehending and holding alleged state law offenders. Rules 10 and 43 would be amended to allow video teleconferencing of certain pretrial proceedings with the approval of the court. The proposed changes to Rule 43 would also allow the court to sentence a defendant in absentia who flees after the trial has begun. Finally, the proposed amendment to Rule 53 would permit broadcasting of proceedings under guidelines to be adopted by the Judicial Conference. A Conference approved pilot program permitting broadcasts of proceedings in civil cases is presently underway.

Your Committee made stylistic changes and voted to circulate the proposed amendments to the bench and bar for comment. In order to establish an orderly time for publication, your Committee also authorized the Advisory Committee to consult with the other advisory committees and determine the time to distribute the proposed amendments for public comment.

IV. Amendments to the Federal Rules of Evidence.

The Advisory Committee on Evidence submitted to your Committee proposed amendments to Evidence Rule 412 together with Committee Notes explaining their purpose and intent. The proposed amendments would clarify and extend the protection of the rule to victims of sexual misconduct in all criminal and civil cases.

Your Committee was advised that legislation had been considered during the last Congressional session that would bypass the rulemaking process by directly amending Evidence Rule 412. To address the Congressional concern for prompt action your Committee, at the request of the Judicial Conference's Ad Hoc Committee on Violence Against Women, agreed to expedite the rulemaking process to enable Congress to consider the proposed amendments to Rule 412 during the 103rd Congressional session.

The original draft of the amendments to Evidence Rule 412 was prepared by the Advisory Committee on Criminal Rules in consultation with the Advisory Committee on Civil Rules. The proposed amendments would expand the protection of the rule to all criminal and civil cases. They were circulated for public comment under an expedited timetable in late December 1992 for a four-month period. A public hearing was held on the amendments by the newly reactivated Advisory Committee on Evidence Rules in Washington, D.C. on May 6, 1993.

Based on the comments received and the testimony at the hearing, the Advisory Committee on Evidence revised and restructured the original proposal. In particular, the committee

clarified the operation and effect of the amendments in civil cases and on third party witnesses. The Committee Note was also substantially revised to clarify the meanings of several phrases used throughout the rule and explain the precise extent of the rule's protections. The changes to the original draft did not alter, however, the principal purpose of the amendments, which was to protect the privacy interests of a victim of a sexual offense in all civil and criminal cases. Your Committee adopted several additional revisions, including language explicitly allowing the prosecutor to introduce evidence of prior sexual acts by the defendant with the victim.

The proposed amendments to Rule 412 of the Federal Rules of Evidence appears in Appendix D.

> **Recommendation:** That the Judicial Conference approve the proposed amendments to Rule 412 of the Federal Rules of Evidence and transmit the proposal to the Supreme Court for its consideration with the recommendation that it be adopted by the Court and transmitted to Congress pursuant to law.

V. Report of the Advisory Committee on Civil Rules.

The Advisory Committee on Civil Rules submitted proposed amendments to Civil Rules 26, 43, 50, 52, and 59 and recommended that they be published for public comment. Proposed changes to Rule 23 were also submitted for discussion but without a request for immediate publication.

The proposed changes to Rule 26 would clarify the authority of a court to dissolve or modify a protective order. Several factors would be listed for the court to consider in making its decision, including the impact on the public. Rule 43 would be changed to

allow a court to view the testimony of a witness via audio or video transmission during a trial in open court. Finally, the proposed amendments to Rules 50, 52, and 59 would set uniform time periods to file certain post-trial motions consistent with the proposed changes to the Appellate and Bankruptcy Rules.

Your Committee voted to circulate the proposed amendments to the bench and bar for comment after slightly revising the changes to Rules 50, 52, and 59 to achieve uniformity with the changes in the Appellate and Bankruptcy Rules. The timing of the publication was left to the discretion of the Advisory Committee because of the possibility of confusion resulting from the large package of rules amendments now pending before the Congress.

VI. Technical Amendments and Conformance of Local Rules with National Rules.

Your Committee reviewed draft uniform provisions prepared by the committees' reporters that would: (1) authorize the Judicial Conference to make technical corrections and conforming amendments to the rules directly, without action by the Supreme Court and the Congress; (2) authorize the Judicial Conference to prescribe a uniform numbering system that must be followed in the local court rules, and (3) permit the imposition of a sanction for noncompliance with certain local court procedures only if a party has had actual notice of the requirement. The uniform provisions would be included in the following rules: (1) Rules 47 and 49 of the Federal Rules of Appellate Procedure; (2) Rules 8018, 9029, and 9037 of the Federal Rules of Bankruptcy Procedure; (3) Rules 83 and 84 of the Federal Rules of Civil Procedure; and (4) Rules 57

and 59 of the Federal Rules of Criminal Procedure. The Advisory Committee on Evidence was requested to determine whether the proposed amendments should be included in the Federal Rules of Evidence.

The amendments proposed by the Advisory Committee on Civil Rules included an additional provision that would relieve a party, who failed through negligence to comply with a local rule imposing a requirement of form, from any loss of rights. Your Committee voted to circulate the proposed amendments with the addition of the provision recommended by the Advisory Committee on Civil Rules to the bench and bar for comment.

VII. Proposed Guidelines For Filing by Facsimile.

At the request of the Committee on Court Administration and Case Management, your Committee reviewed proposed Guidelines for Filing by Facsimile. Under Appellate Rule 25, Bankruptcy Rule 7005 (incorporating the civil procedures in adversary proceedings), Civil Rule 5, and Criminal Rule 49 (incorporating the civil procedures), papers may be filed with the court by "facsimile transmission if permitted by rules of the (court), provided that the rules are authorized by and consistent with standards established by the Judicial Conference of the United States." In 1991, the Conference issued very restrictive guidelines that allow facsimile filing only in compelling circumstances or where it had been authorized previously by a court. The proposed guidelines would liberalize the opportunity of courts to authorize filing by facsimile.

Your Committee requested each of the Advisory Committees to determine whether the proposed guidelines were inconsistent with the federal rules. After considerable discussion, your Committee voted to recommend against adoption of the proposed Guidelines for Filing by Facsimile in their present form.

The reporters to the respective advisory committees attempted to draft an acceptable revision of the proposed guidelines. After examining the draft of the reporters, your Committee is of the view that many issues would still remain that require careful consideration before approval of a revised draft could be recommended. In particular, concerns were raised regarding potential abuse by pro se litigants, the likelihood that extensive local rulemaking would be necessary to resolve issues left outstanding under the guidelines, and the consequences for failing to comply with specific provisions of the guidelines, e.g., using equipment not prescribed by the guidelines.

Recommendation: That the Judicial Conference not approve the adoption of the proposed Guidelines for Filing by Facsimile in their present form.

VIII. Report of the Subcommittee on Long-Range Planning.

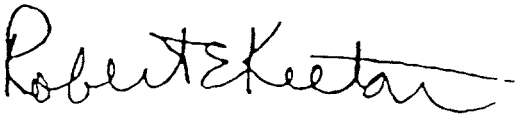
Your Committee discussed the request of the Long-Range Planning Committee for its views on the size of the Article III judiciary. After careful consideration, your Committee determined that any cap or limitation on the size of the federal judiciary would have no material effect on the Rules Enabling Act process or the federal rules. Accordingly, your Committee voted not to take a position as a committee on this issue.

IX. Report to the Chief Justice on Proposed Amendments Generating Substantial Controversy.

In accordance with the standing request of the Chief Justice, a summary of the proposed amendments generating substantial controversy is set forth as Appendix E.

Respectfully submitted,

Thomas E. Baker
William O. Bertelsman
Frank H. Easterbrook
Thomas S. Ellis, III
Alan W. Perry
Edwin J. Peterson
George C. Pratt
Dolores K. Sloviter
Alicemarie H. Stotler
Alan C. Sundberg
Philip B. Heymann
William R. Wilson
Charles Alan Wright



Robert E. Keeton, Chairman

Appendix A: Proposed Amendments to the Federal Rules of Appellate Procedure

Appendix B: Proposed Amendments to the Federal Rules of Bankruptcy Procedure

Appendix C: Proposed Amendments to the Federal Rules of Criminal Procedure

Appendix D: Proposed Amendments to the Federal Rules of Evidence

Appendix E: Proposed Rules Amendments Generating Substantial Controversy

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
OF THE
JUDICIAL CONFERENCE OF THE UNITED STATES
WASHINGTON, D.C. 20544

Agenda F-19
(Appendix A)
Rules
September 1993

ROBERT E. KEETON
CHAIRMAN

PETER G. McCABE
SECRETARY

CHAIRMEN OF ADVISORY COMMITTEES
KENNETH F. RIPPLE
APPELLATE RULES

SAM C. POINTER, JR.
CIVIL RULES

WILLIAM TERRELL HODGES
CRIMINAL RULES

EDWARD LEAVY
BANKRUPTCY RULES

TO: Honorable Robert E. Keeton, Chair, and Members of the Standing Committee on Rules of Practice and Procedure

FROM: Honorable Kenneth F. Ripple, Chair
Advisory Committee on Appellate Rules

DATE: May 28, 1993

The Advisory Committee on Appellate Rules submits the following items to the Standing Committee on Rules:

1. Proposed amendments to Federal Rules of Appellate Procedure 1, 3, 5, 5.1, 9, 13, 21, 25, 26.1, 27, 28, 30, 31, 32, 33, 35, 38, 40, 41 and 48 approved by the Advisory Committee on Appellate Rules at its April 20 & 21, 1993 meeting. All of these proposed amendments, except the amendments to Rule 1, were published in January 1993. A public hearing was scheduled for February 17, 1993, in Chicago, Illinois but was canceled for lack of interest.

The Advisory Committee has reviewed the written comments and, in some instances, altered the proposed amendments in light of the comments. The Advisory Committee requests that the Standing Committee approve for transmittal to the Judicial Conference all of the published rules, as amended, except Rule 32. The Advisory Committee also requests that amended Rule 1 be included in this packet even though it has not been published. The change to Rule 1 is technical. Rule 1 is amended by adding a subdivision to it; the new subdivision includes the caption and text of existing Rule 48. The Advisory Committee suggests that change so that new rules can be added at the end of the existing set of appellate rules without "burying" the "title" provision currently found at Rule 48.

Because the post-publication alterations to Rule 32 are substantial, the Advisory Committee requests that the Standing Committee republish the proposed amendments to Rule 32 for a new period of comment. This report includes two drafts of Rule 32. The first draft, found at pages 23 through 28 of this memorandum, was approved by a majority of the Advisory Committee. The second draft, found at pages 29 through 34 of this memorandum, is favored by two members of the Committee. For a discussion of the Committee's concerns, *see* pp. 49-50 of this memorandum.

The Advisory Committee's report on the rules published in January is organized as follows:

- Part A of this report includes the amended rules.
- Part B identifies and discusses the changes made in the text or notes after publication and it discloses any disagreement among the Advisory Committee members concerning the changes.
- Part C is a summary of the written comments received.

2. Proposed amendments to Federal Rules of Appellate Procedure 4, 8, 10, 21, 25, 32, 35, 41, and 47, and proposed Rule 49. These proposals were approved at the Advisory Committee's April 20 & 21 meeting and the Advisory Committee requests the Standing Committee's approval of them for publication.

- Part D of this report contains the draft amendments.

cc: Chairs and Reporters other Advisory Committees
Members and Reporter, Advisory Committee on Appellate Rules

ISSUES AND CHANGES
Proposed Amendments to the Federal Rules of Appellate Procedures
Published January 1993

Number of Copies

The amendments to Rules 3, 5, 5.1, 13, 21, 25(e), 26.1, 27, 30, 31, and 35 deal with the number of copies of documents that must be filed with a court of appeals. The Local Rules Project noted that a number of circuits have local rules requiring a party to file a different number of copies of a document than the national rules require. The Local Rules Project also pointed out that the Appellate Rules are inconsistent regarding the authority of a court of appeals to alter the number by local rule or by order in an individual case. The Project suggested that the rules be amended either to require a uniform number in all circuits, or to consistently authorize local rulemaking. The Advisory Committee decided to authorize local variations and to make the language in the national rules consistent.

No comments were received concerning these amendments. No changes were made in either the text of the rules or the committee notes except to change "shall" to "must" in the text of Rules 26.1 and 30.

Rule 1

The proposed amendment to Rule 1 was not published but it is a companion amendment to the proposed new rule on special masters that was published. A new subdivision is added to Rule 1. The text of new subdivision (c) has been moved from Rule 48 to Rule 1 to allow the addition of new rules at the end of the existing set of appellate rules without burying the "title" provision among other rules. The title provision is combined with the scope provision in the Bankruptcy Rules.

The Advisory Committee believes that the change is technical in nature and does not require publication.

Rule 9

The amended rule published in January was a complete rewriting of Rule 9. The amended rule recognizes the government's ability to appeal release decisions. The amendments also require a party seeking review to supply the court with certain basic documents: a copy of the district court's order regarding release and its statement of reasons; and, if the appellant questions the factual basis for the district court's order, a transcript of the release proceedings in the district court. In addition, subdivision (b) clarifies those instances in which review may be sought by motion rather than by notice of appeal.

Only two comments were submitted. One commentator notes that subdivision 9(c) should also refer to 18 U.S.C. § 3145(c). The other commentator suggests that all statutory references be omitted from subdivision (c). Because subdivision (c) and the statutory references were added to the rule by Congress, the Committee decided that it should not delete them but should add the reference to § 3145(c).

The second commentator, the National Association of Criminal Defense Lawyers (NACDL), also made other suggestions. It suggests that the captions of subdivision (a) and (b) should be coordinated to clarify whether (a) or (b) applies after a finding of guilt but before sentencing. In response to that comment the Committee approved several changes:

1. it amended the caption of subdivision (a) to read: "Appeal from an Order Regarding Release Before Judgment of Conviction";
2. on line 57 the Committee inserted a period after the word "conviction" and deleted the words "or the terms of the sentence";
3. it amended the first paragraph of the Committee Note, in line three after the word "before" the Committee inserted "the judgment of conviction is entered at the time of";
4. following the first sentence of the Committee Note explaining subdivision (a), the Committee added a citation to Fed. R. Crim. P. 32(b); and
5. in the second paragraph of the Committee Note accompanying subdivision (b), the Committee inserted a period at line 4 after the word conviction and deleted the words "or from the terms of the sentence".

NACDL also suggests that the rule should be amended to make it clear whether a motion for release must be filed in the district court after a notice of appeal has been filed. In response to that suggestion, the Committee decided to omit the second sentence of the Committee Note accompanying subdivision (b). That sentence stated: "Implicit in the first sentence, but less clear than in subdivision (a), is the requirement that the initial decision regarding release after sentencing must be made by the district court." The deletion was

intended to remove any inference that a motion for release must in all instances be made first in the district court. The rule deals only with review of a release decision made by a district court and not with release decisions that may be sought initially in a court of appeals. Therefore, the Committee decided that it would be inappropriate to include any language stating categorically either that a motion must be made, or need not be made, first in a district court.

NACDL also suggests that the rule be amended to allow a party to supplement the district court's bail record with evidentiary material. The Committee decided that it would ordinarily be inappropriate to allow a party to supplement the bail record in the court of appeals so no change was made in the rule.

Rule 25(a)

The published amendment provides that a clerk may not refuse to file any paper solely because the paper is not presented in the proper form. The amendment parallels similar language in Civil Rule 5(e) and Bankruptcy Rule 5005. No formal comments were submitted but the clerks, through their representative who attends the Advisory Committee meetings, expressed opposition to the change.

The Advisory Committee made no post-publication changes in the proposed amendments.

Rule 25(e)

The published amendment to Rule 25(e) provides that whenever service is accomplished by mailing, the proof of service must include the addresses to which the papers were mailed. No comments were submitted; the Committee decided, however, to expand the change to require that a proof of service must also include the addresses at which papers were hand delivered. When a document is hand delivered, the document is usually delivered to office personnel rather than to the party or the party's counsel personally. Therefore, questions about service can arise even when a document has been hand delivered. The Committee consensus was that the change is not substantial and that republication would not be necessary.

In cases involving many parties inclusion of all the addresses could result in a lengthy certificate of service. The Committee agreed that the certificate of service should not count against the page limit for a brief. Therefore, the Committee approved a conforming amendment to Rule 28(g) which provides that the "proof of service" should be included in

that subdivision that among the other items that do not count for purposes of the page limit. The Committee agreed that the change could be treated as technical and would not require publication.

Rule 28

The published amendment to Rule 28 requires that a brief include a summary of argument.

Three comments were submitted. Two commentators suggest that there should not be a national rule requiring a summary of argument. The third commentator suggests that a summary should be required only when the argument exceeds 25 pages.

The Committee believes that a summary of argument would be useful in a variety of ways and decided not to make any changes in the proposed amendments. The Committee discussion further noted that a number of circuits have local rules requiring a summary of argument, that those circuits report satisfaction with the requirement, and that including the requirement in the national rule would eliminate the need for those local rules.

For a discussion of the change to subdivision (g), see the discussion of Rule 25(e) above.

Rule 32

Rule 32 governs the form of documents. Four commentators remarked on the proposed amendments and substantial changes were made after the close of the comment period.

The major changes in the rule involve an effort to standardize type styles. The published rule provided that any brief not produced by standard typographic printing must be prepared using not more than 11 characters per inch. Although only one commentator formally objected to that approach, the Committee decided that it would be undesirable to use that standard because it does not permit the use of proportional typefaces.

Having decided that the rule should permit proportional typeface, the Committee had difficulty formulating a standard that would accomplish its objectives without unduly complicating the rule. The Committee has two basic objectives: that all litigants have equal opportunity to present their arguments, and that briefs be easily legible.

The first objective requires parity between commercially printed briefs and those produced by some other method. It also requires parity among non-printed briefs produced by a variety of office machines and software programs.

Legibility, the Committee's second objective, hinges upon the interplay of several factors. The type size, the style of type, and the page format (meaning line length, spacing between lines, and number of lines per page) all affect legibility.

The task of formulating such a rule is made more difficult by the need for a rule that is sufficiently general that it will not require constant amendment to keep pace with rapid changes in the computer industry.

The majority of the Committe approves of the approach used in draft one, found at pages 23 through 28. That draft provides that a brief produced by a method other than standard typographic printing cannot exceed on average the same content per page as a printed brief. The Committee realizes that practitioners will need additional information to assist them in implementing that standard. Therefore, the rule provides that the Administrative Office will from time to time publish a list of acceptable typefaces and any other information necessary to assist a person to comply with the standard established in the rule. The list prepared by the Administrative Office should include only typefaces and formats that are legible.

Because the rule itself establishes the standard, the Advisory Committee does not believe that the task delegated to the Administrative Office creates any problems under the Rules Enabling Act.

Two members of the Committee believe that a more concrete standard is needed. They suggest draft two, found at pages 29 through 34. Because draft two is a very recent suggestion, it is uncertain whether 300 words per page is the appropriate number although cursory review suggests that it is.

If the Standing Committee approves either draft for publication, the Advisory Committee requests that special efforts be made to elicit comments from the printing and software industries. Their comments may be key to the final development of a stable and precise rule.

In addition to changing the provisions governing typefaces, the Committee considered a number of other suggestions made by the commentators and made several minor changes in the proposed amendments.

Three commentators object to double spacing footnotes. The Committee agrees that the rule should permit single spaced footnotes but added a caution, modeled on language drawn from Sup. Ct. R. 33.1(b), that no attempt should be made to use footnotes in a manner that would increase the content of a brief.

Two commentators object to the requirement that a brief be bound so that it will lie flat when open. A third commentator favors the change but suggests that the rule specifically require spiral binding. The Committee decided to make no change in the proposal.

Two commentators object to the requirement that the case number be centered at the top of the cover. One of them suggests that if the requirement is retained that the rule be reorganized so that the requirements are arranged in the rule in order corresponding to the items' location on the cover page, *i.e.*, from top to bottom. In response to that suggestion, the Committee approved rearranging the list of items that must appear on a cover so that the items are listed in the order of their location. One commentator objects to the requirement that the attorney's telephone number be included on the cover. The requirement was retained. One commentators also notes that the proposed amendment requires a petition for rehearing, a suggestion for rehearing in banc, and any response to such petition or suggestion be produced in the same manner as a brief, but that the rule does not prescribe the cover color. The Committee approved an amendment requiring such documents to have "a cover the same color as the party's principal brief."

One commentator suggests that the rule should be amended so that a petition for rehearing may be in the form either of a brief or a motion, or that it should be in the form of a brief unless local rules provide otherwise. The Committee decided to make no change in the proposed rule.

Rule 33

The published amendments to Rule 33 made several changes in the existing rule. The published amendments provide: 1) the court may require parties to attend an appellate conference in appropriate cases; 2) settlement of the case is a possible conference topic; 3) persons other than judges may preside over a conference; and 4) an attorney must consult with his or her client before a settlement conference and obtain as much authority as feasible to settle the case.

Only one comment was submitted. The commentator does not remark generally about the amendments but suggests specifically that the language be changed to make it clear that the choice of an in-person or telephone conference is the court's choice, not the parties'. The Committee decided to make no changes in the proposed amendments. The Committee thought that any statement to the effect that the "court" decides the nature of the conference might suggest that judges are involved in the process. Because circuits that currently use settlement conferences have adopted practices aimed at keeping the judges distanced from the process, the Committee did not adopt the suggestion.

The Solicitor General's office had requested that changes be made to the Committee Note and the Committee approved those changes. The Solicitor's office thought that as published the Committee Note could give rise to an inference that suits against government official should be treated differently than suits against agencies. The redrafting is intended to make it clear that a government official may be represented at an appeal conference by an employee. The specific changes are:
1) the Committee deleted the third sentence of the third paragraph of the Committee Note (that sentence stated: "The Committee realizes that when the party is a corporatin or government agency, the party can attend only through agents.");
2) the fourth sentence of the third paragraph of the Note was amended by inserting "of a corporation or government agency" after the parenthetical; and
3) in that same sentence the word "regarding" was substituted for the word "over."

Rule 38

The published amendment to Rule 38 requires a court to give an appellant notice and opportunity to respond before damages or costs are assessed for filing a frivolous appeal.

Two comments were received. NACDL strongly supports the proposal and the NLRB suggests deleting the requirement that the notice come "from the court." The Committee decided to make no substantive changes in the proposed amendments. The only

post-publication change is a language change, changing "shall determine" to "determines."

Rule 40

The published amendments to Rules 40 and 41 lengthen the time for filing a petition for rehearing in a civil case involving the United States.

Two comments were submitted. One commentator states that the additional time for requesting a rehearing should be extended only to the United States and not to other parties to a civil appeal that involves the United States. The Committee decided to make no change in the published rule. A rule giving an extension only to the government would leave the clerk's office in the position of trying to determine whether the government might want to petition for rehearing or whether the mandate should issue. The Committee decided that an evenhanded approach would be preferable.

The NLRB opposes the amendment because it may delay the effectiveness of enforcement orders. The NLRB believes that an enforcement order becomes effective only upon issuance of the mandate. Because the extension of the time for petitioning for rehearing will delay the issuance of the mandate, the effective date of an enforcement order will also be delayed. The Committee decided to make no change in the proposed amendment because when necessary the court can direct that the mandate issue forthwith.

Rule 41

The published amendments to subdivision (a) provide that the mandate will not issue until 7 days after expiration of the time for filing a petition for rehearing. This is a conforming amendment to the change being made in Rule 40(a). Because the amendment to Rule 40(a) lengthens the time for filing a petition for rehearing in civil cases involving the United States from 14 to 45 days, the rule requiring the mandate to issue 21 days after the entry of judgment would cause the mandate to issue while the government is still considering whether to request a rehearing. Therefore, the amendment generally requires the mandate to issue 7 days after the expiration of the time for filing a petition for rehearing.

One comment was received. The commentator suggests that the rule should state that the mandate must issue within 7 days after the time for seeking rehearing expires. The Committee decided to make no change in the proposed amendment. The Committee discussed the possibility that 7 days may even be too short a time period to seek a stay of mandate if the party intends to petition for a writ of certiorari. The Committee also

preferred to have a day certain on which the mandate will issue. The NLRB's comment on Rule 40 is also pertinent here. See the discussion of Rule 40 above.

The published amendments to subdivision (b) provide that a motion for a stay of mandate pending petition for certiorari must show that a petition for certiorari would present a substantial question and that there is good cause for a stay.

One comment was submitted and it does not bear directly upon the proposed amendment. NACDL suggests that the 30 day period for a stay is anachronistic because the period for filing a petition for certiorari is now 90 days in both civil and criminal suits. The Committee decided to make no change in the proposed amendment but placed the suggestion on its docket for later discussion.

When the Advisory Committee voted to approve the amendments as published there was one dissenting vote. That members wanted the record to reflect his belief that the rule should require a motion to show that a petition for ceritorari would present a substantial question or that there is good cause for a stay. In short, that the two should be disjunctive not conjunctive. The Committee's position is that the rule does not create a substantive standard that the circuits are bound to follow but instead that the rule provides notice of the issues that should be addressed in such a motion. To remove the inference that the rule establishes a substantive standard for granting a stay, the Committee decided to delete from the Committee Note the citation to Justice Scalia's chambers opinion in the Barnes case and to substitute therefor a citation to the § 17.19 of Stern & Gressman's treatise on Supreme Court Practice.

Rule 48

Rule 48 is a proposed new rule authorizing the use of special masters in the courts of appeals. Only one comment was received, the NLRB voiced strong support for the proposed rule. The only change made after publication was to change the number of the proposed rule from 49 to 48 (and the consequent moving of the provisions in existing Rule 48 to Rule 1(c)).

SUMMARY OF COMMENTS ON THE PROPOSED AMENDMENTS TO THE FED. R. APP. P. PUBLISHED JANUARY, 1993

1. There are no comments concerning the proposed amendments to Rules 3, 5, and 5.1.

2. With regard to the proposed amendments to Rule 9, there are two comments. One commentator notes that proposed Rule 9(c) should also refer to 18 U.S.C. § 3145(c). The other commentator makes several suggestions: a) clarify which subdivision applies after finding of guilt but before sentencing; b) clarify whether a motion for release must always be filed first in a district court; c) omit the statutory references in subdivision (c); and d) allow a party to supplement the district court's bail record.

3. There are no comments concerning the proposed amendments to Rule 13.

4. There is one comment concerning the proposed amendments to Rule 21. The comment is occasioned by the cover memorandum accompanying the published rules and need not concern the committee.

5. There are no comments on the proposed amendments to Rules 25, 26.1, and 27.

6. There are three comments concerning the proposed amendments to Rule 28. Two commentators suggest that there should not be a national rule requiring a summary of argument. The third commentator suggests that a summary should be required only when the argument exceeds 25 pages.

7. There are no comments on the proposed amendments to Rules 30 and 31.

8. Four commentators submitted remarks on the proposed amendments to Fed. R. App. P. 32.

   One commentator supports the effort to standardize type styles but suggests several changes:

   a. Normal text should be in roman font.
   b. For non-typographic processes, the "11 characters per inch" standard is not clear enough. If the effort is to prohibit proportional fonts, the rule should say so and give an example such as "courier."
   c. Requiring all briefs produced by non-typographic processes to be double-spaced may have unintended consequences. Word processors can produce text

that is visually indistinguishable from standard typographic process. A brief prepared by such a technique should be subject to the same rules that govern the standard typographic process.

As to all three of the preceding points, the commentator suggests review of the new Second Circuit local rule.

Three commentators object to double spacing footnotes.

Two commentators object to the requirement that a brief or appendix be bound so that it will lie flat when open. One of them bases his objection on the fact that coil bindings take extra space and become entangled with other documents. A third commentator favors the change but suggests that the language be more specific and require spiral binding.

Two commentators object to the requirement that the case number be positioned at the top of the cover. One of them suggests that if the requirement is retained that the rule be reorganized so that the requirements are arranged in the rule in order corresponding to the items' location on the cover page, i.e., from top to bottom.

One commentator suggests that the committee consider a uniform rule as to whether briefs produced in any manner other than standard typographic process use only one side of each sheet or both.

One commentator objects to the requirement that the attorney's telephone number be included on the cover.

One commentator suggests that the rule be amended so that a petition for rehearing may be in the form of either a brief or a motion, or that it should be in the form of a brief unless local rule provides otherwise.

9. One comment was received concerning the proposed amendments to Rule 33. The commentator does not remark generally about the amendments but suggests specifically that the language be changed to make it clear that the choice of an in-person or telephone conference is the court's choice, not the parties'.

10. There are no comments on the proposed amendments to Rule 35.

11. There are two comments on the proposed amendments to Rule 38. One commentator strongly endorses the notice provision. The other commentator believes that requiring the court to give notice unduly burdens the court and that notice from the other party

that the party has requested sanctions should be sufficient.

12. There are two comments on the proposed amendments to Rule 40. One commentator states that it is unwise to build a one-month delay into all civil appeals in which the government is a party in order to accommodate the small number of cases in which the government seeks rehearing. The additional time should be extended only to the United States or an agency of officer thereof. The other commentator opposes the extension of time because it will delay the issuance of the mandate and thus delay the effective date of an enforcement order.

13. There are three comments on the proposed amendments to Rule 41. Two of the comments relate to the delay of issuance of the mandate in civil cases involving the United States. One commentator states that there is no need to delay the issuance of the mandate for seven days after the time for seeking rehearing expires. The courts should be free to issue the mandate immediately. The other commentator opposes the delay in issuance of the mandate because it will delay the effective date of an enforcement order. The third comment is not directly relevant to any of the proposed amendments but suggests that the 30 day presumptive period for a stay pending certiorari should be changed to 90 days.

14. There is one comment on proposed Rule 49. The commentator strongly supports the proposed rule.

COMMENTS ON PROPOSED AMENDMENT OF FED. R. APP. P. 9

1. Honorable Peter C. Dorsey
United States District Judge
141 Church Street
New Haven, Connecticut 06510

Judge Dorsey makes no general comment about the proposed amendments to Rule 9 but suggests that subdivision (c) should refer to 18 U.S.C. § 3145 (c). He states that the difficulty of resolving the interrelation between §§ 3142 and 3143 with § 3145(c) suggests that the rule should also refer to § 3145(c).

2. National Association of Criminal Defense Lawyers (NACDL)
1110 Vermont Avenue, N.W.
Suite 1150
Washington, D.C. 20005

NACDL makes four suggestions. First, it suggests that the captions of subdivisions (a) and (b) should be coordinated to clarify whether (a) or (b) applies after a finding of guilt but before sentencing. Second, it suggests that the rule should be amended to make it clear whether a motion for release must be filed first in the district court even after a notice of appeal has been filed. Third, it suggests omitting the statutory references in subdivision (c) and, if necessary, moving them to the Committee Note. Fourth, it suggests amending the rule to allow a party to supplement the district court's bail record with evidentiary material.

COMMENTS ON PROPOSED AMENDMENT OF FED. R. APP. P. 21

1. Honorable Jon O. Newman
United States Circuit Judge
450 Main Street
Hartford, Connecticut 06103

Judge Newman notes that the transmittal letter accompanying the published rules reports an amendment concerning use of the judge's name and *pro forma* representation and that the published text omits those changes. The transmittal letter included in the published materials is the letter from the Advisory Committee to the Standing Committee requesting publication of a packet of rules. The Standing Committee did not approve the changes noted by Judge Newman, therefore, they were not published for comment. A different letter should have accompanied the published rules.

COMMENTS ON PROPOSED AMENDMENT OF FED. R. APP. P. 28

1. Jerry M. Hunter, Esquire
General Counsel
National Labor Relations Board
Washington, D.C. 20570

Suggests that a summary of argument should be required only when the argument exceeds 25 pages.

2. National Association of Criminal Defense Lawyers (NACDL)
1110 Vermont Avenue, N.W.
Suite 1150
Washington, D.C. 20005

Recommends that the decision whether to include a summary of argument be left to the judgment of the lawyer.

3. Honorable Jon. O. Newman
United States Circuit Judge
450 Main Street
Hartford, Connecticut 06103

Judge Newman states that requiring a brief to contain a summary of the argument is ill-advised. He does not believe that it is useful; a judge must still read the main argument. He doubts that an argument is clearer because a summary is provided. He suggests that the choice should be left to each court and to the parties in courts that do not require a summary.

COMMENTS ON PROPOSED AMENDMENT OF FED. R. APP. P. 32

1. Charles D. Cole, Jr., Esquire
Meyer, Suozzi, English & Klein, P.C.
1505 Kellum Place
Mineola, New York 11501-4824

Mr. Cole agrees with the amendment requiring a brief or appendix to be stapled or bound so that it will lie flat when open. He suggests, however, that the rule be made more specific and require spiral binding. He also suggests that the committee create uniformity on the question of whether a brief or appendix, produced by the any process other than standard typographic process, should use only one side of a sheet of paper or both.

2. Gordon P. MacDougall, Esquire
1026 Connecticut Avenue, N.W.
Washington, D.C. 20036

Mr. MacDougall voices several objections to the proposed amendments. First, he objects to double spacing of footnotes. Second, he objects to the requirement that briefs be bound so that they will lie flat when open. Third, he objects to the requirement that the case number be positioned at the top of a cover and that the attorney's telephone number be included on the cover.

3. National Association of Criminal Defense Lawyers (NACDL)
1110 Vermont Avenue, N.W.
Suite 1150
Washington, D.C. 20005

NACDL objects to double spacing of footnotes. NACDL also questions the need for a national rule to specify the location of the case number on a brief cover but suggests that if the rule does specify the location, the rule be reorganized so that requirements are arranged in the rule in order corresponding to the items' location on the cover page, i.e., from top to bottom. NACDL suggests that the rule be amended so that a petition for rehearing may be in the form of either a brief or a motion, or that it should be in the form of a brief unless local rule provides otherwise.

4. Honorable Jon O. Newman
United States Circuit Judge
450 Main Street
Hartford, Connecticut 06103

Judge Newman supports the effort to standardize type styles but suggests several changes:

a. Normal text should be in roman font.

b. For non-typographic processes, the "11 characters per inch" standard is not clear enough. If the effort is to prohibit proportional font, the rule should say so and give an example such as "courier."

c. Textual footnotes should not be double spaced; requiring that they be in the same size type is adequate.

d. Requiring all briefs produced by non-typographic processes to be double-spaced may have unintended consequences. Word processors can produce text that is visually indistinguishable from standard typographic process. A brief prepared by such a technique should be subject to the same rules that govern the standard typographic process.

As to all four of the proceeding points, Judge Newman suggests that the Committee review of the new Second Circuit local rule.

e. The rule should not require all briefs and appendices to be bound as to permit them to lie flat because coil bindings take extra space and become entangled with other documents.

COMMENTS ON THE PROPOSED AMENDMENT OF FED. R. APP. P. 33

1. Honorable Jon O. Newman
United States Circuit Judge
450 Main Street
Hartford, Connecticut 06103

Judge Newman does not comment generally on the proposed amendments but suggests specifically that the language be amended to make it clear that the choice of an in-person or telephone conference is the court's not the parties. He suggests adding ", as the court directs," after the word telephone on line 24 of the published rule.

COMMENTS ON THE PROPOSED AMENDMENT OF FED. R. APP. P. 38

1. Jerry M. Hunter, Esquire
General Counsel
National Labor Relations Board
Washington, D.C. 20570

Mr. Hunter believes that the proposed amendment requiring a court to give notice would place unwarranted burdens on the court. He suggests deleting the words that require notice to come "from the court." He suggests that the rule should state: "after notice and reasonable opportunity to respond."

2. National Association of Criminal Defense Lawyers (NACDL)
1110 Vermont Avenue, N.W.
Suite 1150
Washington, D.C. 20005

NACDL strongly endorses the notice provision.

COMMENTS ON THE PROPOSED AMENDMENT OF FED. R. APP. P. 40

1. Jerry M. Hunter, Esquire
General Counsel
National Labor Relations Board
Washington, D.C. 20570

Mr. Hunter opposes the amendment because it lengthens the time for filing a petition for rehearing in a civil case involving the United States. That change may delay the effectiveness of an order enforcing an administrative order. An enforcement order becomes effective upon issuance of the mandate which will issue later under the proposed amendments.

2. Honorable Jon O. Newman
United States Circuit Judge
450 Main Street
Hartford, Connecticut 06103

Judge Newman states that it is unwise to build a one-month delay into all civil appeals in which the government is a party. He suggests that the added time should be extended only to the United States or an agency or officer thereof.

COMMENTS ON THE PROPOSED AMENDMENT OF FED. R. APP. P. 41

1. Jerry M. Hunter, Esquire
General Counsel
National Labor Relations Board
Washington, D.C. 20570

Mr. Hunter opposes the amendment because it lengthens the time for filing a petition for rehearing in a civil case involving the United States. That change may delay the effectiveness of an order enforcing an administrative order. An enforcement order becomes effective upon issuance of the mandate which will issue later under the proposed amendments.

2. National Association of Criminal Defense Lawyers (NACDL)
1110 Vermont Avenue, N.W.
Suite 1150
Washington, D.C. 20005

NACDL suggests that the 30 day presumptive period for a stay pending certiorari should be changed to 90 days. NACDL notes that the 30 day period was written into the rule when the period for filing a petition for a writ of certiorari in a federal criminal case was 30 days. Because a party now has 90 days to file a petition for a writ of certiorari even in a criminal case, NACDL suggests that the presumptive period should be 90 days.

3. Honorable Jon O. Newman
United States Circuit Judge
450 Main Street
Hartford, Connecticut 06103

Judge Newman states that there is no need to delay the issuance of the mandate until 7 days after the time for seeking rehearing has expired. He believes that a court should be able to issue a mandate immediately.

COMMENTS ON THE PROPOSED NEW RULE 49

1. Jerry M. Hunter, Esquire
General Counsel
National Labor Relations Board
Washington, D.C. 20570

Mr. Hunter expressed complete agreement with the advent and overall thrust of proposed Rule 49. He states that the Board has regularly called upon the courts of appeals to appoint special masters in contempt cases and the proposed rule would appear to codify existing practice.

Rule 1. Scope of Rules and Title*

(a) *Scope of Rules.*-- These rules govern procedure in appeals to United States courts of appeals from the United States district courts and the United States Tax Court; in appeals from bankruptcy appellate panels; in proceedings in the courts of appeals for review or enforcement of orders of administrative agencies, boards, commissions and officers of the United States; and in applications for writs or other relief which a court of appeals or a judge thereof is competent to give. When these rules provide for the making of a motion or application in the district court, the procedure for making such motion or application shall be in accordance with the practice of the district court.

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*New matter is underlined; matter to be omitted is lined through. These rules include amendments adopted by the Supreme Court on April 22, 1993, which will become effective on December 1, 1993, unless Congress acts otherwise.

(b) *Rules Not to Affect Jurisdiction.*-- These rules shall not be construed to extend or limit the jurisdiction of the courts of appeals as established by law.

(c) *Title.*-- These rules may be known and cited as the Federal Rules of Appellate Procedure.

Committee Note

Subdivision (c). A new subdivision is added to the rule. The text of new subdivision (c) has been moved from Rule 48 to Rule 1 to allow the addition of new rules at the end of the existing set of appellate rules without burying the title provision among other rules. In a similar fashion the Bankruptcy Rules combine the provisions governing the scope of the rules and the title in the first rule.

Rule 3. Appeal as of Right - How Taken

(a) *Filing the Notice of Appeal.*-- An appeal permitted by law as of right from a district court to a court of appeals ~~shall~~ must be taken by filing a notice of appeal with the clerk of the district court within the time allowed by Rule 4. At the time of filing, the appellant

must furnish the clerk with sufficient copies of the notice of appeal to enable the clerk to comply promptly with the requirements of subdivision (d) of this Rule 3. Failure of an appellant to take any step other than the timely filing of a notice of appeal does not affect the validity of the appeal, but is ground only for such action as the court of appeals deems appropriate, which may include dismissal of the appeal. Appeals by permission under 28 U.S.C. § 1292(b) and appeals in bankruptcy ~~shall~~ must be taken in the manner prescribed by Rule 5 and Rule 6 respectively.

* * * * *

Committee Note

Subdivision (a). The amendment requires a party filing a notice of appeal to provide the court with sufficient copies of the notice for service on all other parties.

Rule 5. ~~Appeals~~ Appeal by Permission under 28 U.S.C. § 1292(b)

* * * * *

(c) *Form of Papers; Number of Copies.*-- All papers may be typewritten. ~~Three copies shall be filed with the original, but the court may require that additional copies be furnished.~~ An original and three copies must be filed unless the court requires the filing of a different number by local rule or by order in a particular case.

* * * * *

Committee Note

Subdivision (c). The amendment makes it clear that a court may require a different number of copies either by rule or by order in an individual case. The number of copies of any document that a court of appeals needs varies depending upon the way in which the court conducts business. The internal operation of the courts of appeals necessarily varies from circuit to circuit because of differences in the number of judges, the geographic area included within the circuit, and other such factors. Uniformity could be achieved only by setting the

number of copies artificially high so that parties in all circuits file enough copies to satisfy the needs of the court requiring the greatest number. Rather than do that, the Committee decided to make it clear that local rules may require a greater or lesser number of copies and that, if the circumstances of a particular case indicate the need for a different number of copies in that case, the court may so order.

Rule 5.1. Appeal by Permission Under 28 U.S.C. § 636(c)(5)

* * * * *

(c) *Form of Papers; Number of Copies.*-- All papers may be typewritten. ~~Three copies shall be filed with the original, but the court may require that additional copies be furnished.~~ An original and three copies must be filed unless the court requires the filing of a different number by local rule or by order in a particular case.

* * * * *

Committee Note

Subdivision (c). The amendment makes it clear that a court may require a different number of copies either by rule or by order in an individual case. The number of copies of any document that a court of appeals needs varies depending upon the way in which the court conducts business. The internal operation of the courts of appeals necessarily varies from circuit to circuit because of differences in the number of judges, the geographic area included within the circuit, and other such factors. Uniformity could be achieved only by setting the number of copies artificially high so that parties in all circuits file enough copies to satisfy the needs of the court requiring the greatest number. Rather than do that, the Committee decided to make it clear that local rules may require a greater or lesser number of copies and that, if the circumstances of a particular case indicate the need for a different number of copies in that case, the court may so order.

~~**Rule 9. Release in criminal cases**~~

~~(a) *Appeals from orders respecting release entered prior to a judgment of conviction.* — An appeal authorized by law from an order refusing or imposing conditions of release shall be determined promptly. Upon entry of an order refusing or imposing conditions of release, the district court shall state in writing the reasons for the~~

~~action taken. The appeal shall be heard without the necessity of briefs after reasonable notice to the appellee upon such papers, affidavits, and portions of the record as the parties shall present. The court of appeals or a judge thereof may order the release of the appellant pending the appeal.~~

~~(b) *Release pending appeal from a judgment of conviction.* Application for release after a judgment of conviction shall be made in the first instance in the district court. If the district court refuses release pending appeal, or imposes conditions of release, the court shall state in writing the reasons for the action taken. Thereafter, if an appeal is pending, a motion for release, or for modification of the conditions of release, pending review may be made to the court of appeals or to a judge thereof. The motion shall be determined promptly upon such papers, affidavits, and portions of~~

~~the record as the parties shall present and after reasonable notice to the appellee. The court of appeals or a judge thereof may order the release of the appellant pending disposition of the motion.~~

~~(c). *Criteria for release.* The decision as to release pending appeal shall be made in accordance with Title 18, U.S.C. § 3143. The burden of establishing that the defendant will not flee or pose a danger to any other person or to the community and that the appeal is not for purpose of delay and raises a substantial question of law or fact likely to result in reversal or in an order for a new trial rests with the defendant.~~

Rule 9. Release in a Criminal Case

(a) *Appeal from an Order Regarding Release Before Judgment of Conviction.* -The district court must state in writing, or orally on the record, the reasons for an order

regarding release or detention of a defendant in a criminal case. A party appealing from the order, as soon as practicable after filing a notice of appeal with the district court, must file with the court of appeals a copy of the district court's order and its statement of reasons. An appellant who questions the factual basis for the district court's order must file a transcript of any release proceedings in the district court or an explanation of why a transcript has not been obtained. The appeal must be determined promptly. It must be heard, after reasonable notice to the appellee, upon such papers, affidavits, and portions of the record as the parties present or the court may require. Briefs need not be filed unless the court so orders. The court of appeals or a judge thereof may order the release of the defendant pending decision of the appeal.

(b) *Review of an Order Regarding Release After*

Judgment of Conviction. -- A party entitled to do so may obtain review of a district court's order regarding release that is made after a judgment of conviction by filing a notice of appeal from that order with the district court, or by filing a motion with the court of appeals if the party has already filed a notice of appeal from the judgment of conviction. Both the order and the review are subject to Rule 9(a). In addition, the papers filed by the applicant for review must include a copy of the judgment of conviction.

(c) *Criteria for Release.* The decision regarding release must be made in accordance with applicable provisions of 18 U.S.C. §§ 3142, 3143, and 3145(c).

Committee Note

Rule 9 has been entirely rewritten. The basic structure of the rule has been retained. Subdivision (a) governs appeals from bail decisions made before the judgment of conviction is entered at the time of sentencing. Subdivision (b) governs review of bail decisions made after sentencing and pending

appeal.

Subdivision (a). The subdivision applies to appeals from "an order regarding release or detention" of a criminal defendant before judgment of conviction, *i.e.*, before sentencing. *See* Fed. R. Crim. P. 32. The old rule applied only to a defendant's appeal from an order "refusing or imposing conditions of release." The new broader language is needed because the government is now permitted to appeal bail decisions in certain circumstances. 18 U.S.C. §§ 3145 and 3731. For the same reason, the rule now requires a district court to state reasons for its decision in all instances, not only when it refuses release or imposes conditions on release.

The rule requires a party appealing from a district court's decision to supply the court of appeals with a copy of the district court's order and its statement of reasons. In addition, an appellant who questions the factual basis for the district court's decision must file a transcript of the release proceedings, if possible. The rule also permits a court to require additional papers. A court must act promptly to decide these appeals; lack of pertinent information can cause delays. The old rule left the determination of what should be filed entirely within the party's discretion; it stated that the court of appeals would hear the appeal "upon such papers, affidavits, and portions of the record as the parties shall present."

Subdivision (b). This subdivision applies to review of a district court's decision regarding release made after judgment of conviction. As in subdivision (a), the language has been changed to accommodate the government's ability to seek review.

The word "review" is used in this subdivision, rather than

"appeal" because review may be obtained, in some instances, upon motion. Review may be obtained by motion if the party has already filed a notice of appeal from the judgment of conviction. If the party desiring review of the release decision has not filed such a notice of appeal, review may be obtained only by filing a notice of appeal from the order regarding release.

The requirements of subdivision (a) apply to both the order and the review. That is, the district court must state its reasons for the order. The party seeking review must supply the court of appeals with the same information required by subdivision (a). In addition, the party seeking review must also supply the court with information about the conviction and the sentence.

Subdivision (c). This subdivision has been amended to include references to the correct statutory provisions.

Rule 13. Review of a Decisions of the Tax Court

(a) *How Obtained; Time for Filing Notice of Appeal.*-- Review of a decision of the United States Tax Court ~~shall~~ must be obtained by filing a notice of appeal with the clerk of the Tax Court within 90 days after ~~the decision of the Tax Court is entered.~~ entry of the Tax Court's decision. At the time of filing the appellant

must furnish the clerk with sufficient copies of the notice of appeal to enable the clerk to comply promptly with the requirements of Rule 3(d). If a timely notice of appeal is filed by one party, any other party may take an appeal by filing a notice of appeal within 120 days after ~~the decision of the Tax Court is entered.~~ entry of the Tax Court's decision.

* * * * *

Committee Note

Subdivision (a). The amendment requires a party filing a notice of appeal to provide the court with sufficient copies of the notice for service on all other parties.

Rule 21. Writs of Mandamus and Prohibition Directed to a Judge or Judges and Other Extraordinary Writs

* * * * *

(d) *Form of Papers; Number of Copies.*-- All papers may be typewritten. ~~Three copies shall be filed~~

~~with the original, but the court may direct that additional copies be furnished.~~ An original and three copies must be filed unless the court requires the filing of a different number by local rule or by order in a particular case.

Committee Note

Subdivision (d). The amendment makes it clear that a court may require a different number of copies either by rule or by order in an individual case. The number of copies of any document that a court of appeals needs varies depending upon the way in which the court conducts business. The internal operation of the courts of appeals necessarily varies from circuit to circuit because of differences in the number of judges, the geographic area included within the circuit, and other such factors. Uniformity could be achieved only by setting the number of copies artificially high so that parties in all circuits file enough copies to satisfy the needs of the court requiring the greatest number. Rather than do that, the Committee decided to make it clear that local rules may require a greater or lesser number of copies and that, if the circumstances of a particular case indicate the need for a different number of copies in that case, the court may so order.

Rule 25. Filing and Service

(a) *Filing.* - ~~Papers~~ A paper required or

permitted to be filed in a court of appeals must be filed with the clerk. Filing may be accomplished by mail addressed to the clerk, but filing is not timely unless the clerk receives the papers within the time fixed for filing, except that briefs and appendices are treated as filed on the day of mailing if the most expeditious form of delivery by mail, except special delivery, is used. Papers filed by an inmate confined in an institution are timely filed if deposited in the institution's internal mail system on or before the last day for filing. Timely filing of papers by an inmate confined in an institution may be shown by a notarized statement or declaration (in compliance with 28 U.S.C. § 1746) setting forth the date of deposit and stating that first-class postage has been prepaid. If a motion requests relief that may be granted by a single judge, the judge may permit the motion to be filed with the judge, in which event the judge shall note

thereon the ~~date of~~ filing date and thereafter give it to the clerk. A court of appeals may, by local rule, permit papers to be filed by facsimile or other electronic means, provided such means are authorized by and consistent with standards established by the Judicial Conference of the United States. The clerk must not refuse to accept for filing any paper presented for that purpose solely because it is not presented in proper form as required by these rules or by any local rules or practices.

* * * * *

(d) *Proof of Service.*-- Papers presented for filing ~~shall~~ must contain an acknowledgment of service by the person served or proof of service in the form of a statement of the date and manner of service, ~~and~~ of the names of the persons served, and of the addresses to which the papers were mailed or at which they were delivered, certified by the person who made service.

Proof of service may appear on or be affixed to the papers filed. ~~The clerk may permit papers to be filed without acknowledgment or proof of service but shall require such to be filed promptly thereafter.~~

(e) *Number of Copies.*-- Whenever these rules require the filing or furnishing of a number of copies, a court may require a different number by local rule or by order in a particular case.

Committee Note

Subdivision (a). Several circuits have local rules that authorize the office of the clerk to refuse to accept for filing papers that are not in the form required by these rules or by local rules. This is not a suitable role for the office of the clerk and the practice exposes litigants to the hazards of time bars; for these reasons, such rules are proscribed by this rule. This provision is similar to Fed. R. Civ. P. 5(e) and Fed. R. Bankr. P. 5005.

The Committee wishes to make it clear that the provision prohibiting a clerk from refusing a document does not mean that a clerk's office may no longer screen documents to determine whether they comply with the rules. A court may delegate to the clerk authority to inform a party about any noncompliance with the rules and, if the party is willing to

correct the document, to determine a date by which the corrected document must be resubmitted. If a party refuses to take the steps recommended by the clerk or if in the clerk's judgment the party fails to correct the noncompliance, the clerk must refer the matter to the court for a ruling.

Subdivision (d). Two changes have been made in this subdivision. Subdividion (d) provides that a paper presented for filing must contain proof of service.

The last sentence of subdivision (d) has been deleted as unnecessary. That sentence stated that a clerk could permit papers to be filed without acknowledgment or proof of service but must require that it be filed promptly thereafter. In light of the change made in subdivision (a) which states that a clerk may not refuse to accept for filing a document because it is not in the proper form, there is no further need for a provision stating that a clerk may accept a paper lacking a proof of service. The clerk must accept such a paper. That portion of the deleted sentence stating that the clerk must require that proof of service be filed promptly after the filing of the document if the proof is not filed concurrently with the document is also unnecessary.

The second amendment requires that the certificate of service must state the addresses to which the papers were mailed or at which they were delivered. The Federal Circuit has a similar local rule, Fed. Cir. R. 25.

Subdivision (e). Subdivision (e) is a new subdivision. It makes it clear that whenever these rules require a party to file or furnish a number of copies a court may require a different number of copies either by rule or by order in an individual case. The number of copies of any document that a court of

appeals needs varies depending upon the way in which the court conducts business. The internal operation of the courts of appeals necessarily varies from circuit to circuit because of differences in the number of judges, the geographic area included within the circuit, and other such factors. Uniformity could be achieved only by setting the number of copies artificially high so that parties in all circuits file enough copies to satisfy the needs of the court requiring the greatest number. Rather than do that, the Committee decided to make it clear that local rules may require a greater or lesser number of copies and that, if the circumstances of a particular case indicate the need for a different number of copies in that case, the court may so order.

A party must consult local rules to determine whether the court requires a different number than that specified in these national rules. The Committee believes it would be helpful if each circuit either: 1) included a chart at the beginning of its local rules showing the number of copies of each document required to be filed with the court along with citation to the controlling rule; or 2) made available such a chart to each party upon commencement of an appeal; or both. If a party fails to file the required number of copies, the failure does not create a jurisdictional defect. Rule 3(a) states: "Failure of an appellant to take any step other than the timely filing of a notice of appeal does not affect the validity of the appeal, but is ground only for such action as the court of appeals deems appropriate. . . ."

Rule 26.1. Corporate Disclosure Statement

Any non-governmental corporate party to a civil or bankruptcy case or agency review proceeding and any

non-governmental corporate defendant in a criminal case ~~shall~~ must file a statement identifying all parent companies, subsidiaries (except wholly-owned subsidiaries), and affiliates that have issued shares to the public. The statement ~~shall~~ must be filed with a party's principal brief or upon filing a motion, response, petition, or answer in the court of appeals, whichever first occurs, unless a local rule requires earlier filing. Whenever the statement is filed before a party's principal brief, an original and three copies of the statement must be filed unless the court requires the filing of a different number by local rule or by order in a particular case. The statement ~~shall~~ must be included in front of the table of contents in a party's principal brief even if the statement was previously filed.

Committee Note

The amendment requires a party to file three copies of

the disclosure statement whenever the statement is filed before the party's principal brief. Because the statement is included in each copy of the party's brief, there is no need to require the filing of additional copies at that time. A court of appeals may require the filing of a different number of copies by local rule or by order in a particular case.

Rule 27. Motions

* * * * *

(d) *Form of Papers; Number of Copies.*-- All papers relating to a motions may be typewritten. ~~Three copies shall be filed with the original, but the court may require that additional copies be furnished.~~ An original and three copies must be filed unless the court requires the filing of a different number by local rule or by order in a particular case.

Committee Note

Subdivision (d). The amendment makes it clear that a court may require a different number of copies either by rule or by order in an individual case. The number of copies of any document that a court of appeals needs varies depending upon the way in which the court conducts business. The internal

operation of the courts of appeals necessarily varies from circuit to circuit because of differences in the number of judges, the geographic area included within the circuit, and other such factors. Uniformity could be achieved only by setting the number of copies artificially high so that parties in all circuits file enough copies to satisfy the needs of the court requiring the greatest number. Rather than do that, the Committee decided to make it clear that local rules may require a greater or lesser number of copies and that, if the circumstances of a particular case indicate the need for a different number of copies in that case, the court may so order.

Rule 28. Briefs

(a) *Appellant's Brief.*-- The brief of the appellant must contain, under appropriate headings and in the order here indicated:

* * * * *

(5) A summary of argument. The summary should contain a succinct, clear, and accurate statement of the arguments made in the body of the brief. It should not be a mere repetition of the argument headings.

~~(5)~~ (6) An argument. ~~The argument may be~~

~~preceded by a summary.~~ The argument must contain the contentions of the appellant on the issues presented, and the reasons therefor, with citations to the authorities, statutes, and parts of the record relied on. The argument must also include for each issue a concise statement of the applicable standard of review; this statement may appear in the discussion of each issue or under a separate heading placed before the discussion of the issues.

~~(6)~~ (7) A short conclusion stating the precise relief sought.

(b) *Appellee's Brief.*--The brief of the appellee must conform to the requirements of paragraphs (a)(1)-~~(5)~~ (6) , except that none of the following need appear unless the appellee is dissatisfied with the statement of the appellant:

(1) the jurisdictional statement;

(2) the statement of the issues;

(3) the statement of the case;

(4) the statement of the standard of review.

* * * * *

(g) *Length of briefs.*-- Except by permission of the court, or as specified by local rule of the court of appeals, principal briefs ~~shall~~ must not exceed 50 pages, and reply briefs ~~shall~~ must not exceed 25 pages, exclusive of pages containing the corporate disclosure statement, table of contents, tables of citations, proof of service, and any addendum containing statutes, rules, regulations, etc.

Committee Note

Subdivision (a). The amendment adds a requirement that an appellant's brief contain a summary of the argument. A number of circuits have local rules requiring a summary and the courts report that they find the summary useful. *See,* D.C. Cir. R. 11(a)(5); 5th Cir. R. 28.2.2; 8th Cir. R. 28A(i)(6); 11th Cir. R. 28-2(i); and Fed. Cir. R. 28.

Subdivision (b). The amendment adds a requirement that an appellee's brief contain a summary of the argument.

Subdivision (g). The amendment adds proof of service to the list of items in a brief that do not count for purposes of the page limitation. The concurrent amendment to Rule 25(d) requires a certificate of service to list the addresses to which a paper was mailed or at which it was delivered. When a number of parties must be served, the listing of addresses may run to several pages and those pages should not count for purposes of the page limitation.

Rule 30. Appendix to the Briefs

(a) *Duty of Appellant to Prepare and File; Content of Appendix; Time for Filing; Number of Copies.*-- The appellant ~~shall~~ must prepare and file an appendix to the briefs which ~~shall~~ must contain: (1) the relevant docket entries in the proceeding below; (2) any relevant portions of the pleadings, charge, findings, or opinion; (3) the judgment, order, or decision in question; and (4) any other parts of the record to which the parties wish to direct the particular attention of the court. Except where they have independent relevance, memoranda of

law in the district court should not be included in the appendix. The fact that parts of the record are not included in the appendix shall not prevent the parties or the court from relying on such parts.

Unless filing is to be deferred pursuant to the provisions of subdivision (c) of this rule, the appellant ~~shall~~ must serve and file the appendix with the brief. Ten copies of the appendix ~~shall~~ must be filed with the clerk, and one copy ~~shall~~ must be served on counsel for each party separately represented, unless the court ~~shall~~ requires the filing or service of a different number by local rule or by order in a particular case ~~direct the filing or service of a lesser number~~.

* * * * *

Committee Note

Subdivision (a). The only substantive change is to allow a court to require the filing of a greater number of copies of an appendix as well as a lesser number.

Rule 31. Filing and Service of a Briefs

* * * * *

(b) *Number of Copies to Be Filed and Served.*--Twenty-five copies of each brief ~~shall~~ must be filed with the clerk, ~~unless the court by order in a particular case shall direct a lesser number,~~ and two copies ~~shall~~ must be served on counsel for each party separately represented unless the court requires the filing or service of a different number by local rule or by order in a particular case. If a party is allowed to file typewritten ribbon and carbon copies of the brief, the original and three legible copies ~~shall~~ must be filed with the clerk, and one copy ~~shall~~ must be served on counsel for each party separately represented.

* * * * *

Committee Note

Subdivision (b). The amendment allows a court of appeals to require the filing of a greater, as well as a lesser, number of copies of briefs. The amendment also allows the required number to be prescribed by local rule as well as by order in a particular case.

~~**Rule 33. Prehearing conference**~~

~~The court may direct the attorneys for the parties to appear before the court or a judge thereof for a prehearing conference to consider the simplification of the issues and such other matters as may aid in the disposition of the proceeding by the court. The court or judge shall make an order which recites the action taken at the conference and the agreements made by the parties as to any of the matters considered and which limits the issues to those not disposed of by admissions or agreements of counsel, and such order when entered controls the subsequent course of the proceeding, unless modified to prevent manifest injustice.~~

Rule 33. Appeal Conferences

The court may direct the attorneys, and in appropriate cases the parties, to participate in one or more conferences to address any matter that may aid in the disposition of the proceedings, including the simplification of the issues and the possibility of settlement. A conference may be conducted in person or by telephone and be presided over by a judge or other person designated by the court for that purpose. Before a settlement conference, attorneys must consult with their clients and obtain as much authority as feasible to settle the case. As a result of a conference, the court may enter an order controlling the course of the proceedings or implementing any settlement agreement.

Committee Note

Rule 33 has been entirely rewritten. The new rule makes several changes.

The caption of the rule has been changed from "Prehearing Conference" to "Appeal Conferences" to reflect the fact that occasionally a conference is held after oral argument.

The rule permits the court to require the parties to attend the conference in appropriate cases. The Committee does not contemplate that attendance of the parties will become routine, but in certain instances the parties' presence can be useful. The language of the rule is broad enough to allow a court to determine that an executive or employee (other than the general counsel) of a corporation or government agency with authority regarding the matter at issue, constitutes "the party."

The rule includes the possibility of settlement among the possible conference topics.

The rule recognizes that conferences are often held by telephone.

The rule allows a judge or other person designated by the court to preside over a conference. A number of local rules permit persons other than judges to preside over conferences. 1st Cir. R. 47.5; 6th Cir. R. 18; 8th Cir. R. 33A; 9th Cir. R. 33-1; and 10th Cir. R. 33.

The rule requires an attorney to consult with his or her client before a settlement conference and obtain as much authority as feasible to settle the case. An attorney can never

settle a case without his or her client's consent. Certain entities, especially government entities, have particular difficulty obtaining authority to settle a case. The rule requires counsel to obtain only as much authority "as feasible."

Rule 35. Determination of Causes by the Court in Banc

* * * * *

(d) *Number of Copies.*-- The number of copies that must be filed may be prescribed by local rule and may be altered by order in a particular case.

Committee Note

Subdivision (d). Subdivision (d) is added; it authorizes the courts of appeals to prescribe the number of copies of suggestions for hearing or rehearing in banc that must be filed. Because the number of copies needed depends directly upon the number of judges in the circuit, local rules are the best vehicle for setting the required number of copies.

Rule 38. Damages and Costs for ~~delay~~ Frivolous Appeals

If a court of appeals ~~shall~~ determines that an appeal is frivolous, it may, after a separately filed

motion or notice from the court and reasonable opportunity to respond, award just damages and single or double costs to the appellee.

Committee Note

The amendment requires that before a court of appeals may impose sanctions, the person to be sanctioned must have notice and an opportunity to respond. The amendment reflects the basic principle enunciated in the Supreme Court's opinion in Roadway Express, Inc. v. Piper, 447 U.S. 752, 767 (1980), that notice and opportunity to respond must precede the imposition of sanctions. A separately filed motion requesting sanctions constitutes notice. A statement inserted in a party's brief that the party moves for sanctions is not sufficient notice. Requests in briefs for sanctions have become so commonplace that it is unrealistic to expect careful responses to such requests without any indication that the court is actually contemplating such measures. Only a motion, the purpose of which is to request sanctions, is sufficient. If there is no such motion filed, notice must come from the court. The form of notice from the court and of the opportunity for comment purposely are left to the court's discretion.

Rule 40. Petition for Rehearing

(a) *Time for Filing; Content; Answer; Action by Court if Granted.*-- A petition for rehearing may be filed

within 14 days after entry of judgment unless the time is shortened or enlarged by order or by local rule. However, in all civil cases in which the United States or an agency or officer thereof is a party, the time within which any party may seek rehearing shall be 45 days after entry of judgment unless the time is shortened or enlarged by order. The petition ~~shall~~ must state with particularity the points of law or fact which in the opinion of the petitioner the court has overlooked or misapprehended and ~~shall~~ must contain such argument in support of the petition as the petitioner desires to present. Oral argument in support of the petition will not be permitted. No answer to a petition for rehearing will be received unless requested by the court, but a petition for rehearing will ordinarily not be granted in the absence of such a request. If a petition for rehearing is granted, the court may make a final

disposition of the cause without reargument or may restore it to the calendar for reargument or resubmission or may make such other orders as are deemed appropriate under the circumstances of the particular case.

Committee Note

Subdivision (a). The amendment lengthens the time for filing a petition for rehearing from 14 to 45 days in civil cases involving the United States or its agencies or officers. It has no effect upon the time for filing in criminal cases. The amendment makes nation-wide the current practice in the District of Columbia and the Tenth Circuits, *see* D.C. Cir. R. 15(a), 10th Cir. R. 40.3. This amendment, analogous to the provision in Rule 4(a) extending the time for filing a notice of appeal in cases involving the United States, recognizes that the Solicitor General needs time to conduct a thorough review of the merits of a case before requesting a rehearing. In a case in which a court of appeals believes it necessary to restrict the time for filing a rehearing petition, the amendment provides that the court may do so by order. Although the first sentence of Rule 40 permits a court of appeals to shorten or lengthen the usual 14 day filing period by order or by local rule, the sentence governing appeals in civil cases involving the United States purposely limits a court's power to alter the 45 day period to orders in specific cases. If a court of appeals could adopt a local rule shortening the time for filing a petition for rehearing in all cases involving the United States, the purpose

of the amendment would be defeated.

Rule 41. Issuance of Mandate; Stay of Mandate

(a) *Date of Issuance.* -- The mandate of the court ~~shall~~ must issue ~~21~~ 7 days after the ~~entry of judgment~~ expiration of the time for filing a petition for rehearing unless such a petition is filed or the time is shortened or enlarged by order. A certified copy of the judgment and a copy of the opinion of the court, if any, and any direction as to costs shall constitute the mandate, unless the court directs that a formal mandate issue. The timely filing of a petition for rehearing will stay the mandate until disposition of the petition unless otherwise ordered by the court. If the petition is denied, the mandate ~~shall~~ must issue 7 days after entry of the order denying the petition unless the time is shortened or enlarged by order.

(b) *Stay of Mandate Pending ~~Application~~ Petition*

for Certiorari.--~~A stay of the mandate pending application to the Supreme Court for a writ of certiorari may be granted upon motion, reasonable notice of which shall be given to all parties.~~ A party who files a motion requesting a stay of mandate pending petition to the Supreme Court for a writ of certiorari must file, at the same time, proof of service on all other parties. The motion must show that a petition for certiorari would present a substantial question and that there is good cause for a stay. The stay ~~shall~~ cannot exceed 30 days unless the period is extended for cause shown. ~~If~~ or unless during the period of the stay, ~~there is filed with the clerk of the court of appeals~~ a notice from the clerk of the Supreme Court is filed showing that the party who has obtained the stay has filed a petition for the writ ~~in that court~~, in which case the stay ~~shall~~ will continue until final disposition by the Supreme Court.

~~Upon the filing of a copy of an order of the Supreme Court denying the petition for writ of certiorari the mandate shall issue immediately.~~ A The court of appeals must issue the mandate immediately when a copy of a Supreme Court order denying the petition for writ of certiorari is filed. The court may require a bond or other security ~~may be required~~ as a condition to the grant or continuance of a stay of the mandate.

Committee Note

Subdivision (a). The amendment conforms Rule 41(a) to the amendment made to Rule 40(a). The amendment keys the time for issuance of the mandate to the expiration of the time for filing a petition for rehearing, unless such a petition is filed in which case the mandate issues 7 days after the entry of the order denying the petition. Because the amendment to Rule 40(a) lengthens the time for filing a petition for rehearing in civil cases involving the United States from 14 to 45 days, the rule requiring the mandate to issue 21 days after the entry of judgment would cause the mandate to issue while the government is still considering requesting a rehearing. Therefore, the amendment generally requires the mandate to issue 7 days after the expiration of the time for filing a petition for rehearing.

Subdivision (b). The amendment requires a party who files a motion requesting a stay of mandate to file, at the same time, proof of service on all other parties. The old rule required the party to give notice to the other parties; the amendment merely requires the party to provide the court with evidence of having done so.

The amendment also states that the motion must show that a petition for certiorari would present a substantial question and that there is good cause for a stay. The amendment is intended to alert the parties to the fact that a stay of mandate is not granted automatically and to the type of showing that needs to be made. The Supreme Court has established conditions that must be met before it will stay a mandate. *See* Robert L. Stern et al., Supreme Court Practice § 17.19 (6th ed. 1986).

~~**Rule 48. Title**~~

~~These rules may be known and cited as the Federal Rules of Appellate Procedure.~~

Rule 48. Masters

A court of appeals may appoint a special master to hold hearings, if necessary, and to make recommendations as to factual findings and disposition in matters ancillary to proceedings in the court. Unless

the order referring a matter to a master specifies or limits the master's powers, a master shall have power to regulate all proceedings in every hearing before the master and to do all acts and take all measures necessary or proper for the efficient performance of the master's duties under the order including, but not limited to, requiring the production of evidence upon all matters embraced in the reference and putting witnesses and parties on oath and examining them. If the master is not a judge or court employee, the court shall determine the master's compensation and whether the cost will be charged to any of the parties.

Committee Note

The text of the existing Rule 48 concerning the title was moved to Rule 1.

This new Rule 48 authorizes a court of appeals to appoint a special master to make recommendations concerning ancillary matters. The courts of appeals have long used masters in contempt proceedings where the issue is compliance with an

enforcement order. *See Polish National Alliance v. NLRB*, 159 F.2d 38 (7th Cir. 1946); *NLRB v. Arcade-Sunshine Co.*, 132 F.2d 8 (D.C. Cir. 1942); *NLRB v. Remington Rand, Inc.*, 130 F.2d 919 (2d Cir. 1942). There are other instances when the question before a court of appeals requires a factual determination. An application for fees or eligibility for Criminal Justice Act status on appeal are examples.

Ordinarily when a factual issue is unresolved, a court of appeals remands the case to the district court or agency that originally heard the case. It is not the Committee's intent to alter that practice. However, when factual issues arise in the first instance in the court of appeals, such as fees for representation on appeal, it would be useful to have authority to refer such determinations to a master for a recommendation.

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
OF THE
JUDICIAL CONFERENCE OF THE UNITED STATES
WASHINGTON, D.C. 20544

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WILLIAM TERRELL HODGES
CRIMINAL RULES

RALPH K. WINTER, JR.
EVIDENCE RULES

May 10, 1993

TO: Honorable Robert E. Keeton, Chairman
Standing Committee on Rules of Practice and Procedure

FROM: Honorable Edward Leavy, Chairman
Advisory Committee on Bankruptcy Rules

SUBJECT: Proposed Amendments to Rules 8002(b) and 8006 of the Federal Rules of Bankruptcy Procedure

On behalf of the Advisory Committee on Bankruptcy Rules, I have the honor to transmit proposed amendments to Bankruptcy Rules 8002(b) and 8006 for consideration by the Committee on Rules of Practice and Procedure of the Judicial Conference of the United States.

The preliminary draft of proposed changes to the rules was circulated to members of the bench and bar in December, 1992. Comments were received from three respondents after publication of the preliminary draft. A summary of the comments received after publication of the preliminary draft is enclosed. A public hearing was scheduled to be held in Washington, D.C. on April 2, 1993, but was cancelled because of the lack of witnesses requesting to testify. The proposed amendments to Rules 8002(b) and 8006 are not the subject of substantial controversy.

The Advisory Committee considered the three written comments received from the bench and bar, as well as the recommendations of the Style Subcommittee. Except for several stylistic changes, and the deletion of a sentence in the committee note to Rule 8002, the Advisory Committee has not made any changes to the proposed amendments subsequent to publication of the preliminary draft. The change to the committee note is explained below.

A summary of the proposed amendments to Rules 8002(b) and 8006 is provided for your convenience:

(1) Rule 8002(b). Time for Filing Notice of Appeal.

This rule is amended to conform to the proposed amendments to F.R.App.P. 4(a)(4) in two respects: (1) to add a motion for relief from a judgment or order pursuant to F.R.Civ.P. 60 (made applicable by Bankruptcy Rule 9024) to the list of postjudgment motions that toll the time for filing a notice of appeal, and (2) to provide that a notice of appeal filed prior to disposition of a postjudgment motion does not become a nullity, but is suspended until such disposition.

The proposed amendments to Rule 8002(b) differ from the proposed amendments to F.R.App.P. 4(a)(4) in one respect. Instead of requiring that the motion for relief from a judgment under Rule 9024 be "served" within 10 days after entry of the judgment in order to toll the appeal time, the proposed amendment to Rule 8002(b) requires that the motion be "filed" within that 10-day period. The reason for recommending that filing be required within the 10-day period is to achieve greater certainty for parties in interest who want to determine whether the motion has been made. Greater certainty is more important in bankruptcy cases, in which there is only a 10-day appeal period and parties often rely on finality of orders before closing transactions, then it is in district court civil actions where the time to appeal is 30 days.

In response to the public comment, the Advisory Committee deleted the following sentence that appeared in the published version of the committee note to Rule 8002: "This amendment eliminates the difficulty of determining whether a postjudgment motion made within 10 days after entry of the judgment is a Rule 9023 motion, which tolls the time for filing an appeal, or a Rule 9024 motion, which historically has not tolled the time." The Committee believes that this sentence is not entirely accurate in that, under the present rules, a Rule 9023 (Civil Rule 59) motion only has to be served within the 10-day period to toll the appeal time. If the motion is both served and filed within the 10-day period, under the amended rule there will be no need for the court to determine whether it is a Rule 9023 or a Rule 9024 motion. However, if a motion is served within the 10-day period, but not filed until after the 10-day period, it may be necessary for the court to determine whether it is a Rule 9023 or a Rule 9024 motion. The Advisory Committee understands that the need for the court to distinguish between Rule 9023 and Rule 9024 motions may be temporary in that the Civil Rules Committee is considering changes to require that Rule 59 motions be filed within the 10-day period.

(2) Rule 8006. Record and Issues on Appeal.

The proposed amendment to this rule is related to the proposed amendment to Rule 8002(b). The purpose of the amendment is to suspend the 10-day period for filing and serving a designation of the record and statement of the issues if a timely postjudgment motion is made that suspends the time for filing a notice of appeal under Rule 8002(b). The only changes that have been made subsequent to the publication of the proposed amendments to Rule 8006 are stylistic.

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May 10, 1993

TO: Honorable Robert E. Keeton, Chairman
Standing Committee on Rules of Practice and Procedure

FROM: Honorable Edward Leavy, Chairman
Advisory Committee on Bankruptcy Rules

SUBJECT: Report of the Comments Received Subsequent to the Publication of the Preliminary Draft of Proposed Amendments to Bankruptcy Rules 8002(b) and 8006

A preliminary draft of the proposed amendments to Bankruptcy Rules 8002(b) and 8006 was circulated to members of the bench and bar in December 1992. A public hearing was scheduled to be held in Washington, DC, on April 2, 1993, but was cancelled because of the lack of witnesses requesting to testify.

The Advisory Committee on Bankruptcy Rules received letters from three commentators. Listed below are the names and addresses of the commentators and a summary of each comment.

(1) Arnold P. Peter, Esq.
Chair, Committee on Federal Courts
of the State Bar of California
555 Franklin Street
San Francisco, CA 94102-4498
(April 13, 1993)

Mr. Peter reports that the California State Bar Committee on Federal Courts enthusiastically supports the proposed revisions to Rules 8002(b) and 8006. His letter does not contain any suggestions for further modifications.

(2) Hon. S. Martin Teel, Jr.
United States Bankruptcy Court for the
District of Columbia
United States Courthouse
Washington, DC 20001
(January 25, 1993)

Judge Teel suggests that the amendment to Rule 8002(b) provide that a Rule 9024 motion tolls the time to file an appeal if "made within the time for filing and serving a motion under Rule 9023" (instead of the proposed language: "if the motion is filed within 10 days after the entry of judgment"). Judge Teel suggests that linking the time for the Rule 9024 motion to the time for a Rule 9023 motion would be preferable for two reasons. First, the Advisory Committee's language will create only an illusion of certainty. Although there will be greater certainty regarding the making of a Rule 9024 motion, there will remain uncertainty because a Rule 9023 motion may toll the appeal time even if it is not filed within the ten day period. Second, Judge Teel comments that the Advisory Committee proposal will continue to require courts to determine whether a motion to reconsider a judgment is a Rule 9023 or a Rule 9024 motion if the motion is served but not filed within the 10-day period.

Judge Teel states that "[t]he obvious way to achieve the goal of certainty desired would be to amend Rules 7005, 7052 and 9023 to require that motions under Rules 7052 and 9023 be served and filed on the tenth day."

(3) Honorable Robert J. Kressel
Chief Judge
United States Bankruptcy Court for the
District of Minnesota
600 Towle Building
330 Second Avenue South
Minneapolis, Minnesota 55401
(April 9, 1993)

Judge Kressel apparently agrees with the requirement that a Rule 9024 motion be filed in order to toll the time to appeal, but suggests that the amendment go further to also require that a Rule 7052 motion or Rule 9023 motion be filed within ten days.

Judge Kressel also suggests that Rule 8002(c) be amended to require that any motion to extend the appeal period be filed within ten days after the entry of the judgment in order to toll the appeal period. Judge Kressel recognizes that this change to Rule 8002(c) may be outside the scope of the pending amendments, and has asked that the Advisory Committee consider it at its next opportunity.

PROPOSED AMENDMENTS TO THE FEDERAL RULES OF BANKRUPTCY PROCEDURE

Rule 8002. Time for Filing Notice of Appeal

* * * * *

(b) EFFECT OF MOTION ON TIME FOR APPEAL. If any party makes a timely motion of a type specified immediately below, the time for appeal for all parties runs from the entry of the order disposing of the last such motion outstanding. This provision applies to a timely motion: ~~is filed by any party:~~

(1) ~~under Rule 7052(b)~~ to amend or make additional findings of fact under Rule 7052, whether or not ~~an alteration of~~ granting the motion would alter the judgment ~~would be required if the motion is granted~~;

(2) ~~under Rule 9023~~ to alter or amend the judgment under Rule 9023; ~~or~~

(3) ~~under Rule 9023~~ for a new trial

under Rule 9023; or

(4) for relief under Rule 9024 if the motion is filed no later than 10 days after the entry of judgment.~~, the time for appeal for all parties shall run from the entry of the order denying a new trial or granting or denying any other such motion. A notice of appeal filed before the disposition of any of the above motions shall have no effect; a new notice of appeal must be filed.~~ A notice of appeal filed after announcement or entry of the judgment, order, or decree but before disposition of any of the above motions is ineffective to appeal from the judgment, order, or decree, or part thereof, specified in the notice of appeal, until the entry of the order disposing of the last such motion outstanding. Appellate

review of an order disposing of any of the above motions requires the party, in compliance with Rule 8001, to amend a previously filed notice of appeal. A party intending to challenge an alteration or amendment of the judgment, order, or decree shall file a notice, or an amended notice, of appeal within the time prescribed by this Rule 8002 measured from the entry of the order disposing of the last such motion outstanding. No additional fees ~~shall~~ will be required for ~~such~~ filing an amended notice.

* * * * *

COMMITTEE NOTE

These amendments are intended to conform to the 1993 amendments to F.R.App.P. 4(a)(4) and 6(b)(2)(i).

This rule as amended provides that a notice of appeal filed before the

disposition of a specified postjudgment motion will become effective upon disposition of the motion. A notice filed before the filing of one of the specified motions or after the filing of a motion but before disposition of the motion is, in effect, suspended until the motion is disposed of, whereupon, the previously filed notice effectively places jurisdiction in the district court or bankruptcy appellate panel.

Because a notice of appeal will ripen into an effective appeal upon disposition of a postjudgment motion, in some instances there will be an appeal from a judgment that has been altered substantially because the motion was granted in whole or in part. The appeal may be dismissed for want of prosecution when the appellant fails to meet the briefing schedule. But, the appellee may also move to strike the appeal. When responding to such a motion, the appellant would have an opportunity to state that, even though some relief sought in a postjudgment motion was granted, the appellant still plans to pursue the appeal. Because the appellant's response would provide the appellee with sufficient notice of the appellant's intentions, the rule does not require an additional notice of appeal in that situation.

The amendment provides that a notice of appeal filed before the disposition of a postjudgment tolling motion is sufficient to bring the judgment, order, or decree specified in

the original notice of appeal to the district court or bankruptcy appellate panel. If the judgment is altered upon disposition of a postjudgment motion, however, and if a party who has previously filed a notice of appeal wishes to appeal from the disposition of the motion, the party must amend the notice to so indicate. When a party files an amended notice, no additional fees are required because the notice is an amendment of the original and not a new notice of appeal.

Subdivision (b) is also amended to include, among motions that extend the time for filing a notice of appeal, a motion under Rule 9024 that is filed within 10 days after entry of judgment. The addition of this motion conforms to a similar amendment to F.R.App.P. 4(a)(4) made in 1993, except that a Rule 9024 motion does not toll the time to appeal unless it is filed within the 10-day period. The reason for providing that the motion extends the time to appeal only if it is filed within the 10-day period is to enable the court and the parties in interest to determine solely from the court records whether the time to appeal has been extended by a motion for relief under Rule 9024.

Rule 8006. Record and Issues on Appeal

Within 10 days after filing the notice of appeal as provided by Rule 8001(a), ~~or~~ entry of an order granting leave to appeal, or entry of an order disposing of the last timely motion outstanding of a type specified in Rule 8002(b), whichever is later, the appellant shall file with the clerk and serve on the appellee a designation of the items to be included in the record on appeal and a statement of the issues to be presented. Within 10 days after the service of the appellant's statement ~~of the appellant~~ the appellee may file and serve on the appellant a designation of additional items to be included in the record on appeal and, if the appellee has filed a cross appeal, the appellee as cross appellant shall file and serve

a statement of the issues to be presented on the cross appeal and a designation of additional items to be included in the record. A cross appellee may, within 10 days of service of the cross appellant's statement ~~of the cross appellant~~, file and serve on the cross appellant a designation of additional items to be included in the record. The record on appeal shall include the items so designated by the parties, the notice of appeal, the judgment, order, or decree appealed from, and any opinion, findings of fact, and conclusions of law of the court. Any party filing a designation of the items to be included in the record shall provide to the clerk a copy of the items designated or, if the party fails to provide the copy, the clerk shall

prepare the copy at the party's expense ~~of the party~~. If the record designated by any party includes a transcript of any proceeding or a part thereof, the party shall, immediately after filing the designation, deliver to the reporter and file with the clerk a written request for the transcript and make satisfactory arrangements for payment of its cost. All parties shall take any other action necessary to enable the clerk to assemble and transmit the record.

COMMITTEE NOTE

The amendment to the first sentence of this rule is made together with the amendment to Rule 8002(b), which provides, in essence, that certain specified postjudgment motions suspend a filed notice of appeal until the disposition of the last of such motions. The purpose of this amendment is to suspend the 10-day period for filing and serving a

designation of the record and statement of the issues if a timely postjudgment motion is made and a notice of appeal is suspended under Rule 8002(b). The 10-day period set forth in the first sentence of this rule begins to run when the order disposing of the last of such postjudgment motions outstanding is entered. The other amendments to this rule are stylistic.

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
OF THE
JUDICIAL CONFERENCE OF THE UNITED STATES
WASHINGTON, D.C. 20544

Agenda F-19
(Appendix C)
Rules
September 1993

ROBERT E. KEETON
CHAIRMAN

PETER G. McCABE
SECRETARY

CHAIRMEN OF ADVISORY COMMITTEES

KENNETH F. RIPPLE
APPELLATE RULES

EDWARD LEAVY
BANKRUPTCY RULES

SAM C. POINTER, JR.
CIVIL RULES

WILLIAM TERRELL HODGES
CRIMINAL RULES

RALPH K. WINTER, JR.
EVIDENCE RULES

TO: Hon. Robert E. Keeton, Chairman
Standing Committee on Rules of Practice and Procedure

FROM: Hon. Wm. Terrell Hodges, Chairman
Advisory Committee on Federal Rules of Criminal Procedure

SUBJECT Report on Proposed and Pending Rules of Criminal Procedure and Rules of Evidence

DATE: May 14, 1993

I. INTRODUCTION

At its meeting in April 1993, the Advisory Committee on the Rules of Criminal Procedure acted upon proposed or pending amendments to a number of Rules of Criminal Procedure. This report addresses those proposals and the recommendations to the Standing Committee. A GAP Report and copies of the Rules and the accompanying Committee Notes are attached along with a copy of the minutes of the Committee's April 1993 meeting.

II. RULES OF CRIMINAL PROCEDURE PUBLISHED FOR PUBLIC COMMENT.

A. In General

In July 1992, the Standing Committee approved amendments to Rules 16 and 29 but directed publication for public comment be deferred pending a relocation of the Rules Committee Support Office. In December 1992, the Standing Committee approved amendments to Rules 32 and 40 and directed that all four rules (16, 29, 32, and 40) be published on an expedited basis with the comment period to end on April 15, 1993. Comments were received on the proposed amendments and were carefully considered by the

Advisory Committee at its April 1993 meeting in Washington, D.C. In addition, the Committee received the testimony of two witnesses at that same meeting.

The GAP Report provides a more detailed discussion of the changes made to the Rules since their publication. The following discussion briefly notes any significant changes and the Committee's recommended action:

B. Rule 16(a)(1)(A). Production of Statements by Organizational Defendants.

The Committee made a minor change to the rule. The Committee changed the rule to reflect that the defense is entitled to discover the statements of persons, *whom the government contends*, were in a position to bind an organizational defendant. The Note was also changed to indicate that the rule does not require the defense to stipulate or admit that a particular person was in a position to bind the organization.

The Committee recommends that Rule 16(a)(1)(A), as amended be approved by the Standing Committee and forwarded to the Judicial Conference for its approval.

C. Rule 29(b). Delayed Ruling on Judgment of Acquittal.

Although the Committee made no changes to the rule, it did make a minor change to the Committee Note to reflect that on appeal of a delayed ruling on a motion for judgment of acquittal, the appellate court would also be limited to consideration of the evidence presented before the motion was made.

The Advisory Committee recommends that the Standing Committee approve Rule 29 and forward it to the Judicial Conference for its approval.

D. Rule 32. Sentence and Judgment.

The Advisory Committee has made several changes to the rule and the Committee Note. They are as follows:

1. Time Limits:

The Committee changed Rule 32(a) to retain the current language that sentencing should take place "without unnecessary delay." The rule continues to

provide, however, that the internal time limits in Rule 32(b)(6) will be followed unless the court advances or shortens them.

2. Presence of Counsel:

The Committee changed subdivision (b)(2) to provide that the defendant's counsel is "entitled to notice and a reasonable opportunity" to attend any interview. The Note was also changed to indicate that the burden should be on counsel, once notice is given, to respond. The Note was also modified to indicate that the Committee believed that the term "interview" should extend only to communications initiated by the probation officer for the purpose of obtaining information to be used in the presentence report.

3. Probation Officer's Determination of Applicable Sentencing Classification:

As published, subdivision (b)(4)(B) required the probation officer to include in the presentence report the classification of the offense which the probation officer "determines" to apply. In response to comments on the proposal, the Committee replaced the word "determines" with the word "believes."

4. Availability of Nonprison Programs

A minor change was made in Rule 32(b)(4)(E) to clarify that the presentence report need not include information about nonprison programs and resources except in appropriate cases.

5. Filing of Original Objections:

The Committee added a comment in the Note to indicate that nothing in the rule prohibits the court from requiring the parties to file their objections with the court or have them included in full as a part of the addendum to the presentence report. *See* Rule 32(b)(6)(B).

6. Probation Officer's Authority to Require Meeting:

In response to comments that Rule 32(b)(6)(B) might create incorrect perceptions about the probation officer's role in sentencing by authorizing the probation officer to "require" the parties to meet, the Committee modified the language to state that the

probation officer "may meet" with the parties to discuss their objections.

7. Additional Evidence at Sentencing Hearing:

In Rule 32(c)(1) the Committee modified the language addressing the court's discretion to permit the parties to present additional information at the sentencing hearing. The words "to introduce testimony or other evidence on the objections," were changed to read, "to introduce evidence." The modification gives the court the discretion to decide if the offered evidence, in whatever form, should be admitted. The Committee Note was expanded to recognize that in appropriate cases, due process might require the court to hear the offered evidence.

8. Disclosure of Information Not Included in the Presentence Report:

Rule 32(c)(3)(A) was changed to provide that if the court had received information which has been excluded from the presentence report under (b)(5) because it is confidential, etc., the court must create a written summary of that information and provide it to the parties -- if the court intends to rely on the information in sentencing. As published, the court had the option of summarizing that information orally or in writing. The language was also modified slightly to require the court to give the defense a reasonable opportunity to comment on the information. The Committee Note was amended to recognize that the reasonable opportunity requirement might necessitate a continuance.

9. Notification of Right to Appeal:

Rule 32(c)(5) was changed to reflect the differences in the right to appeal, depending on whether the defendant has entered a guilty or not guilty plea.

The Advisory Committee recommends that Rule 32, as amended, be approved by the Standing Committee and forwarded to the Judicial Conference for its approval.

E. Rule 40(d). Conditional Release of Probationer.

The Committee received no comments on, and made no changes in, the proposed language of Rule 40(d) or the

Committee Note.

The Advisory Committee recommends that Rule 40(d) be approved by the Standing Committee and forwarded to the Judicial Conference for its approval.

III. PROPOSED AMENDMENTS TO THE RULES OF CRIMINAL PROCEDURE.

A. In General.

The Advisory Committee at its April 1993 meeting in Washington, D.C. considered proposed amendments to several Rules. It recommends that the following amendments be approved for publication and comment from the bench and bar. Copies of the proposed amendments and the proposed Advisory Committee Notes are attached.

B. Rule 5. Exemption of Persons Arrested for Unlawful Flight to Avoid Prosecution.

At the Advisory Committee's October 1992 meeting in Seattle, a subcommittee was tasked with studying possible problems resulting from the requirement that persons arrested for violating 18 U.S.C. § 1073, Unlawful Flight to Avoid Prosecution (UFAP) appear before a magistrate under Rule 5. The subcommittee reported at the April 1993 meeting that its study indicated that several scenarios are possible where state officials may or may not be involved in the arrest of a UFAP defendant and that the Rule 5 requirement of prompt appearance may not be essential where the U.S. attorney has no intent to prosecute. The Committee therefore recommended that Rule 5 be amended to exempt UFAP defendants from Rule 5 where the United States does not intend to prosecute. The proposed Rule and Committee Note are attached. The Advisory Committee recommends that the amendment be published for public comment.

C. Rule 10. In Absentia Arraignments; Use of Video Teleconferencing.

Pursuant to a proposal from the Bureau of Prisons, the Committee considered a proposal to amend Rules 10 and 43 to permit video arraignments at its October 1992 meeting. A subcommittee was appointed and recommended to the Committee at its April 1993 meeting that Rule 10 be amended to provide for video arraignments, where the defendant waives the right to be present in court. Its recommendation was based, in part, on the Judicial Conference's recent approval of a

pilot program in the Eastern District of North Carolina. That program permits use of video conferencing technology to conduct competency hearings between the court and a corrections facility. The Committee contemplates that the Rule will simply permit the court, in its discretion, to use such technology.

The Advisory Committee recommends that the proposed amendment, which is attached, be approved for publication and comment.

D. Rule 43. In Absentia Pretrial Sessions; Use of Video Teleconferencing; In Absentia Sentencing.

The Advisory Committee considered two different amendments to Rule 43. The first focused on use of video teleconferencing for pretrial sessions and the second focused on in absentia sentencing for defendants who become fugitives after their trial has begun.

1. Video Teleconferencing for Pretrial Sessions:

In conjunction with its consideration of an amendment to Rule 10 regarding video arraignments, supra, the Committee also addressed an amendment to Rule 43 which would permit use of video teleconferencing technology for other pretrial sessions, where the defendant waives the right to be present in court. Both rules generated extensive discussion and as with the amendment to Rule 10, the amendment to Rule 43 grants the court the discretion to use video teleconferencing. It does not mandate such use.

The Advisory Committee recommends that this proposed amendment to Rule 43 be approved for publication and public comment.

2. In Absentia Sentencing

The Department of Justice has proposed that Rule 43 be amended to permit in absentia sentencing for defendants who flee after their trial has begun. Currently, Rule 43 permits the trial itself to continue, but makes no specific reference to the ability of the court to continue with sentencing. As the Department of Justice explained, this can create a gridlock on the system. The amendment would make it clear that once the trial has begun, the defendant may not only waive the right to be present at trial but also the right to be present at sentencing.

The Committee recommends that the the Standing

Committee approve this amendment for publication and public comment.

E. Rule 53. Permitting Cameras in Courtroom; Broadcasting of Proceedings.

Pursuant to a request from the American Society of Newspaper Editors and others, the Advisory Committee considered an amendment to Rule 53 which would permit photographs and broadcasting of judicial proceedings, under guidelines adopted by the Judicial Conference. The Committee's discussion focused on the pending report on a three-year pilot program for cameras and audio coverage of civil proceedings, which was approved by the Judicial Conference in 1990. The Committee, following an extended discussion of this proposal, believed that it was appropriate to propose an amendment to Criminal Rule 53 and seek public comment. In making that decision, the Committee considered both the absence of horror stories in those courts which permit photographs and broadcasting and the positive features of such coverage.

Attachments:

GAP Report
Proposed Amendments
Minutes of April 1993 Meeting

TO: Hon. Robert E. Keeton, Chairman
Standing Committee on Rules of Practice and Procedure

FROM: Hon. Wm Terrell Hodges, Chairman
Advisory Committee on Rules of Criminal Procedure

SUBJECT: GAP Report: Explanation of Changes Made Subsequent to the Circulation for Public Comment of Rules 16, 29, 32 and 40

DATE: May 15, 1993

At its July 1992 meeting the Standing Committee approved the circulation for public comment of proposed amendments to Rules 16 and 29 and at its meeting in December 1992 approved the circulation for public comment of proposed amendments to Rules 32 and 40.

All four rules were published on an expedited basis in January 1993 with a deadline of April 15, 1993 for any comments. At its meeting on April 22, 1993 in Washington, D.C., two witnesses presented testimony to the Committee on the proposed amendments. The Advisory Committee has considered the written submissions of members of the public as well as the two witnesses. Summaries of any comments on each Rule, the Rules, and the accompanying Committee Notes are attached.

The Advisory Committee's actions on the amendments subsequent to the circulation for public comment are as follows:

1. Rule 16(a)(1)(A). Production of Statements by Organizational Defendants.

The Committee made a minor change to the rule. As originally published, and as reflected in the original Committee Note, the rule did not address the question of what showing the defense would have to make to demonstrate that the requested statements were made by a person associated with an organizational defendant. After additional discussion on that point, the Committee changed the rule to reflect that the defense is entitled to discover the statements of persons, *whom the government contends*, were in a position to bind an organizational defendant. The Note was also changed to indicate that the rule does not require the defense to stipulate or admit that a particular person was in a position to bind the organization.

2. Rule 29(b). Delayed Ruling on Judgment of Acquittal.

The Committee made no changes to the rule. But it did make a minor change to the Committee Note to reflect that on appeal of a delayed ruling on a motion for judgment of acquittal, the appellate court would also be limited to consideration of the evidence presented before the motion was made.

3. Rule 32. Sentence and Judgment.

In response to public comments on the published version of Rule 32, the Advisory Committee has made several changes to the rule and the Committee Note. The changes, other than minor clarifying changes in wording, are as follows:

Time Limits: In response to a significant number of commentators who expressed concern about codifying a specific time limit for sentencing, the Committee changed Rule 32(a) to retain the current language that sentencing should take place "without unnecessary delay." The rule continues to provide, however, that the internal time limits in Rule 32(b)(6) will be followed unless the court advances or shortens them.

Presence of Counsel: Although most commentators agreed that the defense counsel should be entitled to attend the probation officer's interviews of the defendant, there was concern that providing that right might unnecessarily delay the sentencing process. The Committee agreed and changed subdivision (b)(2) to provide that the defendant's counsel is "entitled to notice and a reasonable opportunity" to attend any interview. In the Note, the Committee indicated that the burden should be on counsel, once notice is given, to respond. The Note was further changed to indicate that the Committee believed that the term "interview" should extend only to communications initiated by the probation officer for the purpose of obtaining information to be used in the presentence report.

Probation Officer's Determination of Applicable Sentencing Classification: A number of commentators expressed concern about language in subdivision (b)(4)(B) which required that the presentence report should contain the sentencing classification which the probation officer "determines" is applicable. Some commentators indicated that that language perpetuates the view that the probation officer determines that appropriate sentence. In

response to that concern the Committee changed the word "determines" to "believes."

Availability of Nonprison Programs: In response to the suggestion of at least one commentator, Rule 32(b)(4)(E) was modified slightly to clarify that information about nonprison programs and resources need not be included in the presentence report except in appropriate cases.

Filing of Original Objections: Several commentators raised the question of whether the court would ever see counsel's original objections to the presentence report, as noted in subdivision (b)(6)(B). Although the Committee made no change in the rule, it did add a comment in the Note to indicate that nothing in the rule prohibits the court from requiring the parties to file their objections with the court or have them included in full as a part of the addendum to the presentence report.

Probation Officer's Authority to Require Meeting: As published, subdivision (b)(6)(B) authorized the probation officer to require the parties to meet and discuss their objections to the presentence report. In response to comments that that provision might create incorrect perceptions about the probation officer's role in sentencing, the Committee modified the language to indicate that the probation officer may meet with the parties to discuss their objections.

Additional Evidence at Sentencing Hearing: In subdivision (c)(1) the Committee modified the language addressing the court's discretion to permit the parties to present additional information at the sentencing hearing; in lieu of the words "to introduce testimony or other evidence on the objections," the Committee changed the rule to read, "to introduce evidence," thus leaving it to the court to decide in its discretion if the offered evidence, in whatever form, should be admitted. The Committee Note was expanded slightly to recognize that in appropriate cases, due process might require the court to hear the offered evidence.

Disclosure of Information Not Included in the Presentence Report: The Committee modified subdivision (c)(3)(A) to provide that if the court had received information which has been excluded from the presentence report under (b)(5) because it is confidential, etc., the court must prepare a written summary of that information and provide it to the

parties -- if the court intends to rely on the information in sentencing. As originally published (and as it exists currently in Rule 32) the court had the option of summarizing that information orally or in writing. The language was also modified slightly to require the court to give the defense a reasonable opportunity to comment on the information. The Committee Note was amended to indicate that the reasonable opportunity requirement might necessitate a continuance.

Notification of Right to Appeal: The language in subdivision (c)(5) was changed to reflect the differences in the right to appeal, depending on whether the defendant has entered a guilty or not guilty plea.

4. Rule 40(d). Conditional Release of Probationer.

The Committee received no written comments addressing the proposed change to Rule 40(d) and has made no changes in the proposed language of the rule or the Committee Note.

Attachments:

Rules and Committee Notes
Summaries of Comments and Testimony
Lists of Commentators

Rule 16. Discovery and Inspection

(a) DISCLOSURE OF EVIDENCE BY THE GOVERNMENT.

(1) Information Subject to Disclosure.

(A) STATEMENT OF DEFENDANT. Upon request of a defendant the government must ~~shall~~ disclose to the defendant and make available for inspection, copying, or photographing: any relevant written or recorded statements made by the defendant, or copies thereof, within the possession, custody, or control of the government, the existence of which is known, or by the exercise of due diligence may become known, to the attorney for the government; that portion of any written record containing the substance of any relevant oral statement made by the defendant whether before or after arrest in response to interrogation by any person then known to the defendant to be a government agent; and recorded testimony of the defendant before a grand jury which relates to the offense charged. The government must ~~shall~~ also disclose to the defendant the substance of any other relevant oral statement made by the defendant whether before or after arrest in response to interrogation by any person then known by the defendant to be a government agent if the government intends to use that statement at trial. Upon request of a ~~Where~~ ~~the~~ defendant which is an

organization such as a corporation, partnership, association or labor union, the government must disclose to the defendant any of the foregoing statements made by a person ~~the court may grant the defendant, upon its motion, discovery of relevant recorded testimony of any witness before a grand jury~~ who the government contends (1) was, at the time of making the statement ~~that testimony~~, so situated as a ~~an~~ director, officer, ~~or~~ employee, or agent as to have been able legally to bind the defendant in respect to the subject of the statement ~~conduct constituting the offense~~, or (2) was, at the time of offense, personally involved in the alleged conduct constituting the offense and so situated as a ~~an~~ director, officer, ~~or~~ employee, or agent as to have been able legally to bind the defendant in respect to that alleged conduct in which the ~~witness~~ person was involved.

* * * * *

COMMITTEE NOTE

The amendment is intended to clarify that the discovery and disclosure requirements of the rule apply equally to individual and organizational defendants. *See In re United States*, 918 F.2d 138 (11th Cir. 1990)(rejecting distinction between individual and organizational defendants). Because an organizational defendant may not know what its officers or agents have said or done in regard to a charged offense, it is important that it have access to statements made by persons whose statements or actions could be binding on the defendant. *See also United States v. Hughes*, 413 F.2d 1244, 1251-52 (5th Cir. 1969), *vacated as moot*, 397 U.S. 93 (1970)(prosecution of corporations "often resembles the most

complex civil cases, necessitating a vigorous probing of the mass of detailed facts to seek out the truth").

The amendment defines defendant in a broad, nonexclusive, fashion. *See also* 18 U.S.C. § 18 (the term "organization" includes a person other than an individual). And the amendment recognizes that an organizational defendant could be bound by an agent's statement, *see, e.g.*, Federal Rule of Evidence 801(d)(2), or be vicariously liable for an agent's actions. The amendment contemplates that, upon request of the defendant, the Government will disclose any statements within the purview of the rule and made by persons whom the government contends to be among the classes of persons described in the rule. There is no requirement that the defense stipulate or admit that such persons were in a position to bind the defendant.

Rule 29. Motion for Judgment of Acquittal

* * * * *

(b) RESERVATION OF DECISION ON MOTION. ~~If a motion for judgment of acquittal is made at the close of all the evidence, t~~ The court may reserve decision on ~~the~~ a motion for judgment of acquittal, proceed with the trial (where the motion is made before the close of all the evidence), submit the case to the jury and decide the motion either before the jury returns a verdict or after it returns a verdict of guilty or is discharged without having returned a verdict. If the court reserves decision, it must decide the motion on the basis of the evidence at the time the ruling was reserved.

COMMITTEE NOTE

The amendment permits the reservation of a motion for a judgment of acquittal made at the close of the government's case in the same manner as the rule now permits for motions made at the close of all of the evidence. Although the rule as written did not permit the court to reserve such motions made at the end of the government's case, trial courts on occasion have nonetheless reserved ruling. *See, e.g., United States v. Bruno*, 873 F.2d 555 (2d Cir.), *cert. denied*, 110 S.Ct. 125 (1989);

United States v. Reifsteck, 841 F.2d 701 (6th Cir. 1988). While the amendment will not affect a large number of cases, it should remove the dilemma in those close cases in which the court would feel pressured into making an immediate, and possibly erroneous, decision or violating the rule as presently written by reserving its ruling on the motion.

The amendment also permits the trial court to balance the defendant's interest in an immediate resolution of the motion against the interest of the government in proceeding to a verdict thereby preserving its right to appeal in the event a verdict of guilty is returned but is then set aside by the granting of a judgment of acquittal. Under the double jeopardy clause the government may appeal the granting of a motion for judgment of acquittal only if there would be no necessity for another trial, i.e., only where the jury has returned a verdict of guilty. *United States v. Martin Linen Supply Co.*, 430 U.S. 564 (1977). Thus, the government's right to appeal a rule 29 motion is only preserved where the ruling is reserved until after the verdict.

In addressing the issue of preserving the government's right to appeal and at the same time recognizing double jeopardy concerns, the Supreme Court observed:

> We should point out that it is entirely possible for a trial court to reconcile the public interest in the Government's right to appeal from an erroneous conclusion of law with the defendant's interest in avoiding a second prosecution. In *United States v. Wilson*, 420 U.S. 332 (1975), the court permitted the case to go to the jury, which returned a verdict of guilty, but it subsequently dismissed the indictment for preindictment delay on the basis of evidence adduced at trial. Most recently in *United States v. Ceccolini*, 435 U.S. 168 (1978), we described similar action with approval: 'The District Court had sensibly made its finding on the factual question of guilt or innocence, and then ruled on the motion to suppress; a reversal of these rulings would require no further proceeding in the District Court, but merely a reinstatement of the finding of guilt.' Id. at 271.

United States v. Scott, 437 U.S. 82, 100 n. 13 (1978). By analogy, reserving a ruling on a motion for judgment of acquittal strikes the same balance as that reflected by the Supreme Court in *Scott*.

Reserving a ruling on a motion made at the end of the government's case does pose problems, however, where the defense decides to present evidence and run the risk that such evidence will support the government's case. To address that problem, the amendment provides that the trial court is to consider only the evidence submitted at the time of the motion in making its

ruling, whenever made. And in reviewing a trial court's ruling, the appellate court would be similarly limited.

[Rule 32 is deleted and replaced with the following]

Rule 32. Sentence and Judgment

(a) IN GENERAL; TIME FOR SENTENCING.

When a presentence investigation and report are made under subdivision (b)(1), sentence should be imposed without unnecessary delay following completion of the process prescribed by subdivision (b)(6). The time limits prescribed in subdivision (b)(6) may be either shortened or lengthened for good cause.

(b) PRESENTENCE INVESTIGATION AND REPORT.

(1) *When Made.* The probation officer must make a presentence investigation and submit a report to the court before the sentence is imposed, unless:

(A) the court finds that the information in the record enables it to exercise its sentencing authority meaningfully under 18 U.S.C. § 3553; and

(B) the court explains this finding on the record.

(2) *Presence of Counsel.* On request, the defendant's counsel is entitled to notice and a reasonable opportunity to attend any interview of the defendant by a probation officer in the course of a presentence investigation.

(3) *Nondisclosure.* The report must not be submitted to the court or its contents disclosed to anyone unless the defendant has consented in writing, has pleaded guilty or nolo contendere, or has been found guilty.

(4) *Contents of the Presentence Report.* The presentence report must contain --

(A) information about the defendant's history and characteristics, including any prior criminal record, financial condition, and any circumstances that, because they affect the defendant's behavior, may be helpful in imposing sentence or in correctional treatment;

(B) the classification of the offense and of the defendant under the categories established by the Sentencing Commission under 28 U.S.C. § 994(a), as the probation officer believes to be applicable to the defendant's case; the kinds of sentence and the sentencing range suggested for such a category of offense committed by such a category of defendant as set forth in the guidelines issued by the Sentencing Commission under 28 U.S.C. § 994(a)(1); and the probation officer's explanation of any factors that may suggest a different

sentence -- within or without the applicable guideline -- that would be more appropriate, given all the circumstances;

(C) a reference to any pertinent policy statement issued by the Sentencing Commission under 28 U.S.C. § 994(a)(2);

(D) verified information, stated in a nonargumentative style, containing an assessment of the financial, social, psychological, and medical impact on any individual against whom the offense has been committed;

(E) in appropriate cases, information about the nature and extent of nonprison programs and resources available for the defendant;

(F) any report and recommendation resulting from a study ordered by the court under 18 U.S.C. § 3552(b); and

(G) any other information required by the court.

(5) *Exclusions*. The presentence report must exclude:

(A) any diagnostic opinions that, if disclosed, might seriously disrupt a program of rehabilitation;

(B) sources of information obtained upon a promise of confidentiality; or

(C) any other information that, if disclosed, might result in harm, physical or otherwise, to the defendant or other persons.

(6) *Disclosure and Objections.*

(A) Not less than 35 days before the sentencing hearing -- unless the defendant waives this minimum period -- the probation officer must furnish the presentence report to the defendant, the defendant's counsel, and the attorney for the Government. The court may, by local rule or in individual cases, direct that the probation officer not disclose the probation officer's recommendation, if any, on the sentence.

(B) Within 14 days after receiving the presentence report, the parties shall communicate in writing to the probation officer, and to each other, any objections to any material information, sentencing classifications, sentencing guideline ranges, and policy statements contained in or omitted from the presentence report. After receiving objections, the probation officer may meet with the defendant, the defendant's counsel, and the attorney for the Government to

discuss those objections. The probation officer may also conduct a further investigation and revise the presentence report as appropriate.

(C) Not later than 7 days before the sentencing hearing, the probation officer must submit the presentence report to the court, together with an addendum setting forth any unresolved objections, the grounds for those objections, and the probation officer's comments on the objections. At the same time, the probation officer must furnish the revisions of the presentence report and the addendum to the defendant, the defendant's counsel, and the attorney for the Government.

(D) Except for any unresolved objection under subdivision (b)(6)(B), the court may, at the hearing, accept the presentence report as its findings of fact. For good cause shown, the court may allow a new objection to be raised at any time before imposing sentence.

(c) SENTENCE

(1) *Sentencing Hearing.* At the sentencing hearing, the court must afford counsel for the defendant and for the Government an opportunity to

comment on the probation officer's determinations and on other matters relating to the appropriate sentence, and must rule on any unresolved objections to the presentence report. The court may, in its discretion, permit the parties to introduce testimony or other evidence on the objections. For each matter controverted, the court must make either a finding on the allegation or a determination that no finding is necessary because the controverted matter will not be taken into account in, or will not affect, sentencing. A written record of these findings and determinations must be appended to any copy of the presentence report made available to the Bureau of Prisons.

(2) *Production of Statements at Sentencing Hearing.* Rule 26.2(a)-(d), (f) applies at a sentencing hearing under this rule. If a party elects not to comply with an order under Rule 26.2(a) to deliver a statement to the movant, the court may not consider the affidavit or testimony of the witness whose statement is withheld.

(3) *Imposition of Sentence.* Before imposing sentence, the court must:

(A) verify that the defendant and defendant's counsel have read and discussed the presentence report made available under

subdivision (b)(6)(A). If the court has received information excluded from the presentence report under subdivision (b)(5) the court -- in lieu of making that information available -- must summarize it in writing, if the information will be relied on in determining sentence. The court must also give the defendant and the defendant's counsel a reasonable opportunity to comment on that information;

(B) afford defendant's counsel an opportunity to speak on behalf of the defendant;

(C) address the defendant personally and determine whether the defendant wishes to make a statement and to present any information in mitigation of the sentence; and

(D) afford the attorney for the Government an equivalent opportunity to speak to the court.

(4) *In Camera Proceedings*. The court's summary of information under subdivision (c)(3)(A) may be in camera. Upon joint motion by the defendant and by the attorney for the Government, the court may hear in camera the statements -- made under subdivision (c)(3)(B), (C), and (D) --

by the defendant, the defendant's counsel, or the attorney for the Government.

(5) *Notification of Right to Appeal.* After imposing sentence in a case which has gone to trial on a plea of not guilty, the court must advise the defendant of the right to appeal. After imposing sentence in any case, the court must advise the defendant of any right to appeal the sentence, and of the right of a person who is unable to pay the cost of an appeal to apply for leave to appeal in forma pauperis. If the defendant so requests, the clerk of the court must immediately prepare and file a notice of appeal on behalf of the defendant.

(d) JUDGMENT.

(1) *In General.* A judgment of conviction must set forth the plea, the verdict or findings, the adjudication, and the sentence. If the defendant is found not guilty or for any other reason is entitled to be discharged, judgment must be entered accordingly. The judgment must be signed by the judge and entered by the clerk.

(2) *Criminal Forfeiture.* When a verdict contains a finding of criminal forfeiture, the judgment must authorize the Attorney General to seize the interest or property subject to

forfeiture on terms that the court considers proper.

(e) PLEA WITHDRAWAL. If a motion to withdraw a plea of guilty or nolo contendere is made before sentence is imposed, the court may permit the plea to be withdrawn if the defendant shows any fair and just reason. At any later time, a plea may be set aside only on direct appeal or by motion under 28 U.S.C. § 2255.

COMMITTEE NOTE

The amendments to Rule 32 are intended to accomplish two primary objectives. First, the amendments incorporate elements of a "Model Local Rule for Guideline Sentencing" which was proposed by the Judicial Conference Committee on Probation Administration in 1987. That model rule and the accompanying report were prepared to assist trial judges in implementing guideline sentencing mandated by the Sentencing Reform Act of 1984. See Committee on the Admin. of the Probation Sys., Judicial Conference of the U.S., Recommended Procedures for Guideline Sentencing and Commentary: Model Local Rule for Guideline Sentencing, Reprinted in T. Hutchinson & D. Yellen, *Federal Sentencing Law and Practice*, app. 8, at 431 (1989). It was anticipated that sentencing hearings would become more complex due to the new fact finding requirements imposed by guideline sentencing methodology. *See* U.S.S.G. § 6A1.2. Accordingly, the model rule focused on preparation of the presentence report as a means of identifying and narrowing the issues to be decided at the sentencing hearing.

Second, in the process of effecting those amendments, the rule was reorganized. Over time, numerous amendments to the rule had created a sort of hodge podge; the reorganization represents an attempt to reflect an appropriate sequential order in the sentencing procedures.

Subdivision (a). Subdivision (a) retains the general mandate that sentence be imposed without unnecessary delay thereby permitting the court to regulate the time to be allowed for the probation officer to complete the presentence investigation and submit the report. The only requirement is that sufficient time be allowed for completion of the process prescribed by subdivision (b)(6)

unless the time periods established in the subdivision are shortened or lengthened by the court for good cause. Such limits are not intended to create any new substantive right for the defendant or the Government which would entitle either to relief if a time limit prescribed in the rule is not kept.

The remainder of subdivision (a), which addressed the sentencing hearing, is now located in subdivision (c).

Subdivision (b). Subdivision (b) (formerly subdivision (c)), which addresses the presentence investigation, has been modified in several respects.

First, subdivision (b)(2) is a new provision which provides that, on request, defense counsel is entitled to notice and a reasonable opportunity to be present at any interview of the defendant conducted by the probation officer. Although the courts have not held that presentence interviews are a critical stage of the trial for purposes of the Sixth Amendment right to counsel, the amendment reflects case law which has indicated that requests for counsel to be present should be honored. *See*, e.g., *United States v. Herrera-Figureroa*, 918 F.2d 1430, 1437 (9th Cir. 1990)(court relied on its supervisory power to hold that probation officers must honor request for counsel's presence); *United States v. Tisdale*, 952 F.2d 934, 940 (6th Cir. 1992)(court agreed with rule requiring probation officers to honor defendant's request for attorney or request from attorney not to interview defendant in absence of counsel). The Committee believes that permitting counsel to be present during such interviews may avoid unnecessary misunderstandings between the probation officer and the defendant. The rule does not further define the term "interview." The Committee intended for the provision to apply to any communication initiated by the probation officer where he or she is asking the defendant to provide information which will be used in preparation of the presentence investigation. Spontaneous or unplanned encounters between the defendant and the probation officer would normally not fall within the purview of the rule. The Committee also believed that the burden should rest on defense counsel, having received notice, to respond as promptly as possible to enable timely completion of the presentence report.

Subdivision (b)(6), formerly (c)(3), includes several changes which recognize the key role the presentence report is playing under guideline sentencing. The major thrust of these changes is to address the problem of resolving objections by the parties to the probation officer's presentence report. Subdivision (b)(6)(A) now provides that the probation officer must present the presentence report to the parties not later than 35 days before the sentencing

hearing (rather than 10 days before imposition of the sentence) in order to provide some additional time to the parties and the probation officer to attempt to resolve objections to the report. There has been a slight change in the practice of deleting from the copy of the report given to the parties certain information specified in (b)(6)(A). Under that new provision (changing former subdivision (c)(3)(A)), the court has the discretion (in an individual case or in accordance with a local rule) to direct the probation officer to withhold any final recommendation concerning the sentence. Otherwise, the recommendation, if any, is subject to disclosure. The prior practice of not disclosing confidential information, or other information which might result in harm to the defendant or other persons, is retained in (b)(5).

New subdivisions (b)(6)(B), (C), and (D) now provide explicit deadlines and guidance on resolving disputes about the contents of the presentence report. The amendments are intended to provide early resolution of such disputes by (1) requiring the parties to provide the probation officer with a written list of objections to the report within 14 days of receiving the report; (2) permitting the probation officer to meet with the defendant, the defendant's counsel, and the attorney for the Government to discuss objections to the report, conduct an additional investigation, and to make revisions to the report as deemed appropriate; (3) requiring the probation officer to submit the report to the court and the parties not later than 7 days before the sentencing hearing, noting any unresolved disputes; and (4) permitting the court to treat the report as its findings of fact, except for the parties' unresolved objections. Although the rule does not explicitly address the question of whether counsel's objections to the report are to be filed with the court, there is nothing in the rule which would prohibit a court from requiring the parties to file their original objections or have them included as an addendum to the presentence report.

This procedure, which generally mirrors the approach in the Model Local Rule for Guideline Sentencing, supra, is intended to maximize judicial economy by providing for more orderly sentencing hearings while also providing fair opportunity for both parties to review, object to, and comment upon, the probation officer's report in advance of the sentencing hearing. Under the amendment, the parties would still be free at the sentencing hearing to comment on the presentence report, and in the discretion of the court, to introduce evidence concerning their objections to the report.

Subdivision (c). Subdivision (c) addresses the imposition of sentence and makes no major changes in current practice. The provision consists largely of material

formerly located in subdivision (a). Language formerly in (a)(1) referring to the court's disclosure to the parties of the probation officer's determination of the sentencing classifications and sentencing guideline range is now located in subdivisions (b)(4)(B) and (c)(1). Likewise, the brief reference in former (a)(1) to the ability of the parties to comment on the probation officer's determination of sentencing classifications and sentencing guideline range is now located in (c)(1) and (c)(3).

Subdivision (c)(1) is not intended to require that resolution of objections and imposition of the sentence occur at the same time or during the same hearing. It requires only that the court rule on any objections before sentence is imposed. In considering objections during the sentencing hearing, the court may in its discretion, permit the parties to introduce evidence. The rule speaks in terms of the court's discretion, but the Sentencing Guidelines specifically provide that the court must provide the parties with a reasonable opportunity to offer information concerning a sentencing factor reasonably in dispute. *See* U.S.S.G. § 6A1.3(a). Thus, it may be an abuse of discretion not to permit the introduction of additional evidence. Although the rules of evidence do not apply to sentencing proceedings, *see* Fed. R. Evid. 1101(d)(3), the court clearly has discretion in determining the mode, timing, and extent of the evidence offered. *See, e.g., United States v. Zuleta-Alvarez*, 922 F.2d 33, 36 (1st Cir. 1990)(trial court did not err in denying defendant's late request to introduce rebuttal evidence by way of cross-examination).

Subdivision (c)(1) (formerly subdivision (c)(3)(D)) indicates that the court need not resolve controverted matters which will "not be taken into account in, or will not affect, sentencing." The words "will not affect" did not exist in the former provision but were added in the revision in recognition that there might be situations, due to overlaps in the sentencing ranges, where a controverted matter would not alter the sentence even if the sentencing range were changed.

The provision for disclosure of a witness' statements, which was recently proposed as an amendment to Rule 32 as new subdivision (e), is now located in subdivision (c)(2).

Subdivision (c)(3) includes minor changes. First, if the court intends to rely on information otherwise excluded from the presentence report under subdivision (b)(5), that information is to be summarized in writing and submitted to the defendant and the defendant's counsel. Under the former provision in (c)(3)(A), such information could be summarized orally. Once the information is presented, the defendant and the defendant's counsel are to be given a reasonable

opportunity to comment; in appropriate cases, that may require a continuance of the sentencing proceedings.

Subdivision (c)(5), concerning notification of the right to appeal, was formerly included in subdivision (a)(2). Although the provision has been rewritten, the Committee intends no substantive change in practice. That is, the court may, but is not required to, advise a defendant who has entered a guilty plea, nolo contendere plea or a conditional guilty plea of any right to appeal (such as an appeal challenging jurisdiction). However, the duty to advise the defendant in such cases extends only to advice on the right to appeal any sentence imposed.

Subdivision (d). Subdivision (d), dealing with entry of the court's judgment, is former subdivision (b).

Subdivision (e). Subdivision (e), which addresses the topic of withdrawing pleas, was formerly subdivision (d). Both provisions remain the same except for minor stylistic changes.

Under present practice, the court may permit, but is not required to hear, victim allocution before imposing sentence. The Committee considered, but rejected, a provision which would have required the court to permit victim allocution at sentencing.

Rule 40. Commitment to Another District

* * * * *

(d) ARREST OF PROBATIONER OR SUPERVISED RELEASEE. If a person is arrested for a violation of probation or supervised release in a district other than the district having jurisdiction, such person shall be taken without unnecessary delay before the nearest available federal magistrate judge. The person may be released under Rule 46(c). The federal magistrate judge shall:

(1) Proceed under Rule 32.1 if jurisdiction over the person is transferred to that district;

(2) Hold a prompt preliminary hearing if the alleged violation occurred in that district, and either (i) hold the person to answer in the district court of the district having jurisdiction or (ii) dismiss the proceedings and so notify that court; or

(3) Otherwise order the person held to answer in the district court of the district having jurisdiction upon production of certified copies of the judgment, the warrant, and the application for the warrant, and upon a finding that the person before the magistrate is the person named in the warrant.

* * * * *

COMMITTEE NOTE

The amendment to subdivision (d) is intended to clarify the authority of a magistrate judge to set conditions of release in those cases where a probationer or supervised releasee is arrested in a district other than the district having jurisdiction. As written, there appeared to be a gap in Rule 40, especially under (d)(1) where the alleged violation occurs in a jurisdiction other than the district having jurisdiction.

A number of rules contain references to pretrial, trial, and post-trial release or detention of defendants, probationers and supervised releasees. Rule 46, for example, addresses the topic of release from custody. Although Rule 46(c) addresses custody pending sentencing and notice of appeal, the rule makes no explicit provision for detaining or releasing probationers or supervised releasees who are later arrested for violating terms of their probation or release. Rule 32.1 provides guidance on proceedings involving revocation of probation or supervised release. In particular, Rule 32.1 (a)(1) recognizes that when a person is held in custody on the ground that the person violated a condition of probation or supervised release, the judge or United States magistrate judge may release the person under Rule 46(c), pending the revocation proceeding. But no other explicit reference is made in Rule 32.1 to the authority of a judge or magistrate judge to determine conditions of release for a probationer or supervised releasee who is arrested in a district other than the district having jurisdiction.

The amendment recognizes that a judge or magistrate judge considering the case of a probationer or supervised releasee under Rule 40(d) has the same authority vis a vis decisions regarding custody as a judge or magistrate proceeding under Rule 32.1(a)(1). Thus, regardless of the ultimate disposition of an arrested probationer or supervised releasee under Rule 40(d), a judge or magistrate judge acting under that rule may rely upon Rule 46(c) in determining whether custody should be continued and if not, what conditions, if any, should be placed upon the person.

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
OF THE
JUDICIAL CONFERENCE OF THE UNITED STATES
WASHINGTON, D.C. 20544

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July 23, 1993

MEMORANDUM TO: Honorable Robert E. Keeton

FROM: Dean Margaret A. Berger, Reporter

SUBJECT: GAP report

Federal Rules of Evidence.

Proposed Rule 412 did not cause significant disagreement in either the Advisory Committee or in the Standing Committee. The version of the rule that was circulated for public comment had been drafted by the Advisory Committee on the Rules of Criminal Procedure. After the newly appointed Advisory Committee on the Rules of Evidence reviewed written comments and held a public hearing, the Evidence Committee made a number of stylistic changes that were unanimously approved. The Advisory Committee also selected a balancing test for civil cases (one of two proposed alternatives in the circulated version) that was the overwhelming choice of commentators on the proposed rule.

The Standing Committee made a number of additional stylistic changes. It also added language that would admit evidence, otherwise admissible, that is offered by the prosecution and relates to the alleged victim's behavior with the accused. Such evidence might, for instance, be offered pursuant to Rule 404(b) as establishing a pattern of behavior.

PROPOSED AMENDMENTS TO THE
FEDERAL RULES OF EVIDENCE*

RULE 412. ADMISSIBILITY ~~SEX OFFENSE CASES; RELEVANCE~~ OF ALLEGED VICTIM'S ~~PAST~~ SEXUAL BEHAVIOR OR ALLEGED SEXUAL PREDISPOSITION

(a) Evidence Generally Inadmissible. ~~Notwithstanding any other provision of law, in a criminal case in which a person is accused of an offense under chapter 109A of title 18, United States Code, reputation or opinion evidence of the past sexual behavior of an alleged victim of such offense is not admissible.~~ The following evidence is not admissible in any civil or criminal proceeding

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

involving alleged sexual misconduct except as provided in subdivisions (b) and (c):

(1) evidence offered to prove that any alleged victim engaged in other sexual behavior; and

(2) evidence offered to prove any alleged victim's sexual predisposition.

(b) Exceptions. ~~Notwithstanding any other provision of law, in a criminal case in which a person is accused of an offense under chapter 109A of title 18, United States Code, evidence of a victim's past sexual behavior other than reputation or opinion evidence is also not admissible, unless such evidence other than reputation or opinion evidence is~~

(1) In a criminal case, the

following evidence is admissible, if otherwise admissible under these rules:

~~(1) admitted in accordance with subdivisions (c)(1) and (c)(2) and is constitutionally required to be admitted; or~~

~~(2) admitted in accordance with subdivision (c) and is evidence of~~

(A) evidence of specific instances of ~~past~~ sexual behavior by the alleged victim ~~with persons other than the accused,~~ offered ~~by the accused upon the issue of whether~~ to prove that a person other than the accused was ~~or was not, with respect to the alleged victim,~~ the source of semen, ~~or~~ injury, or other physical evidence; ~~or~~

(B) evidence of specific

instances of ~~past~~ sexual behavior by the alleged victim with respect to the person accused of the sexual misconduct ~~and is~~ offered by the accused ~~upon the issue of whether the alleged victim consented to the sexual behavior with respect to which such offense is alleged.~~ to prove consent or by the prosecution; and

(C) evidence the exclusion of which would violate the constitutional rights of the defendant.

(2) In a civil case, evidence offered to prove the sexual behavior or sexual predisposition of any alleged victim is admissible if it is otherwise admissible under these rules and its

probative value substantially outweighs the danger of harm to any victim and of unfair prejudice to any party. Evidence of an alleged victim's reputation is admissible only if it has been placed in controversy by the alleged victim.

(c) Procedure to Determine Admissibility.

~~(c)~~ (1) ~~If the person accused of committing an offense under chapter 109A of title 18, United States Code intends to offer under subdivision (b) evidence of specific instances of the alleged victim's past sexual behavior, the accused shall make a written motion to offer such evidence not later than fifteen days before the date on which the trial in which such evidence is to be offered is scheduled to begin, except~~

~~that the court may allow the motion to be made at a later date, including during trial, if the court determines either that the evidence is newly discovered and could not have been obtained earlier through the exercise of due diligence or that the issue to which such evidence relates has newly arisen in the case. Any motion made under this paragraph shall be served on all other parties and on the alleged victim.~~

~~(2) The motion described in paragraph (1) shall be accompanied by a written offer of proof. If the court determines that the offer of proof contains evidence described in subdivision (b), the court shall order a hearing in chambers to determine if such evidence is admissible. At such hearing~~

~~the parties may call witnesses, including the alleged victim, and offer relevant evidence. Notwithstanding subdivision (b) of rule 104, if the relevancy of the evidence which the accused seeks to offer in the trial depends upon the fulfillment of a condition of fact, the court, at the hearing in chambers or at a subsequent hearing in chambers scheduled for such purpose, shall accept evidence on the issue of whether such condition of fact is fulfilled and shall determine such issue.~~

~~(3) If the court determines on the basis of the hearing described in paragraph (2) that the evidence which the accused seeks to offer is relevant and that the probative value of such evidence outweighs the danger of unfair prejudice,~~

~~such evidence shall be admissible in the trial to the extent an order made by the court specifies evidence which may be offered and areas with respect to which the alleged victim may be examined or cross-examined.~~

(1) A party intending to offer evidence under subdivision (b) must:

(A) file a written motion at least 14 days before trial specifically describing the evidence and stating the purpose for which it is offered unless the court, for good cause requires a different time for filing or permits filing during trial; and

(B) serve the motion on all parties and notify the alleged victim or, when appropriate, the

alleged victim's guardian or representative.

(2) Before admitting evidence under this rule the court must conduct a hearing in camera and afford the victim and parties a right to attend and be heard. The motion, related papers, and the record of the hearing must be sealed and remain under seal unless the court orders otherwise.

~~(d) For purposes of this rule, the term "past sexual behavior" means sexual behavior other than the sexual behavior with respect to which an offense under chapter 109A of title 18, United States Code is alleged.~~

COMMITTEE NOTE

Rule 412 has been revised to diminish some of the confusion engendered by the original rule and to expand the

protection afforded alleged victims of sexual misconduct. Rule 412 applies to both civil and criminal proceedings. The rule aims to safeguard the alleged victim against the invasion of privacy, potential embarrassment and sexual sterotyping that is associated with public disclosure of intimate sexual details and the infusion of sexual innuendo into the factfinding process. By affording victims protection in most instances, the rule also encourages victims of sexual misconduct to institute and to participate in legal proceedings against alleged offenders.

Rule 412 seeks to achieve these objectives by barring evidence relating to the alleged victim's sexual behavior or alleged sexual predisposition, whether offered as substantive evidence or for impeachment, except in designated circumstances in which the probative value of the evidence significantly outweighs possible harm to the victim.

The revised rule applies in all cases involving sexual misconduct without regard to whether the alleged victim or person accused is a party to the litigation. Rule 412 extends to "pattern" witnesses in both criminal and civil cases whose testimony about other instances of sexual misconduct by the person accused is otherwise admissible. When the case does not involve alleged sexual misconduct, evidence relating to a

third-party witness' alleged sexual activities is not within the ambit of Rule 412. The witness will, however, be protected by other rules such as Rules 404 and 608, as well as Rule 403.

The terminology "alleged victim" is used because there will frequently be a factual dispute as to whether sexual misconduct occurred. It does not connote any requirement that the misconduct be alleged in the pleadings. Rule 412 does not, however, apply unless the person against whom the evidence is offered can reasonably be characterized as a "victim of alleged sexual misconduct." When this is not the case, as for instance in a defamation action involving statements concerning sexual misconduct in which the evidence is offered to show that the alleged defamatory statements were true or did not damage the plaintiff's reputation, neither Rule 404 nor this rule will operate to bar the evidence; Rule 401 and 403 will continue to control. Rule 412 will, however, apply in a Title VII action in which the plaintiff has alleged sexual harassment.

The reference to a person "accused" is also used in a non-technical sense. There is no requirement that there be a criminal charge pending against the person or even that the misconduct would constitute a criminal offense. Evidence offered to prove allegedly false prior claims by the victim is not barred by

Rule 412. However, this evidence is subject to the requirements of Rule 404.

Subdivision (a). As amended, Rule 412 bars evidence offered to prove the victim's sexual behavior and alleged sexual predisposition. Evidence, which might otherwise be admissible under Rules 402, 404(b), 405, 607, 608, 609, or some other evidence rule, must be excluded if Rule 412 so requires. The word "other" is used to suggest some flexibility in admitting evidence "intrinsic" to the alleged sexual misconduct. Cf. Committee Note to 1991 amendment to Rule 404(b).

Past sexual behavior connotes all activities that involve actual physical conduct, i.e. sexual intercourse and sexual contact, or that imply sexual intercourse or sexual contact. See, e.g., United States v. Galloway, 937 F.2d 542 (10th Cir. 1991), cert. denied, 113 S.Ct. 418 (1992) (use of contraceptives inadmissible since use implies sexual activity); United States v. One Feather, 702 F.2d 736 (8th Cir. 1983) (birth of an illegitimate child inadmissible); State v. Carmichael, 727 P.2d 918, 925 (Kan. 1986) (evidence of venereal disease inadmissible). In addition, the word "behavior" should be construed to include activities of the mind, such as fantasies or dreams. See 23 C. Wright & K. Graham, Jr., Federal Practice and Procedure, §5384 at p. 548 (1980) ("While there may be some doubt under statutes that require

'conduct,' it would seem that the language of Rule 412 is broad enough to encompass the behavior of the mind.").

The rule has been amended to also exclude all other evidence relating to an alleged victim of sexual misconduct that is offered to prove a sexual predisposition. This amendment is designed to exclude evidence that does not directly refer to sexual activities or thoughts but that the proponent believes may have a sexual connotation for the factfinder. Admission of such evidence would contravene Rule 412's objectives of shielding the alleged victim from potential embarrassment and safeguarding the victim against stereotypical thinking. Consequently, unless the (b)(2) exception is satisfied, evidence such as that relating to the alleged victim's mode of dress, speech, or life-style will not be admissible.

The introductory phrase in subdivision (a) was deleted because it lacked clarity and contained no explicit reference to the other provisions of law that were intended to be overriden. The conditional clause, "except as provided in subdivisions (b) and (c)" is intended to make clear that evidence of the types described in subdivision (a) is admissible only under the strictures of those sections.

The reason for extending the rule to

all criminal cases is obvious. The strong social policy of protecting a victim's privacy and encouraging victims to come forward to report criminal acts is not confined to cases that involve a charge of sexual assault. The need to protect the victim is equally great when a defendant is charged with kidnapping, and evidence is offered, either to prove motive or as background, that the defendant sexually assaulted the victim.

The reason for extending Rule 412 to civil cases is equally obvious. The need to protect alleged victims against invasions of privacy, potential embarrassment, and unwarranted sexual sterotyping, and the wish to encourage victims to come forward when they have been sexually molested do not disappear because the context has shifted from a criminal prosecution to a claim for damages or injunctive relief. There is a strong social policy in not only punishing those who engage in sexual misconduct, but in also providing relief to the victim. Thus, Rule 412 applies in any civil case in which a person claims to be the victim of sexual misconduct, such as actions for sexual battery or sexual harassment.

Subdivision (b). Subdivision (b) spells out the specific circumstances in which some evidence may be admissible that would otherwise be barred by the general rule expressed in subdivision

(a). As amended, Rule 412 will be virtually unchanged in criminal cases, but will provide protection to any person alleged to be a victim of sexual misconduct regardless of the charge actually brought against an accused. A new exception has been added for civil cases.

In a criminal case, evidence may be admitted under subdivision (b)(1) pursuant to three possible exceptions, provided the evidence also satisfies other requirements for admissibility specified in the Federal Rules of Evidence, including Rule 403. Subdivisions (b)(1)(A) and (b)(1)(B) require proof in the form of specific instances of sexual behavior in recognition of the limited probative value and dubious reliability of evidence of reputation or evidence in the form of an opinion.

Under subdivision (b)(1)(A), evidence of specific instances of sexual behavior with persons other than the person whose sexual misconduct is alleged may be admissible if it is offered to prove that another person was the source of semen, injury or other physical evidence. Where the prosecution has directly or indirectly asserted that the physical evidence originated with the accused, the defendant must be afforded an opportunity to prove that another person was responsible. See United

States v. Begay, 937 F.2d 515, 523 n. 10 (10th Cir. 1991). Evidence offered for the specific purpose identified in this subdivison may still be excluded if it does not satisfy Rules 401 or 403. See, e.g., United States v. Azure, 845 F.2d 1503, 1505-06 (8th Cir. 1988) (10 year old victim's injuries indicated recent use of force; court excluded evidence of consensual sexual activities with witness who testified at in camera hearing that he had never hurt victim and failed to establish recent activities).

Under the exception in subdivision (b)(1)(B), evidence of specific instances of sexual behavior with respect to the person whose sexual misconduct is alleged is admissible if offered to prove consent, or offered by the prosecution. Admissible pursuant to this exception might be evidence of prior instances of sexual activities between the alleged victim and the accused, as well as statements in which the alleged victim expressed an intent to engage in sexual intercourse with the accused, or voiced sexual fantasies involving the specific accused. In a prosecution for child sexual abuse, for example, evidence of uncharged sexual activity between the accused and the alleged victim offered by the prosecution may be admissible pursuant to Rule 404(b) to show a pattern of behavior. Evidence relating to the victim's alleged sexual predisposition is not admissible pursuant to this

exception.

Under subdivision (b)(1)(C), evidence of specific instances of conduct may not be excluded if the result would be to deny a criminal defendant the protections afforded by the Constitution. For example, statements in which the victim has expressed an intent to have sex with the first person encountered on a particular occasion might not be excluded without violating the due process right of a rape defendant seeking to prove consent. Recognition of this basic principle was expressed in subdivision (b)(1) of the original rule. The United States Supreme Court has recognized that in various circumstances a defendant may have a right to introduce evidence otherwise precluded by an evidence rule under the Confrontation Clause. See, e.g., Olden v. Kentucky, 488 U.S. 227 (1988) (defendant in rape cases had right to inquire into alleged victim's cohabitation with another man to show bias).

Subdivision (b)(2) governs the admissibility of otherwise proscribed evidence in civil cases. It employs a balancing test rather than the specific exceptions stated in subdivision (b)(1) in recognition of the difficulty of foreseeing future developments in the law. Greater flexibility is needed to accommodate evolving causes of action such as claims for sexual harassment.

The balancing test requires the proponent of the evidence, whether plaintiff or defendant, to convince the court that the probative value of the proffered evidence "substantially outweighs the danger of harm to any victim and of unfair prejudice to any party." This test for admitting evidence offered to prove sexual behavior or sexual propensity in civil cases differs in three respects from the general rule governing admissibility set forth in Rule 403. First, it reverses the usual procedure spelled out in Rule 403 by shifting the burden to the proponent to demonstrate admissibility rather than making the opponent justify exclusion of the evidence. Second, the standard expressed in subdivision (b)(2) is more stringent than in the original rule; it raises the threshold for admission by requiring that the probative value of the evidence substantially outweigh the specified dangers. Finally, the Rule 412 test puts "harm to the victim" on the scale in addition to prejudice to the parties.

Evidence of reputation may be received in a civil case only if the alleged victim has put his or her reputation into controversy. The victim may do so without making a specific allegation in a pleading. Cf. Fed.R.Civ.P. 35(a).

Subdivision (c). Amended

subdivision (c) is more concise and understandable than the subdivison it replaces. The requirement of a motion before trial is continued in the amended rule, as is the provision that a late motion may be permitted for good cause shown. In deciding whether to permit late filing, the court may take into account the conditions previously included in the rule: namely whether the evidence is newly discovered and could not have been obtained earlier through the existence of due diligence, and whether the issue to which such evidence relates has newly arisen in the case. The rule recognizes that in some instances the circumstances that justify an application to introduce evidence otherwise barred by Rule 412 will not become apparent until trial.

The amended rule provides that before admitting evidence that falls within the prohibition of Rule 412(a), the court must hold a hearing in camera at which the alleged victim and any party must be afforded the right to be present and an opportunity to be heard. All papers connected with the motion and any record of a hearing on the motion must be kept and remain under seal during the course of trial and appellate proceedings unless otherwise ordered. This is to assure that the privacy of the alleged victim is preserved in all cases in which the court rules that proffered evidence is not admissible, and in which the

hearing refers to matters that are not received, or are received in another form.

The procedures set forth in subdivision (c) do not apply to discovery of a victim's past sexual conduct or predisposition in civil cases, which will be continued to be governed by Fed. R. Civ. P. 26. In order not to undermine the rationale of Rule 412, however, courts should enter appropriate orders pursuant to Fed. R. Civ. P. 26 (c) to protect the victim against unwarranted inquiries and to ensure confidentiality. Courts should presumptively issue protective orders barring discovery unless the party seeking discovery makes a showing that the evidence sought to be discovered would be relevant under the facts and theories of the particular case, and cannot be obtained except through discovery. In an action for sexual harassment, for instance, while some evidence of the alleged victim's sexual behavior and/or predisposition in the workplace may perhaps be relevant, non-work place conduct will usually be irrelevant. Cf. Burns v. McGregor Electronic Industries, Inc., 989 F.2d 959, 962-63 (8th Cir. 1993) (posing for a nude magazine outside work hours is irrelevant to issue of unwelcomeness of sexual advances at work). Confidentiality orders should be presumptively granted as well.

One substantive change made in subdivision (c) is the elimination of the following sentence: "Notwithstanding subdivision (b) of Rule 104, if the relevancy of the evidence which the accused seeks to offer in the trial depends upon the fulfillment of a condition of fact, the court, at the hearing in chambers or at a subsequent hearing in chambers scheduled for such purpose, shall accept evidence on the issue of whether such condition of fact is fulfilled and shall determine such issue." On its face, this language would appear to authorize a trial judge to exclude evidence of past sexual conduct between an alleged victim and an accused or a defendant in a civil case based upon the judge's belief that such past acts did not occur. Such an authorization raises questions of invasion of the right to a jury trial under the Sixth and Seventh Amendments. See 1 S. Saltzburg & M. Martin, Federal Rules Of Evidence Manual, 396-97 (5th ed. 1990).

The Advisory Committee concluded that the amended rule provided adequate protection for all persons claiming to be the victims of sexual misconduct, and that it was inadvisable to continue to include a provision in the rule that has been confusing and that raises substantial constitutional issues.

PROPOSED RULES AMENDMENTS GENERATING SUBSTANTIAL CONTROVERSY

At its meeting on June 17-19, 1993, the Committee on Rules of Practice and Procedure reviewed the proposed rules amendments submitted by four advisory committees and with few exceptions voted unanimously to recommend their adoption. A summary of the proposals generating substantial controversy is set forth below.

I. Federal Rules of Appellate Procedure.

None of the proposed rules caused significant controversy either in the Advisory Committee or in the Standing Committee, and none generated significant comment during the publication period.

The Standing Committee made several technical and stylistic changes that were not controversial. Rule 38 is the only rule that was substantially changed by the Standing Committee. The Advisory Committee had recommended that Rule 38 require that a court of appeals give notice and opportunity to respond before it could impose sanctions. The Standing Committee amended the rule to provide that if sanctions are requested in a separately filed motion, the court need not give notice.

The amendments to Rule 28 require that a brief include a summary of argument. Only three comments were submitted, and all of them opposed the proposal. The Advisory Committee, however, believes that a summary would be useful in a variety of ways and decided not to make any changes in the proposed amendment. The Committee further noted that a number of circuits have local rules requiring a summary of argument and that those circuits report satisfaction with the requirement. The Standing Committee unanimously approved the Advisory Committee's proposal.

The amendments to Rules 40 and 41 lengthen from 14 to 45 days the time for filing a petition for rehearing in a civil case involving the United States. The NLRB opposes the amendment because it may delay the effectiveness of enforcement orders. The NLRB believes that an enforcement order becomes effective only upon issuance of the mandate. Because the extension of time for petitioning for rehearing will delay the issuance of the mandate, the effective date of an enforcement order will also be delayed. The Committee decided to make no change in the proposed amendment because, when necessary, that court can direct that the mandate issue forthwith. The Standing Committee unanimously approved the Advisory Committee's proposal.

II. Federal Rules of Criminal Procedure.

The only proposal generating controversy concerned the proposed amendments to Rule 32, which is being completely reorganized. Within that rule there were several points of debate. Most of the comments on the proposal were from probation officers, who were concerned about the impact that the rewritten rule might have on their practices.

First, as originally published for comment, Rule 32(a) included a 70-day maximum time limit for completing the sentencing procedures. Almost all the commentators criticized any fixed deadline for completing what can be a time-consuming process. After carefully considering those comments, the Criminal Rules Advisory Committee modified the proposed amendments to the rule to provide, as it does now, that a sentence should be imposed "without unnecessary delay." The proposed rule would continue to apply internal time limits for completing the component parts of the sentencing procedures; but even those limits may be shortened or lengthened for good cause. Thus, each court will continue to have flexibility in setting time limits for sentencing.

Second, a number of probation officers expressed concern about the delays that might result if the defendant were given the right to have defense counsel present during any interviews conducted by the probation officer. Still other commentators endorsed the idea of having counsel present; in their view, counsel's presence would avoid later misunderstandings. Again, the Advisory Committee considered the criticisms of the proposed rule and modified it slightly to provide that counsel will be given a reasonable opportunity to be present. That should ensure that counsel will not be permitted to delay the proceedings unduly by not being available for the interview.

Finally, the Advisory Committee was aware that Congress is considering an amendment to Rule 32 to require a court to apprise victims of certain crimes of the right to make a statement during sentencing. As published, the Committee Note to Rule 32 included a specific statement indicating that the Committee had considered, and rejected, an explicit right of victim allocution in the rule. Although the Committee was sensitive to the interest of some victims in the sentence to be imposed, it also recognized a number of difficulties that the Committee ultimately concluded outweighed any value to the victim in personally addressing the court.

First, under guideline sentencing (which takes victim impact into account), the court has very limited sentencing discretion once the applicable guideline range, which is usually below the maximum sentence allowed by statute, has been determined. In most cases, therefore, the views of the victim would have little or no

impact upon the sentence, thereby producing a likelihood of victim frustration rather than victim satisfaction.

Additionally, if the victim's allocution persuaded the court to consider a possible departure from the guideline sentencing range, due process might require notice and an opportunity to contest that result under Burns v. United States, _____ U.S. ____ 111 S.Ct. 2182 (1991). This could substantially complicate and delay the sentencing hearing. There is also a problem in the federal system in identifying victims who would have the right to allocution. Although a single victim of a violent crime is easily identified, federal criminal law covers a broad range of both violent and non-violent conduct, which often results in numerous victims. In such cases, it simply would not be feasible to extend the right of allocution to all victims.

Finally, the Committee also took into account existing law and procedures keep victims informed of the progress of the case, permit the victim to be present at all stages of the judicial proceeding including sentencing, and provide an opportunity for direct input in the preparation of the presentence report. See Rule 32(b)(4)(D). See also, 42 U.S.C. §§ 10601, et seq. (enumerated victims' rights include, inter alia, the right to be notified of court proceedings and the right to confer with the attorney for the Government).

III. Federal Rules of Bankruptcy and Evidence.

The proposed amendments to two Bankruptcy Rules and one Evidence Rule did not generate substantial controversy. The Standing Committee made technical and stylistic revisions to each proposal.