SUMMARY OF THE

REPORT OF THE JUDICIAL CONFERENCE

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE

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

1. Approve the proposed amendments to Appellate Rules 1, 4, 5, 21, 24, 25, 26, 26.1, 27, 28, 31, 32, 36, 41, 44, and 45 and new Form 6 and transmit them to the Supreme Court for its consideration with the recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law. . . . . pp. 2-7

2. Approve the proposed amendments to Bankruptcy Rules 1004, 2004, 2014, 2015, 4004, 9014, and 9027, and new Rule 1004.1 and transmit them to the Supreme Court for its consideration with the recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law. . . . . pp. 7-13

3. Approve the proposed revisions to Official Bankruptcy Forms 1 and 15, and that the revisions take effect on December 1, 2001. . . . . pp.13-14

4. Approve the proposed amendments to Civil Rules 54, 58, and 81, and a new Rule 7.1, and Rule C of Supplemental Rules for Certain Admiralty and Maritime Claims and transmit these changes to the Supreme Court for its consideration with the recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law . . . . . pp. 15-17

5. Approve the proposed amendments to Criminal Rules 1 through 60 and transmit these changes to the Supreme Court for its consideration with the recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law . . . . . pp. 18-24

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

6. Approve the separately proposed "substantive" amendments to Criminal Rules 5, 5.1, 10, 12.2, 26, 30, 35, and 43 and new Rule 12.4 and transmit these changes to the Supreme Court for its consideration with the recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law .... pp. 24-35

7. Substitute the separately proposed "substantive" amendments to Criminal Rules 5, 5.1, 10, 12.2, 26, 30, 35, and 43 and new Rule 12.4 for the corresponding amendments contained in the comprehensive "style" revision of the Criminal Rules and transmit these changes along with the remaining amendments in the "style" revision as a single set of proposals to the Supreme Court for its consideration with the recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law p.35

The remainder of the report is submitted for the record, and includes the following items for the information of the Conference:

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:

The Committee on Rules of Practice and Procedure met on June 7-8, 2001. The Department of Justice was represented by Roger A. Pauley, Director, Department of Justice, Office of Legislation, Criminal Division.

Representing the advisory rules committees were: Judge Will L. Garwood, chair, and Professor Patrick J. Schiltz, reporter, of the Advisory Committee on Appellate Rules; Judge A. Thomas Small, chair, and Professor Jeffrey W. Morris, reporter, of the Advisory Committee on Bankruptcy Rules; Judge David F. Levi, chair, Judge Lee H. Rosenthal, member, Professor Richard L. Marcus, special consultant, and Professor Edward H. Cooper, reporter, of the Advisory Committee on Civil Rules; Judge W. Eugene Davis, chair, and Professor David A. Schlueter, reporter, of the Advisory Committee on Criminal Rules; and Judge Milton I. Shadur, chair, and Professor Daniel J. Capra, reporter, of the Advisory Committee on Evidence Rules.

Participating in the meeting were Peter G. McCabe, the Committee's secretary; Professor Daniel R. Coquillette, the Committee's reporter; John K. Rabiej, Chief, Administrative Office's Rules Committee Support Office; Nancy Miller of the Administrative Office; Joseph Cecil of the Federal Judicial Center; Professor Mary P. Squiers, Director of the Local Rules Project; and

NOTICE
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Joseph F. Spaniol, consultant to the Committee. Chief Justice Charles Talley Wells was unable to attend the meeting.

FEDERAL RULES OF APPELLATE PROCEDURE

Rules Recommended for Approval and Transmission

The Advisory Committee on Appellate Rules submitted proposed amendments to Rules 1, 4, 5, 21, 24, 25, 26, 26.1, 27, 28, 31, 32, 36, 41, 44, and 45 and new Form 6 with a recommendation that they be approved and transmitted to the Judicial Conference. The amendments were circulated to the bench and bar for comment in August 2000. A scheduled hearing was canceled because no witness requested to testify. The proposed changes, other than amendments to Rule 4(a)(7) and Rule 26.1, are generally "housekeeping."

Rule 1(b) (Rules Do Not Affect Jurisdiction), which provides that the rules "do not extend or limit the jurisdiction of the courts of appeals," would be abrogated as obsolete. Recent legislation (Pub. L. 102-572, 102nd Congress) explicitly authorizes the Supreme Court to prescribe rules that may limit or extend jurisdiction.

Rule 4(a)(7) (Entry Defined) would be amended to address conflicting decisions of the courts of appeals regarding the time to appeal a judgment. If a district court's order or judgment has been entered in the civil docket, but not on a separate document as required by Civil Rule 58, neither the time to bring a post-judgment motion nor the time to appeal ever begins to run. Consequently, judgments improperly entered years ago may still be open to appeal.

The proposed amendments to Rule 4(a)(7), in combination with proposed amendments to Civil Rule 58, cure this problem. First, orders disposing of certain post-judgment motions will no longer have to be entered on a separate document under the proposed amendments to Civil Rules 54 and 58. Second, if a separate document is required under the civil rules, judgment will

be deemed to be entered upon the occurrence of the earlier of the following two events: (1) when the judgment or order is entered in the civil docket and is actually set forth on a separate document; or (2) if not set forth on a separate document, when 150 days have run from entry of the judgment or order in the civil docket. The 90-day "cap" (a 60-day grace period plus 30 days to file an appeal) proposed in the original amendment published for comment was thought too short and might result in a trap for the unwary. The expanded period—150 days before the time to appeal begins to run and then 30 days to file the appeal for a total of 180 days—is believed more suitable because it coincides with the time to move to reopen the time to appeal from a judgment. The amendments to Rule 4(a)(7) would also allow an appellant—for whose benefit the separate document requirement exists—to waive the requirement and bring an appeal without waiting for a judgment or order to be set forth on a separate document. Moreover, the parties should be aware of the duty to inquire when there has been no activity for 150 days.

Under other proposed amendments to **Rule 4 (Appeal as of Right — When Taken)**, a court may extend the time to file an appeal on a showing of excusable neglect or good cause, whether or not the motion for additional time is filed before or during the 30 days provided after the original deadline to file an appeal expires. The amended rule makes clear that the provisions governing the time to appeal a decision in a civil case, and not a criminal case, apply to a writ of error *coram nobis*. The amended rule also provides that motions to correct a sentence under what is currently Criminal Rule 35(c)—and what will become Criminal Rule 35(a) if the restyling of the criminal rules is approved—does not toll the time to appeal a notice of appeal from a judgment of conviction.

The proposed amendments to **Rule 5 (Form of Papers; Number of Copies)** correct a cross-rule reference and limit petitions for permission to appeal to 20 pages.

The proposed amendments to **Rule 21(d) (Writs of Mandamus and Prohibition, and Other Extraordinary Writs)** similarly correct a cross-rule reference and limit petitions for extraordinary relief to 30 pages. The advisory committee agreed with submitted public comments recommending that the page limit on a petition for an extraordinary writ should be increased from 20 pages to 30 pages because it closely resembles a principal brief on the merits.

Rule 24 (Proceeding in Forma Pauperis) would be amended to account for enactment of the Prison Litigation Reform Act of 1995, which requires all prisoners upon filing to pay the full amount of the filing fee or a partial amount with the remainder payable in installments, and which does not permit prisoners who have proceeded in forma pauperis in the district court "automatically" to proceed in forma pauperis on appeal.

The proposed amendments to Rules 25, 26, 36, and 45 set out procedures for providing service and notice by electronic means. They are similar to amendments to the Federal Rules of Civil Procedure that will take effect in December 2001, and they reflect an ongoing effort by the rules committees to maintain uniformity among the different sets of rules when essentially the same procedure is involved.

Rule 25(c)-(d) (Filing and Service) would be amended to permit electronic service of papers on parties who consent to such service in writing and to provide that electronic service is generally complete upon "transmittal." **Rule 26(c) (Computing and Extending Time)** would be amended, consistent with the existing three-day "mail rule," to provide a party with an additional three calendar days to respond to a paper served by electronic means. The three-day provision was included to encourage parties to use electronic service. Providing the additional time also recognizes that although electronic transmission is usually instantaneous, it can be delayed because of technical problems. Under proposed amendments to **Rule 36(b) (Entry of**

Judgment; Notice) and **Rule 45(c) (Clerk's Duties)**, a clerk of court would be permitted to serve a judgment or a notice of entry of an order or judgment electronically on a party who has consented to such service by electronic means.

At the request of the Committee on Codes of Conduct, the advisory rules committees considered changes to the Appellate, Bankruptcy, Civil, and Criminal Rules requiring a nongovernmental corporate party to disclose financial interests as presently required under Appellate Rule 26.1, so that a judge can ascertain whether recusal is necessary. For the present time, the rules committees believed that a rule amendment must be sufficiently flexible to accommodate the preferences of the respective courts on an issue so personal and sensitive to judges. Accordingly, the proposed amendments—like Appellate Rule 26.1—continue to permit courts to require additional disclosure information in an individual case or by local rule.

The proposed amendment of **Rule 26.1 (Disclosure Statement)** is similar to proposed new Civil Rule 7.1 and Criminal Rule 12.4. A nongovernmental corporate party would continue to be required to disclose any parent corporation and any publicly held corporation owning at least 10 percent of its stock. If no such corporation exists, the party will now be required affirmatively to report that fact in its disclosure statement. In addition, a party will be required to supplement the disclosure statement if circumstances change.

The proposed amendments to **Rule 26(a) (Computing and Extending Time)** would eliminate the disparity in counting days for deadline purposes between the appellate rules and the civil and criminal rules. It would exclude intermediate Saturdays, Sundays, and legal holidays when computing deadlines under 11 days but count them when computing deadlines of 11 days or more, similar to the computation methods in the civil and criminal rules. The existing appellate rule accounts for "intermediate" days only for deadlines of fewer than 7 days.

The parenthetical in **Rule 4(a)(4) (Appeal as of Right—When Taken)**, which cross references the time computation method set forth in the civil rules, is deleted as unnecessary in light of the proposed change to Rule 26. Proposed amendments to **Rule 27(a) (Motions)** would change the time to respond to a motion from 10 to 8 days and the time to reply to a response to a motion from 7 to 5 days to account for the additional time provided by including intermediate weekends and holidays in accordance with the computation changes proposed in Rule 26. The time deadline contained in **Rule 41 (Mandate: Contents; Issuance and Effective Date; Stay)** to issue a mandate would be clarified to maintain the existing 7 calendar-day deadline.

The proposed amendments to **Rule 27(d) (Motions)** and **Rule 32 (Form of Briefs, Appendices, and Other Papers)** would specify the color of covers of certain papers filed with the court.

The proposed amendments to **Rule 28(j) (Citation of Supplemental Authorities)** would limit the body of a letter containing supplemental authorities to 350 words and remove the prohibition on "argument." The word limit was increased from 250 words originally proposed by the advisory committee to accommodate public comment expressing concern that the limit was too restrictive.

Rule 31 (Serving and Filing Briefs) would be amended to clarify that copies of briefs must be served on all parties, including unrepresented parties.

The other proposed amendments to **Rule 32 (Form of Briefs, Appendices, and Other Papers)** provide that new Form 6, in which a party certifies that a brief complies with Rule 32's type-volume limitation, must be regarded as sufficient to meet the existing certification requirement of Rule 32. They also provide that every brief, motion, or other paper filed with the court must be signed by the attorney or unrepresented party who files it.

The proposed amendments to **Rule 44 (Case Involving a Constitutional Question When the United States or the Relevant State is Not a Party)** require a party to give written notice to the clerk of court if it challenges the constitutionality of a state statute in a case in which the state is not a party. The amendments also require the clerk to notify the state's attorney general of the challenge.

The Committee concurred with the advisory committee's recommendations. The proposed amendments to the Federal Rules of Appellate Procedure and new Form 6 are in Appendix A together with an excerpt from the advisory committee report.

> **Recommendation**: That the Judicial Conference approve the proposed amendments to Appellate Rules 1, 4, 5, 21, 24, 25, 26, 26.1, 27, 28, 31, 32, 36, 41, 44, and 45 and new Form 6 and transmit them to the Supreme Court for its consideration with the recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law.

FEDERAL RULES OF BANKRUPTCY PROCEDURE

Rules Recommended for Approval and Transmission

The Advisory Committee on Bankruptcy Rules submitted proposed amendments to Rules 1004, 2004, 2014, 2015, 4004, 9014, and 9027, new Rule 1004.1, and amendments to Official Forms 1 and 15 with a recommendation that they be approved and transmitted to the Judicial Conference. The amendments and new rule were circulated to the bench and bar for comment in August 2000. A public hearing was held in Washington, D.C. on January 26, 2001.

The proposed amendment to **Rule 1004 (Involuntary Petition Against a Partnership)** eliminates the provision implying that all general partners must consent to the filing of a voluntary petition by the partnership. The filing requirements are a matter of substantive law and outside the scope of the rules.

Proposed new **Rule 1004.1 (Petition for an Infant or Incompetent Person)** establishes procedures for an infant or an incompetent person to commence a case. It is based on the procedures contained in Civil Rule 17(c).

Rule 2004 (Examination) would be amended to compel a witness to attend an examination of an entity under procedures governing a subpoena in Civil Rule 45, whether the examination is conducted within or outside the district in which the case is pending. The proposed amendments also make clear that an attorney authorized to practice either in the court in which the case is pending or in the court for the district in which the examination will be held may issue and sign the subpoena on behalf of the court for the district in which the examination will be held.

Rule 2014 "Disinterestedness" Finding

The proposed amendments to **Rule 2014 (Employment of a Professional Person)** revise the disclosure requirements that apply to a professional seeking appointment to provide services in a bankruptcy case, typically a lawyer designated by the debtor in a Chapter 11 business reorganization case. The present rule implements § 327 of the Bankruptcy Code, which conditions appointment of a professional on a court's finding that the professional is a "disinterested person," defined under § 101(14) of the Bankruptcy Code to be "a person that does not have an interest materially adverse to the interest of the estate or any class of creditors or equity security holders, *by reason of any direct or indirect relationship to, connection with, or interest in the debtor* or an investment banker ... or for any other reason." (emphasis added). Carrying out this statutory directive is especially difficult because, as a practical necessity, the "disinterestedness" evaluation must be conducted as soon as possible after the bankruptcy case is filed in order to accommodate the professional, who must immediately begin rendering

substantial services. As long as the court delays making its Rule 2014 "disinterestedness" finding, the professional is rendering those services with no assurance of eventual compensation.

The current language of Rule 2014 imposes an absolute requirement on an applicant to disclose "all of the person's connections with the debtor, creditors, any other party in interest, their respective attorneys and accountants, the United States trustee, or any person employed in the office of United States trustee." The disclosure requirements are substantially and unnecessarily broader than the ones required under the Code.

The proposed amendments to Rule 2014 require a professional to disclose, among other things, "(3) any interest in, relationship to, or connection the person has with the debtor; (4) any interest, connection, or relationship the person has that may cause the court or a party in interest reasonably to question whether the person is disinterested under § 101." The amendments ensure that the information necessary to make a "disinterestedness" determination under § 327 continues to be disclosed to the court. The amendments leave intact the demanding disclosure requirements regarding connections with debtors (addressing questions about the neutrality of the professional's disinterestedness that are most likely to be relevant and which are the focus of § 327), while establishing a more appropriate objective disclosure standard that will provide more useful information regarding connections to other participants in the case.

Present Rule 2014 is Ineffective

Present Rule 2014 is intended to assist a court in making its "disinterestedness" finding. But it often hinders an effective evaluation of the professional because the disclosure requirements are undefined and very broad on their face. If every "connection" were disclosed, as required under a literal reading of the rule, the volume of the disclosures would overwhelm the court and interested parties, thereby rendering the disclosure ineffective. To comply with the

present rule some professionals submit voluminous disclosure documents containing a mass of irrelevant information in an attempt to gain some level of comfort that their appointment will not result in a later-imposed sanction for a failure to be disinterested as required by the Bankruptcy Code. These lengthy submissions are filed at the beginning of Chapter 11 cases when creditors, the United States trustee, and the court have limited time to evaluate the materials and an immediate decision is needed for the case to proceed. The combination of the limited opportunity for review and the extensive nature of the disclosures make it nearly impossible for the court and the creditors to evaluate the request for employment in a manner that fully considers the propriety of the appointment under the Code.

Strict adherence to Rule 2014, moreover, imposes a virtually impossible task on a conscientious attorney or other professional, who must arguably search for and disclose every connection—no matter how trivial—to a debtor, creditors, any other party in interest, and their respective attorneys and accountants. The requirement is no mean task as Chapter 11 cases often involve thousands of creditors and other parties in interest. For example, the disclosure requirement could reach such attenuated connections as serving—in unrelated litigation concluded many years prior to the commencement of the bankruptcy case in which the professional is seeking employment—as co-counsel with an attorney who is an associate in a firm that represents a creditor in the bankruptcy case. As another example, a term life insurance policy issued to a member of the professional's staff, e.g., a paralegal, by a company that is a creditor in the bankruptcy case may have to be reported under the rule's disclosure requirements. In practice, full compliance with the rule is honored in the breach, and professionals intentionally or inadvertently fail to disclose every *de minimis* connection, e.g., small outstanding credit charge

payable to a credit-card creditor company or inconsequential connection between a member, associate, or even employee of the professional's firm and a creditor.

The rule's undefined standard can result in selective enforcement producing arbitrary results. Although courts usually examine all the circumstances in a particular case, apply a reasonableness or common-sense test, and refrain from imposing sanctions for minor or technical infractions, that is no guarantee against sanctioning a professional for minor disclosure omissions.

Under the present disclosure requirements, a professional is responsible to know the identity of the creditors' attorneys and accountants. But it is unrealistic for a professional to contact creditors prior to the commencement of the case to ascertain the identity of their attorneys and accountants without disclosing an impending bankruptcy filing. Such a disclosure would often be fatal to the client's prospect for a successful bankruptcy reorganization. Yet, the current rule demands disclosure of "connections" with those persons or firms.

The rules committees concluded that the disclosure requirements articulated under the present rule are too exacting, not required by the Bankruptcy Code, and often counterproductive. The committees believed that the proposed amendments create a more rational and fairer disclosure standard that more closely follows the intent of § 327 of the Code, which they are designed to implement. Of course, a judge continues to retain discretion to require disclosure of more information, if appropriate, in an individual case.

Proposed Amendments More Closely Follow Intent of § 327 of the Code

The advisory committee was sensitive to the concern that any apparent weakening of the duty to disclose information might encourage professionals to withhold relevant material information. On the other hand, the committee believed that more artful language could be

drafted that is fully consistent with the Bankruptcy Code's "disinterestedness" requirement yet provides a fair and workable disclosure standard for professionals.

The advisory committee's proposed amendments, as published for comment in August 2000, had required disclosure of "relevant" information. This formulation was thought to be broader than "material information" specified by the Bankruptcy Code, yet as a subjective criterion it provided some limited discretion—not permitted under the current rule—to a professional to omit *de minimis* connections. Although the bar commented favorably on the proposal, some judges expressed concern that the requirement was subjective and might lead to inappropriate appointments based on inadequate disclosures. Accordingly, the committee tightened the proposed amendments to require: (1) absolute disclosure of any interest in, relationship to, or connection the professional has with the debtor; and (2) disclosure under a more objective standard of "any interest, connection, or relationship the person has that may cause the court or a party in interest reasonably to question whether the person is disinterested."

Rule 2015 (Duty to Keep Records, Make Reports and Give Notice of Case) would be amended to clarify that the trustee or debtor in possession in a Chapter 11 case must report disbursements during the time that quarterly fees are required to be paid under 28 U.S.C. § 1930(a)(6).

The proposed amendment of **Rule 4004 (Grant or Denial of Discharge)** postpones the entry of discharge in a Chapter 7 case on the filing of a motion to dismiss under § 707 of the Bankruptcy Code.

Rule 9014 (Contested Matters) would be amended to apply the provisions of Rule 7009, governing pleading on special matters, and Rule 7017, governing real parties in interest, including infants and incompetent persons, to contested matters; permit service of papers—other

than the initial motion—by electronic means; clarify that an evidentiary hearing must be held if a disputed, unresolved material issue of fact exists; and establish procedures notifying attorneys at an early date of a hearing at which witnesses are to appear.

Rule 9027 (Removal) would be amended to clarify the time limits for filing a notice of removal of a claim or cause of action filed after the commencement of a bankruptcy case, whether the bankruptcy case is pending, suspended, dismissed, or closed.

The Committee concurred with the advisory committee's recommendations.

Recommendation: That the Judicial Conference approve the proposed amendments to Bankruptcy Rules 1004, 2004, 2014, 2015, 4004, 9014, and 9027, and new Rule 1004.1 and transmit them to the Supreme Court for its consideration with the recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law.

Official Form 1 (Voluntary Petition) would be revised to require the debtor to disclose ownership or possession of property posing a threat of harm to the public health or safety.

The proposed revision of **Official Form 15 (Order Confirming Plan)** conforms to the amendment of Bankruptcy Rule 3020, which takes effect on December 1, 2001. If a plan contains an injunction against conduct not otherwise enjoined under the Bankruptcy Code, the revised form provides space for the judge issuing the order confirming the plan to describe acts enjoined and identify entities subject to the injunction. The proposed revision is technical and conforming and was not published for comment.

The advisory committee recommends that the proposed revisions to the Forms take effect on December 1, 2001, to coincide with the amendments to Rule 3020 and to provide sufficient time to publishers and software vendors to format and reproduce the forms for public distribution. The Committee concurred with the advisory committee's recommendations.

Recommendation: That the Judicial Conference approve the proposed revisions to Official Bankruptcy Forms 1 and 15, and that the revisions take effect on December 1, 2001.

The proposed amendments to the Federal Rules of Bankruptcy Procedure and the revisions to Forms 1 and 15 are in Appendix B together with an excerpt from the advisory committee report.

Rules Approved for Publication and Comment

The advisory committee proposed amendments to Rules 1007, 2003, 2009, and 2016, and a new Rule 7007.1, and revisions to Official Forms 1, 5, and 17 together with a recommendation that they be published for comment.

Rule 1007 (Lists, Schedules, and Statements; Time Limits) would be amended to assist judges in making recusal decisions by requiring corporate debtors to disclose any parent corporation and any publicly held corporation owning 10 percent or more of its equity. **Rule 2003 (Meeting of Creditors or Equity Security Holders)** and **Rule 2009 (Trustees for Estates When Joint Administration Ordered)** would be amended to conform the rules with recent legislation that makes multilateral clearing organizations eligible for bankruptcy relief. Proposed amendments to **Rule 2016 (Compensation for Services Rendered and Reimbursement of Expenses)** require a bankruptcy-petition preparer to file a statement disclosing any fee received from a debtor in accordance with § 110(h) of the Bankruptcy Code. New **Rule 7007.1 (Corporate Ownership Statement)** is derived from Appellate Rule 26.1 and requires a corporation that is a party to an adversary proceeding to disclose any parent corporation and any publicly held corporation owning 10 percent or more of its equity interests to assist a judge in making a recusal decision.

Official Form 1 (Voluntary Petition) would be revised to add a box for designating a clearing-bank case filed under subchapter V of Chapter 7. **Official Form 5 (Involuntary Petition)** and **Form 17 (Notice of Appeal)** would be amended to give notice that a child-support creditor or its representative is not required, after submitting the appropriate form specified under the Bankruptcy Code, to pay the fee for filing an involuntary petition or notice of appeal.

The Committee approved the advisory committee's recommendation to circulate the proposed rule amendments and revisions to Official Forms to the bench and bar for comment.

FEDERAL RULES OF CIVIL PROCEDURE

Rules Recommended for Approval and Transmission

The Advisory Committee on Civil Rules submitted proposed amendments to Rules 54, 58, 81, and new Rule 7.1, and proposed amendments to Admiralty Rule C with a recommendation that they be approved and transmitted to the Judicial Conference. The amendments to the Civil Rules were published for comment by the bench and bar in August 2000, and the proposed amendments to Admiralty Rule C were published in January 2001. The scheduled public hearings were canceled because no request to testify was submitted.

Proposed new **Rule 7.1 (Disclosure Statement)** would require a nongovernmental corporate party to disclose any parent corporation and any publicly held corporation that owns 10 percent of its stock, or state that no such corporation exists. The proposed new rule is similar to proposed changes to the Appellate, Bankruptcy, and Criminal Rules.

The proposed amendments to **Rule 54 (Judgments; Costs)** and **Rule 58 (Entry of Judgment)** are intended to address problems caused when a judgment or order is not entered on a separate document, and as a result the time for appeal never begins to run under the Appellate Rules. Under the proposed amendments to Rules 54 and 58, orders disposing of certain post-

judgment motions no longer have to be entered on a separate document. In addition, the amended rules, in conjunction with proposed changes to Appellate Rule 4(a)(7), provide that when a separate document is required, judgment is considered entered upon the occurrence of the earlier of either of two events: when the judgment is entered in the civil docket and set forth on a separate document, or when 150 days have run from entry of the judgment in the civil docket.

Rule 81(a)(2) (Applicability in General) would be amended to delete the specific time deadline for a return of a habeas corpus writ, which is inconsistent with the time limit set out in the Rules Governing Section 2254 Cases or the Rules Governing Section 2255 Proceedings.

Rule C of the Supplemental Rules for Certain Admiralty and Maritime Claims (In Rem Actions: Special Provisions) would be amended to conform to the Civil Asset Forfeiture Reform Act of 2000 (Pub. L. 106-185, 106th Congress). The legislation was enacted one week after the Supreme Court had prescribed and transmitted to Congress amendments to Rule C that took effect in December 2000. The legislation contains a deadline of 30 days in which a person may assert an interest or right against the property subject to forfeiture, which is different from the rule's 20-day deadline. The proposed amendment to Rule C increases the relevant time deadline from 20 days to 30 days consistent with the new legislation. It also makes other changes as well to conform to the new legislation.

The Committee concurred with the advisory committee's recommendations. The proposed amendments to the Federal Rules of Civil Procedure and the Supplemental Rules for Certain Admiralty and Maritime Claims are in Appendix C together with an excerpt from the advisory committee report.

Recommendation: That the Judicial Conference approve the proposed amendments to Civil Rules 54, 58, and 81, and a new Rule 7.1, and Rule C of Supplemental Rules for Certain Admiralty and Maritime Claims and transmit these changes to the Supreme Court for its consideration with the

recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law.

Rules Approved for Publication and Comment

The advisory committee proposed amendments to Rules 23, 51, and 53 together with a recommendation that they be published for comment.

The proposed amendments to **Rule 23 (Class Actions)** are based on an extensive study of class actions begun by the advisory committee in 1991. The first stage of the committee's study focused on certification standards and ended with an amendment authorizing permissive interlocutory appeal of a class-action certification order that will foster the development of pertinent appellate case law. The current stage of the committee's study is aimed at matters of process and judicial oversight and addresses concerns expressed by the Supreme Court in recent class-action decisions.

The proposed amendments focus on the timing of the certification decision and notice, judicial oversight of settlements, attorney appointment, and attorney compensation in class actions. They also provide a court with discretion to require in appropriate cases that class members be offered an opportunity to opt out of a Rule 23(b)(3) class upon learning the terms of a proposed class-action settlement. The proposal is intended to provide assurances to the certifying court that if a proposed settlement is unfair the class members can protect themselves by opting out.

Rule 51 (Instructions to Jury; Objections; Plain Error) would be amended to reflect existing practices and to require the court to inform the parties of the instructions before final arguments. The proposed amendments explicitly authorize a court to require submission of proposed jury instructions before trial begins. Moreover, if a court has made a definitive ruling on the record declining to grant a timely requested instruction, a party may assign error for

declining the requested instruction without first renewing the request by objection. The "plain error" doctrine recognized in most but not all circuits would be confirmed.

Rule 53 (Masters) would be comprehensively amended to reflect contemporary practice. Courts have increasingly appointed special masters for pretrial and post-judgment purposes. The existing rule provides little guidance on appointment standards or procedures. The proposed amendments would establish a framework to regularize the practice, but they are not designed to encourage or discourage use of special masters. Comment is particularly requested on whether a de novo or clearly erroneous standard of review is appropriate regarding a master's fact findings.

The Committee approved the advisory committee's recommendation to circulate the proposed rule amendments to the bench and bar for comment.

FEDERAL RULES OF CRIMINAL PROCEDURE

Rules Recommended for Approval and Transmission

The Advisory Committee on Criminal Rules completed a comprehensive "style" revision of Criminal Rules 1-60 using uniform drafting guidelines. It also proposed substantive amendments to several rules that have been under consideration outside the "style" project. The two sets of amendments to the Criminal Rules were published in separate pamphlets for comment by the bench and bar in August 2000. Three public hearings were scheduled on the proposed amendments, but only one was held in Washington, D.C. on April 25, 2001, because no witnesses requested to testify at the two other hearings.

Proposed Comprehensive "Style" Revision of Criminal Rules

The "style" revision of the Criminal Rules is part of an effort to clarify and simplify the language of the procedural rules. The comprehensive revision is similar in nature to the revision of the Federal Rules of Appellate Procedure, which took effect in December 1998. The original

draft of the comprehensive revision was prepared by a leading legal-writing scholar. The draft was then vetted by the Committee's Style Subcommittee with the assistance of two law professors. The revised draft was submitted to the advisory committee, which divided itself into two subcommittees. Both the advisory committee and its subcommittees held a total of 16 meetings during a 28-month period intensively reviewing all the rules. The draft went through countless flyspecking sessions and many iterations before it was approved for publication for public comment.

In addition to publishing the proposals in major legal publications and circulating them to the large bench-and-bar mailing list, the proposed amendments were distributed to several hundred law professors who teach criminal procedure. Copies of the proposals were also sent to all major bar groups, including liaisons from each of the state bar associations. Major organizations involved in the administration of criminal justice were alerted early to the project, provided input throughout the project, and commented on the published proposals. These included the Department of Justice, Federal Magistrate Judges Association, Federal Public Defenders Association, and National Association of Criminal Defense Lawyers. Virtually all comments received from the bench, bar, and law professors were favorable to the restyled rules. The only negative comments were received from the National Association of Criminal Defense Lawyers, who were concerned that the changes might generate satellite litigation arising from inadvertent substantive changes. It bears notice, however, that they failed to identify any inadvertent substantive change. The committees' deliberate and laborious process was designed to ferret out any inadvertent substantive changes. No substantive changes beyond those identified by the advisory committee and specifically described in the Committee Notes to the rules have been identified so far.

Overarching Revisions

In its "style" project, the advisory committee focused on several major elements. First, it attempted to eliminate the existing confusion regarding key terms and phrases that appear throughout the rules by simplifying and standardizing them. For example, existing Rule 54 (Application and Exception) draws a distinction between a "Federal magistrate judge," which is limited to a federal magistrate judge, and a "Magistrate judge," which includes state judicial officials. The proposed amendments eliminate these misleading titles and include a state judicial official in the definition of "judge." Second, the committee deleted provisions that no longer are applicable or necessary, usually because case law has evolved since the rule was first promulgated. Third, it reorganized several rules to make them easier to read and apply. Over the years, these rules have evolved inconsistently, occasionally resulting in convoluted provisions. For example, existing Rule 40 (Commitment to Another District) contains multiple layers of procedures that have bedeviled even experienced lawyers. The rule has been reorganized.

Specific Revisions Affecting Present Practices

The "style" revision resolved existing ambiguities in the rules that may affect present practices in some districts, which are identified in the Committee Notes accompanying the specific rule. None of the specific rule changes drew criticism during public comment. The more significant changes are highlighted below.

Rule 4 (Arrest Warrant or Summons on a Complaint) was amended to conform to the recently enacted Military Extraterritorial Jurisdiction Act (Pub. L. No. 106-523, 106th Cong.), which authorizes arrest warrants to be executed outside the United States on military personnel and Department of Defense civilian personnel. The comprehensive "style" revision of the rules was published for comment before the statute was enacted. The proposed amendment to Rule 4

conforms to the later-enacted statutory provisions and is submitted in accordance with established Judicial Conference procedures without first being published for comment.

Rule 5 (Initial Appearance) was amended to conform to the Military Extraterritorial Jurisdiction Act's provisions authorizing a magistrate judge to conduct an initial appearance proceeding of certain persons overseas by telephone communication. The change conforms to the statute and also was not included in the proposed amendments published for comment. In addition, many of the removal provisions presently contained in Rule 40 have been transferred to proposed Rule 5 and are revised to provide a court with flexibility to hold an initial appearance proceeding of an accused who is arrested in a district other than the district where the offense was allegedly committed. Under the proposed amendment, the initial appearance proceeding may occur in the district where the prosecution is pending if that district is adjacent to the district of arrest and the appearance will occur on the day of the arrest.

The title of **Rule 5.1 (Preliminary Hearing)** would be changed from preliminary "examination" to preliminary "hearing," which predominates present usage and more accurately describes the proceeding.

Under the proposed amendments to **Rule 6 (The Grand Jury)**, a court may require disclosure of a grand-jury matter if the disclosure may reveal a violation of military-criminal law.

Consistent with case law, **Rule 7 (The Indictment and the Information)** would be amended to exempt a charge of criminal contempt from the general requirement that prosecutions for a felony must be initiated by indictment.

The proposed amendment to **Rule 9 (Arrest Warrant or Summons on an Indictment or Information)** provides a court with discretion not to issue an arrest warrant if a defendant fails to respond to a summons and if the government declines to request issuance of a warrant.

Rule 12 (Pleadings and Pretrial Motions) would be amended to promote early setting of pretrial-motion deadlines by vesting the authority to set the deadlines exclusively in the judge—instead of the court by local rule.

Rule 16 (Discovery and Inspection) would be amended to require a defendant to disclose reports of examinations and tests that the defendant intends "to use"—instead of items that the defendant intends "to introduce"—at trial. The proposed change is consistent with the standard used elsewhere in the rule regarding the disclosure of other types of information.

Rule 17 (Subpoena) would be amended to conform with the recent amendment of 28 U.S.C. § 636(e), which authorizes a magistrate judge to hold in contempt a witness who disobeys a subpoena issued by that magistrate judge. The proposed amendment was not included in the amendments published for comment because the Federal Courts Improvement Act took effect after publication. The amendment conforms with the new statute and need not be published for comment in accordance with established Judicial Conference procedures.

Rule 24 (Trial Jurors) contains ambiguous language that may be construed to authorize a defendant, who is represented by counsel, to conduct voir dire of a prospective witness. The proposed amendment eliminates this ambiguity by explicitly authorizing a defendant to conduct voir dire only if the defendant is acting pro se.

The provision in **Rule 26 (Taking Testimony)**, which limits taking testimony to only "oral" testimony, would be deleted to accommodate a witness who is not able to give oral testimony, e.g., a witness needing a sign-language interpreter.

Rule 31 (Jury Verdict) would be amended to clarify that a jury may return partial verdicts, either as to multiple defendants or multiple counts, or both.

Rule 32 (Sentencing and Judgment) would be amended to include victims of child pornography under 18 U.S.C. §§ 2251-2257 under the rule's definition of "crimes of violence or sexual abuse." A new provision would also be added to require that a court provide notice to the parties of possible departure from sentencing guidelines on a ground not identified in the presentence report. Finally, the advisory committee withdrew a proposed provision, which had been published for comment, that would have required a judge to make findings on any unresolved objection to a material matter in a presentence report, whether or not it would affect the sentencing decision. The existing requirements are retained, although the Committee Note encourages judges to be sensitive to unresolved controverted matters in the presentence report that may have no effect on the sentence but that may affect the defendant's place of commitment or medical, psychological, or drug treatment.

Rule 32.1 (Revoking or Modifying Probation or Supervised Release) would be amended to provide a procedural framework governing prosecution of a defendant charged with violating probation or supervised release. The proposed amendments would require that the defendant be afforded an initial appearance proceeding, but the proceeding could be combined with a preliminary revocation hearing, a relatively common practice.

The provisions in **Rule 40 (Arrest for Failing to Appear in Another District)** dealing with the initial appearance of a defendant arrested in one district for an offense allegedly committed in another district would be transferred to Rule 5, Rule 5.1, and Rule 32.1. The proposed amendments clarify and simplify the procedures in existing Rule 40, which have caused confusion.

Rule 42 (Criminal Contempt) would be amended to provide explicit procedures governing the appointment of an attorney to prosecute a contempt. It is also amended to

recognize the authority of a magistrate judge to summarily punish a person who commits criminal contempt, consistent with recent statutory changes.

Rule 46 (Release from Custody) would be amended to delete the requirement that the government file bi-weekly reports with the court concerning the status of any defendant in pretrial detention as unnecessary in light of the Speedy Trial Act.

Rule 49 (Serving and Filing Papers) would be amended to permit a court to issue a notice of an order on any post-arraignment motion by electronic means.

Rule 52 (Harmless and Plain Error) would eliminate the ambiguity in the existing rule that refers in the disjunctive to "plain error or defect." As noted in *United States v. Young*, 470 U.S. 1, 15 n.12 (1985), the disjunctive is misleading. The words "or defect" would be deleted under the proposed amendments.

The definitions contained in **Rule 54 (Application and Exception)** would be transferred to Rule 1 under the proposed amendments.

Rule 59 (Effective Date) would be abrogated as no longer necessary.

The Committee concurred with the advisory committee's recommendations. The proposed "style" revision of the Federal Rules of Criminal Procedure is in Appendix D together with an excerpt from the advisory committee report.

> **Recommendation:** That the Judicial Conference approve the proposed amendments to Criminal Rules 1 through 60 and transmit these changes to the Supreme Court for its consideration with the recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law.

Proposed "Substantive" Amendments

For several years the advisory committee has been working on separate "substantive" amendments to Rules 5, 5.1, 10, 12.2, 26, 30, 35, and 43 and new Rule 12.4. The proposed

amendments were published separately from the restylized rules to ensure that each set was separately considered.

Video-Teleconferencing Proposal

The proposed amendments to **Rule 5 (Initial Appearance)**, **Rule 10 (Arraignment)**, and **Rule 43 (Defendant's Presence)** would explicitly provide a judge with the discretion to conduct initial appearance and arraignment proceedings by video teleconferencing (in lieu of the defendant's physical presence) upon the defendant's consent. For nearly a decade, the advisory committee has been urged by judges, particularly judges in large geographic districts, to amend the rules and specifically authorize video teleconferencing of these preliminary proceedings. The proposed amendments generated substantial favorable and negative comment from the bench and bar.

The proposals published for comment in August 2000 included an alternative version that would have authorized a court to conduct these pretrial proceedings by video teleconferencing without the defendant's consent. Although this proposal drew considerable support, especially from the Department of Justice, the advisory committee determined to proceed only with the more limited version that requires the defendant's consent. The advisory committee believed that requiring the defendant's consent and the approval of the judge as preconditions to the use of the video-teleconference procedure substantially satisfied the concerns raised against the proposed amendments.

Some federal district courts take the position that the defendant can now waive the right to be present at a preliminary proceeding, despite the existing provisions of Rule 5, Rule 10, or Rule 43. Other courts question whether the defendant can waive this right. The committee

believed that making it clear in the rules that this procedure is authorized will facilitate its use in appropriate cases by eliminating any reluctance engendered by the potential of a legal challenge.

- Background of Video-Teleconferencing Proposal

The Ninth Circuit Court of Appeals in *Valenzuela-Gonzales v. United States*, 915 F.2d 1276 (9th Cir. 1990), held that Rule 10 does not allow video teleconferencing of an arraignment over the defendant's objections. Since then, the advisory committee received requests to consider amending the rules to permit video teleconferencing of initial appearances and arraignments. Proposed amendments authorizing the procedure in an arraignment with the defendant's consent were published for comment in 1993. At the request of the Committee on Defender Services, however, the advisory committee withdrew the proposal pending completion of a pilot video-teleconferencing project funded by the United States Marshals Service. This pilot project eventually collapsed when the public defender in one of the two courts chosen to participate in the project declined to consent to such a procedure.

Since 1993, several developments have prompted the advisory committee to move forward with the proposed video-teleconferencing amendments. First, the advisory committee continued to receive a steady stream of requests from judges to amend the rules to authorize video teleconferencing. Second, the Judicial Conference has adopted a general policy of promoting video teleconferencing and reiterated its endorsement of this general policy on several occasions. Third, legislation authorizing the procedure has been introduced in Congress. Finally, the quality of video transmission continues to steadily improve. Today's equipment is markedly superior to equipment used only a few years ago.

- Repeated Requests from Judges to Amend the Rules to Authorize Video Teleconferencing

The ever-growing criminal caseload continues to place immense pressures on judges, particularly on judges stationed in "border states" where the volume of criminal cases has exploded. Some of these judges routinely walk into courtrooms packed with 50 to 100 prisoners waiting for summary pretrial proceedings. Many of these prisoners have been on buses during the previous night traveling to the courthouse. The judges working in these conditions have understandable concerns for the security of everyone in the courtrooms. Video teleconferencing of these proceedings not only alleviates some of the security problems, but it also offers a technology that may enhance a judge's flexibility in scheduling proceedings and reduce down-time spent in physically presenting the defendant before the judge.

- Judicial Conference Actions Promoting Use of Video-Teleconferencing Technologies

The *1997 Long Range Plan for Automation in the Federal Judiciary*, approved by the Judicial Conference in 1997 (JCUS-MAR 97, p. 10), encourages courts to "use video telecommunications technologies to facilitate more efficient training, conferencing, administration, and judicial proceedings." The report observes that "when used for courtroom proceedings, video telecommunications technologies may possibly speed the resolution of cases, reduce the cost of litigation, and, for pretrial hearings, reduce security costs and risks by allowing prisoners to participate directly from prison." The June 2000 report of the Committee on Court Administration and Case Management to the Judicial Conference is in accord, noting that "various pretrial, civil and criminal proceedings, sentencings, settlement conferences, witness appearances in trials, arraignments, bankruptcy hearings, and appellate oral arguments are among the types of judicial proceedings in which this technology has proven beneficial where

compelling geographic and logistical conditions exist." Further support for the use of video-conferencing technologies is found in the Director's February 2000 report on Optimal Utilization of Judicial Resources sent to Congress on behalf of the judiciary, which concludes that the procedure is cost effective: "In June 1998, an assessment was completed of the applicability of video evidence presentation, videoconferencing, and other technologies. The study confirmed earlier views that technology in the courtroom can facilitate case management and decision making, reduce trial time and litigation costs, and improve the quality of evidence presentation, fact-finding, jury attentiveness, and understanding, and access to court proceedings."

Today, well over 100 federal court sites are equipped with video-teleconferencing capability. Additional sites continue to be fitted with the new technology. The equipment is used in a wide variety of proceedings, including prisoner proceedings, settlement conferences, and bankruptcy hearings.

- Congressional Interest in Greater Use of Video-Teleconferencing Technologies

On April 26, 2001, Senator Strom Thurmond (R-SC) introduced S. 791 (107th Congress), which would directly amend the Criminal Rules to authorize a court to conduct video teleconferencing of initial appearance and arraignment proceedings without the defendant's consent, and of sentencing proceedings under certain restrictive circumstances. Senator Thurmond remarked that the bill would "promote a safer and more efficient federal court system." He went on to say that video teleconferencing "allows proceedings to operate more efficiently and at lower costs, while maintaining many of the benefits of communicating in person." The bill reflects a recurring congressional theme urging the federal judiciary to fully use technology.

- Quality of Video Transmission

The quality of the transmission from early video-teleconferencing equipment proved unsatisfactory, often with grainy pictures and awkward delays between aural and facial movements. State-of-the-art technology has eliminated much of the deficiencies. Picture quality can be excellent with only the briefest delay detected between sound and movement.

- Justification of Proposal

The advisory committee carefully reviewed the advantages and drawbacks of the video-teleconferencing proposal. It concluded that the proposed amendments should be adopted because they promote security, efficiency, and convenience for the court, defendant, and counsel. The specific reasons include the following:

(1) These summary proceedings by video teleconference can only take place with the defendant's consent, which the committee believes avoids most, if not all, the problems opponents raise.

(2) Conducting pretrial proceedings by video teleconferencing reduces security risks in the courtroom, where adequate law enforcement officers are sometimes unavailable to police large groups of transported defendants. It also eliminates security risks not only to the law enforcement officers but also to the defendants during transit to the courthouse.

(3) Judges continue to request that the rules be amended to provide them with discretion to conduct proceedings by video teleconference in appropriate cases. Particularly in high-volume criminal-case jurisdictions, video teleconferencing would provide a court with added flexibility to control its calendar, provide a more efficient process, and save judges' time.

(4) The ability to conduct an initial appearance by video teleconference may eliminate delays of up to 48 hours and expedite a defendant's release in some large geographic districts (e.g., Eastern District of Washington, Vermont) where the single judge would otherwise have to travel hundreds of miles to conduct the proceeding.

(5) Holding facilities in some jurisdictions are far from the courthouse, imposing significant travel inconvenience on defendants who may be transported early in the morning with a large group of other defendants, compelled to stay at the courthouse until all proceedings are completed, and returned to the holding facility at the end of the day. Video teleconferencing eliminates the need for these travel days with all their attendant problems.

(6) Video teleconferencing is already being conducted with the defendant's consent in many state and some federal court jurisdictions. In many cases, the proceeding is viewed by the defendant as purely administrative with no adjudication and little need for a personal appearance. Judges who have conducted these summary proceedings by video teleconferences recommend them and tell the committee that they have been well received by counsel.

(7) Finally, counsel is not appointed in some jurisdictions until after an initial appearance proceeding. In these cases counsel need not travel to the holding facility where the defendant is appearing for an initial appearance by video teleconference.

The advisory committee is sensitive to the concerns that video teleconferencing may represent an erosion of an important element of the judicial process. A defendant may not fully appreciate the importance of the preliminary proceeding if conducted by video teleconferencing, particularly if the setting is one bearing little resemblance to a courtroom. In addition, although the quality of a court's equipment may be excellent, the equipment at the holding facility may be substandard. The resulting flawed video transmission may reflect poorly on the pretrial proceeding creating a perception that the proceeding is not important. Beyond raising these potential perceptions, the committee was concerned about the voluntariness of a defendant's consent when made outside the judge's presence in the holding facility. On balance, however, the advisory committee concluded that vesting discretion in the judge to either allow or decline to allow video teleconferencing establishes a strong safeguard that obviates many of these concerns. A judge has complete control over the setting, may inquire into the voluntariness of the consent, and may stop video teleconferencing if the transmission quality is unsatisfactory.

The advisory committee also carefully considered continuing concerns expressed by the Committee on Defender Services. The advisory committee recognized that there might be some cost shifting from the Marshals Service's appropriation to the judiciary's Defender Services appropriation if defense counsel travels to the holding facility to stand with the defendant at the

video teleconferencing. The advisory committee concluded that the cost shifting, if any, was justified for several reasons. First, counsel is not appointed prior to nor is present at many initial appearance proceedings, so that the federal public defenders' budget is not affected in these cases. Second, it is unknown how often defense counsel would travel to the holding facility, rather than appear at the courthouse, for the video teleconferencing. Based on the favorable reaction of judges and counsel who have used video teleconferencing for these summary proceedings, the committee believes that as the bar becomes more accustomed to video teleconferencing counsel will become more confident in the integrity of the procedure, and they will increasingly attend the proceedings at the courthouse, if more convenient. In some instances, counsel's office is located closer to the holding facility than the courthouse, and counsel prefers traveling to the holding facility rather than to the courthouse. Finally, although the individual Marshals' and judiciary's budget accounts may be affected differently, the overall cost to the government as a whole will likely be reduced by using video teleconferencing rather than incurring the significant costs in transporting defendants.

In its study of various state-courts' experiences with video teleconferencing of pretrial proceedings, the advisory committee found that state public defenders use the court's video teleconferencing equipment to interview clients in prison. In a state-sponsored comprehensive study of California video conferencing in arraignment proceedings, public defenders praised the system for saving significant travel expenses and time spent on travel to meet and confer with their clients. As video teleconferencing becomes more widespread, any additional cost incurred by public defenders to travel to a prison to attend a pretrial proceeding transmitted by video may be offset by savings later derived from attorney-client interviews conducted using the same equipment.

The Committee on Defender Services' other concerns—lost opportunities that might facilitate early plea negotiations, potential defendant misperceptions about the neutrality of the judicial proceeding, and fears about dehumanizing the process—were issues constantly in the forefront of the advisory committee's deliberations. The Committee Note contains an extended discussion that is intended to alert courts to these concerns and suggests steps to allay them. In the end, the advisory committee believed that ultimately all these concerns must be weighed by the defendant and counsel, and if the benefits of video teleconferencing are found wanting, no consent should be given.

In summary, most judges probably will not elect to conduct initial appearances and arraignments by video teleconference because the holding facilities, counsel, and prosecutor are all located near the courthouse. But some districts must operate under the inconvenience of having the prisoner (and sometimes counsel) located some distance from the courthouse and the judge. These amendments recognize that courts operate under widely differing circumstances and are designed to give courts the flexibility to conduct these summary proceedings by video teleconference where that procedure is needed—so long as the defendant consents. The advisory committee believes that the unqualified right of a defendant to insist that the initial appearance or arraignment proceeding be held in open court substantially satisfies the concerns raised against the proposed amendments. The committee also believes that many of the objections will dissolve after the court and counsel have gained experience in using video teleconference for these summary proceedings. The committee heard from judges in 10 judicial districts who have conducted these summary proceedings by video teleconference with the parties' consent. These judges gave positive reports about their experiences with this procedure and urged us to adopt the amendments to remove any doubt about the legality of their actions. The comments of these

judges who had actually worked with this procedure strongly reinforced the advisory committee's conclusion that these amendments should be adopted to give courts the flexibility to use this procedure.

Remaining "Substantive" Amendments

Rule 5.1 (Preliminary Hearing) would be amended to authorize a magistrate judge to continue a preliminary examination over the defendant's objection. The proposed amendment is inconsistent with a parallel statutory provision authorizing only a district judge to continue the hearing if a defendant objects to a magistrate judge doing so. An earlier proposal to seek amendment of the legislation before amending the rule was rejected by the Judicial Conference at its March 1998 meeting. (JCUS-MAR 98, p. 24) The Conference instructed this Committee to move forward with the rule change, which is now under consideration. If approved, it is anticipated that notice will be sent to appropriate congressional offices alerting them of the inconsistency between rule and statute so that conforming legislation may be enacted.

Rule 12.2 (Notice of an Insanity Defense; Mental Examination) would be amended to: (1) clarify that a court may order submission to a mental examination by a defendant who has indicated an intention to raise a defense of mental condition bearing on the issue of guilt; (2) require a defendant to give notice of an intent to present expert evidence of the defendant's mental condition during a capital-sentencing proceeding; (3) authorize a court to order a mental examination of a defendant who has given notice of an intent to present evidence of mental condition during a capital-sentencing proceeding; (4) set out the time provisions for disclosing results and reports of the defendant's expert examination; and (5) exclude any expert evidence from the defendant on mental condition during the punishment phase of a capital case for failing to comply with the rule's notice and examination requirements.

New Rule 12.4 (Disclosure Statement) would require a nongovernmental corporate party to disclose any parent corporation. It closely tracks the financial disclosure provisions proposed in similar amendments to the Appellate and Civil Rules. But the proposed amendment would also require the government to disclose, to the extent it can be obtained through due diligence, the identity of any organizational victim. The disclosure of a victim's financial statement could affect a judge's recusal decision if restitution is ordered.

Rule 26 (Taking Testimony) would be amended to allow the court to use remote "two-way" transmission of live testimony under "exceptional circumstances" when a witness is otherwise unavailable within the meaning of Evidence Rule 804(a)(4)-(5). The proposed amendment tracks an analogous amendment to Civil Rule 43, but is more restricted consistent with Confrontation-Clause considerations.

Rule 30 (Jury Instructions) would be amended to permit a court to request a party to submit its requested jury instructions before trial, consistent with the prevailing practice in many districts. The Committee Note makes clear that the amendment does not preclude the practice of permitting the parties to supplement their requested instructions during the trial.

The proposed amendment of **Rule 35 (Correcting or Reducing a Sentence)** clarifies circumstances when a sentence can be reduced to account for the defendant's substantial assistance in providing information helpful to the government in prosecuting another person when the information was known but not fully appreciated nor acted on within the prescribed time.

The Committee concurred with the advisory committee's recommendations. The proposed amendments to the Federal Rules of Criminal Procedure are in Appendix E together with an excerpt from the advisory committee report.

Recommendation: That the Judicial Conference approve the separately proposed "substantive" amendments to Criminal Rules 5, 5.1, 10, 12.2, 26, 30, 35, and 43 and new Rule 12.4 and transmit these changes to the Supreme Court for its consideration with the recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law.

Combining "Style" and "Substantive" Amendments in a Single Transmission

The comprehensive "style" revision and the proposed "substantive" amendments of the Criminal Rules were published separately to ensure that each set of proposals received individualized attention. The bifurcated review process has worked well. Many comments were received on the "substantive" amendments, resulting in significant changes to several rules and the withdrawal of several others. Maintaining two separate rules packages has served its purposes, and the Committee now recommends that the Judicial Conference combine the two sets of rules proposals into a single package for the Supreme Court's consideration.

Recommendation: That the Judicial Conference substitute the separately proposed "substantive" amendments to Criminal Rules 5, 5.1, 10, 12.2, 26, 30, 35, and 43 and new Rule 12.4 for the corresponding amendments contained in the comprehensive "style" revision of the Criminal Rules, and transmit these changes along with the remaining amendments in the "style" revision as a single set of proposals to the Supreme Court for its consideration with the recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law.

Rules Approved for Publication and Comment

The advisory committee proposed amendments to Rule 35 with a recommendation that they be published for comment.

Rule 35 (Correcting or Reducing a Sentence) would be amended to define "sentencing," for purposes of the rule, to mean the "entry of judgment." The amendment would clarify an existing ambiguity about when certain time deadlines based on the meaning of "sentencing" begin to start. The advisory committee discovered the ambiguity in the existing

rule only after publication of the "style" revision. The advisory committee concluded that public comment on the proposed amendment would be helpful.

The Committee approved the advisory committee's recommendation to circulate the proposed rule amendments to the bench and bar for comment.

Informational Item — Proposed Amendments Governing "Habeas Corpus Rules"

The advisory committee decided to defer taking action on the proposed amendments to rules governing § 2254 and § 2255 proceedings, which had been published for public comment in August 2000 to conform the rules with the Antiterrorism and Effective Death Penalty Act and recent Criminal Rules amendments. The advisory committee plans to "restyle" the rules consistent with the comprehensive "style" revision of the Criminal Rules and consider several new changes to the rules suggested by the public comments.

FEDERAL RULES OF EVIDENCE

Rules Approved for Publication and Comment

The Advisory Committee on Evidence Rules proposed amendments to Rule 608(b) and Rule 804(b)(3) with a recommendation that they be published for comment.

The limitation on using extrinsic evidence contained in **Rule 608(b) (Evidence of Character and Conduct of Witness)** is clarified and narrowed under the proposed amendment to apply only to cases in which the proponent's sole purpose is to impeach the witness's character for "veracity." The existing rule prohibits extrinsic evidence to impeach a witness's "credibility," which has been construed broadly by some courts, resulting in conflicting case law. By limiting the application of the rule to proof of a witness's character for truthfulness, the proposed amendment clearly permits the admissibility of extrinsic evidence offered for other grounds of impeachment.

Rule 804(b)(3) (Statement against interest) would be amended to provide uniform treatment of hearsay statements offered as declarations against interest. The rule's requirement to present corroborating circumstances indicating the trustworthiness of any statement exposing the declarant to criminal liability that exculpates the accused would be extended to apply to a statement that incriminates the accused.

The Committee approved the advisory committee's recommendation to circulate the proposed rule amendments to the bench and bar for comment.

RULES GOVERNING ATTORNEY CONDUCT

The Committee's Subcommittee on Rules Governing Attorney Conduct continues to monitor discussions among Congress, state court representatives, the American Bar Association, and the Department of Justice on the subject. The Committee has deferred further action, pending the outcome of these discussions.

PRIVACY AND ACCESS TO ELECTRONIC CASE FILES

The Committee reviewed the "Report of the Judicial Conference Committee on Court Administration and Case Management's Subcommittee on Privacy and Public Access to Electronic Case Files." The Committee recognized the need to take swift action and is in general agreement with the report's conclusions.

MODEL LOCAL RULES GOVERNING ELECTRONIC CASE FILING

The Committee also reviewed Model Local Rules Governing Electronic Case Filing proposed by the Committee on Court Administration and Case Management. The Committee worked with the Court Administration Committee in developing the model local rules. The Committee generally endorses them.

MODEL LOCAL RULES PROJECT

The Committee received a brief report on the progress of the local rules project, which involves a comprehensive review of all local rules in the federal courts. The project is in its final stages. An extensive report on the results of the project is expected to be given at the Committee's winter meeting.

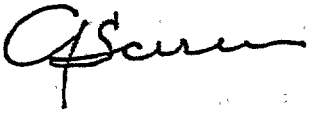
LONG-RANGE PLANNING

The Committee considered an agenda item on long-range planning, which seeks input on ways to measure the quality of justice. The Committee agrees that measuring the quality of justice is an important issue that deserves the judiciary's attention.

REPORT TO THE CHIEF JUSTICE

In accordance with the standing request of the Chief Justice, a summary of issues concerning select proposed amendments generating controversy is set forth in Appendix F.

Respectfully submitted,



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COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
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CIVIL RULES

W. EUGENE DAVIS
CRIMINAL RULES

MILTON I. SHADUR
EVIDENCE RULES

MEMORANDUM

DATE: May 11, 2001

TO: Judge Anthony J. Scirica, Chair
Standing Committee on Rules of Practice and Procedure

FROM: Judge Will Garwood, Chair
Advisory Committee on Appellate Rules

RE: Report of Advisory Committee on Appellate Rules

I. Introduction

The Advisory Committee on Appellate Rules met on April 11, 2001, in New Orleans, Louisiana. At that meeting, the Advisory Committee approved a number of proposed amendments that had been published for comment, declined to approve one such proposed amendment, removed four items from the Committee's study agenda, and discussed but took no action on several other items. Following the April 11 meeting, the Committee took two minor actions by mail ballot; those two actions are identified below.

Detailed information about the Committee's activities can be found in the minutes of the April 11 meeting and in the Committee's docket, both of which are attached to this report.

II. Action Items

Several proposed amendments to the Federal Rules of Appellate Procedure ("FRAP") — as well as several complementary proposed amendments to the Federal Rules of Civil Procedure ("FRCP") — were published for comment in August 2000. The Committee received 20 written comments; no commentator asked to testify in person about the proposed amendments. The Committee approved all but one of the proposed amendments for submission to the Standing Committee. Modifications were made to many of the proposed amendments and Committee Notes, but, in the Committee's view, none of those modifications is so substantial as to require republication.

PROPOSED AMENDMENTS TO THE FEDERAL RULES OF APPELLATE PROCEDURE*

Rule 1. Scope of Rules; Title

* * * * *

(b) ~~**Rules Do Not Affect Jurisdiction.** These rules do not extend or limit the jurisdiction of the courts of appeals.~~ [Abrogated]

* * * * *

Committee Note

Subdivision (b). Two recent enactments make it likely that, in the future, one or more of the Federal Rules of Appellate Procedure ("FRAP") will extend or limit the jurisdiction of the courts of appeals. In 1990, Congress amended the Rules Enabling Act to give the Supreme Court authority to use the federal rules of practice and procedure to define when a ruling of a district court is final for purposes of 28 U.S.C. § 1291. *See* 28 U.S.C. § 2072(c). In 1992, Congress amended 28 U.S.C. § 1292 to give the Supreme Court authority to use the federal rules of practice and procedure to provide for appeals of interlocutory decisions that are not already authorized by 28 U.S.C. § 1292. *See* 28 U.S.C. § 1292(e). Both § 1291 and

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

§ 1292 are unquestionably jurisdictional statutes, and thus, as soon as FRAP is amended to define finality for purposes of the former or to authorize interlocutory appeals not provided for by the latter, FRAP will "extend or limit the jurisdiction of the courts of appeals," and subdivision (b) will become obsolete. For that reason, subdivision (b) has been abrogated.

---

1. Recommendation

The Committee proposes to abrogate Rule 1(b), which provides that the rules of appellate procedure "do not extend or limit the jurisdiction of the courts of appeals." Rule 1(b) has been rendered obsolete by recent Congressional enactments that give the Supreme Court authority to use the federal rules of practice and procedure to define when a decision of a district court is final for purposes of 28 U.S.C. § 1291 and to provide for appeals of interlocutory orders that are not already authorized by 28 U.S.C. § 1292.

2. Changes Made After Publication and Comments

No changes were made to the text of the proposed amendment or to the Committee Note.

3. Summary of Public Comments

The **Public Citizen Litigation Group** (00-AP-005) opposes the amendment. The Group argues that Rule 1(b) "is an appropriate reminder that the Rules are not intended to create, expand, or reduce the jurisdiction of the federal courts." As to the Committee's concern about §§ 1292(e) and 2072(c), the Group argues that rules enacted under § 2072(c) would not truly "extend" the jurisdiction of the

federal courts, and, in any event, that Rule 1(b) should not be repealed "based on what the Rules Committee and ultimately the Supreme Court *might* do in the future." The Group argues that, if and when the Committee and the Supreme Court act under § 1292(e), they can simultaneously amend Rule 1(b). Finally, the Group suggests that, if the Committee is intent on acting at this time, it should not abrogate Rule 1(b), but instead add the following at the end of the rule: "except as authorized by an Act of Congress permitting the promulgation of rules affecting the jurisdiction of the courts of appeals."

Judge Frank H. Easterbrook (7th Cir.) (00-AP-012) supports the proposal, because Rule 1(b) "has never been true, given Rule 4 (and a few others)."

The **Appellate Practice Committee of the Commercial and Federal Litigation Section of the New York State Bar Association** (00-AP-017) does not oppose the proposal, but warns that it would have serious reservations about any future attempt by any of the rules committees "to weaken the final-decision rule or to enlarge the categories in which interlocutory appeals now are allowed."

The **National Association of Criminal Defense Lawyers** (00-AP-019) regards the proposed abrogation of Rule 1(b) as "undesirable, because of the probability of unintended consequences in other areas." It suggests that, instead of abrogating Rule 1(b), the Advisory Committee should insert the phrase "Except as expressly authorized by statute" at the beginning of the rule.

The Association's particular concern is the alleged conflict between Rule 4(b)(1)(B) — which permits the government to file an appeal in a criminal case within 30 days after entry of the order being appealed — and 18 U.S.C. § 3731 — which requires the government

to file an appeal in a criminal case within 30 days after the challenged order "has been rendered." Because "rendered" means "announced" rather than "entered," and because § 3731 is jurisdictional, Rule 4(b)(1)(B) is "presently invalid" as it extends the jurisdiction of the courts of appeals. The Association is concerned that "[r]epeal of Rule 1(b) could . . . be interpreted to mean that the Conference thinks Rule 4(b)'s timing language now extends the jurisdiction of the court of appeals."

The **Advisory Committee on Procedures for the D.C. Circuit** (00-AP-020) supports the proposal.

Rule 4. Appeal as of Right — When Taken

(a) Appeal in a Civil Case.

(1) Time for Filing a Notice of Appeal.

(A) In a civil case, except as provided in Rules 4(a)(1)(B), 4(a)(4), and 4(c), the notice of appeal required by Rule 3 must be filed with the district clerk within 30 days after the judgment or order appealed from is entered.

(B) When the United States or its officer or agency is a party, the notice of appeal may be

filed by any party within 60 days after the judgment or order appealed from is entered.

(C) An appeal from an order granting or denying an application for a writ of error *coram nobis* is an appeal in a civil case for purposes of Rule 4(a).

* * * * *

Committee Note

Subdivision (a)(1)(C). The federal courts of appeals have reached conflicting conclusions about whether an appeal from an order granting or denying an application for a writ of error *coram nobis* is governed by the time limitations of Rule 4(a) (which apply in civil cases) or by the time limitations of Rule 4(b) (which apply in criminal cases). *Compare United States v. Craig*, 907 F.2d 653, 655-57, *amended* 919 F.2d 57 (7th Cir. 1990); *United States v. Cooper*, 876 F.2d 1192, 1193-94 (5th Cir. 1989); and *United States v. Keogh*, 391 F.2d 138, 140 (2d Cir. 1968) (applying the time limitations of Rule 4(a)); *with Yasui v. United States*, 772 F.2d 1496, 1498-99 (9th Cir. 1985); and *United States v. Mills*, 430 F.2d 526, 527-28 (8th Cir. 1970) (applying the time limitations of Rule 4(b)). A new part (C) has been added to Rule 4(a)(1) to resolve this conflict by providing that the time limitations of Rule 4(a) will apply.

Subsequent to the enactment of Fed. R. Civ. P. 60(b) and 28 U.S.C. § 2255, the Supreme Court has recognized the continued

availability of a writ of error *coram nobis* in at least one narrow circumstance. In 1954, the Court permitted a litigant who had been convicted of a crime, served his full sentence, and been released from prison, but who was continuing to suffer a legal disability on account of the conviction, to seek a writ of error *coram nobis* to set aside the conviction. *United States v. Morgan*, 346 U.S. 502 (1954). As the Court recognized, in the *Morgan* situation an application for a writ of error *coram nobis* "is of the same general character as [a motion] under 28 U.S.C. § 2255." *Id.* at 506 n.4. Thus, it seems appropriate that the time limitations of Rule 4(a), which apply when a district court grants or denies relief under 28 U.S.C. § 2255, should also apply when a district court grants or denies a writ of error *coram nobis*. In addition, the strong public interest in the speedy resolution of criminal appeals that is reflected in the shortened deadlines of Rule 4(b) is not present in the *Morgan* situation, as the party seeking the writ of error *coram nobis* has already served his or her full sentence.

Notwithstanding *Morgan*, it is not clear whether the Supreme Court continues to believe that the writ of error *coram nobis* is available in federal court. In civil cases, the writ has been expressly abolished by Fed. R. Civ. P. 60(b). In criminal cases, the Supreme Court has recently stated that it has become "'difficult to conceive of a situation'" in which the writ "'would be necessary or appropriate.'" *Carlisle v. United States*, 517 U.S. 416, 429 (1996) (quoting *United States v. Smith*, 331 U.S. 469, 475 n.4 (1947)). The amendment to Rule 4(a)(1) is not intended to express any view on this issue; rather, it is merely meant to specify time limitations for appeals.

Rule 4(a)(1)(C) applies only to motions that are in substance, and not merely in form, applications for writs of error *coram nobis*. Litigants may bring and label as applications for a writ of error *coram nobis* what are in reality motions for a new trial under Fed. R. Crim.

P. 33 or motions for correction or reduction of a sentence under Fed. R. Crim. P. 35. In such cases, the time limitations of Rule 4(b), and not those of Rule 4(a), should be enforced.

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1. Recommendation

The Committee proposes to add a new Rule 4(a)(1)(C) to provide that an appeal from an order granting or denying an application for a writ of error *coram nobis* is governed by the time limitations of Rule 4(a) (which apply in civil cases) and not by the time limitations of Rule 4(b) (which apply in criminal cases).

2. Changes Made After Publication and Comments

No changes were made to the text of the proposed amendment or to the Committee Note.

3. Summary of Public Comments

The **Public Citizen Litigation Group** (00-AP-005) supports the proposal.

Judge Frank H. Easterbrook (7th Cir.) (00-AP-012) objects that "[t]his new text . . . is not parallel to subsections (A) and (B) of Rule 4(a)(1)." He recommends eliminating subsection (C) and instead amending the first sentence of Rule 4(a)(1) to begin "In a civil case (including coram nobis) . . . ." More broadly, Judge Easterbrook objects to amending Rule 4 to specifically address coram nobis cases: "Why deal separately with a single kind of motion — and an abolished one at that! . . . Rule 4(a) is limited to civil cases; but Rule 60(b)

abolishes coram nobis in civil cases. The Committee Note tries to deal with this incongruity, but unsuccessfully."

Finally, Judge Easterbrook believes that, if the coram nobis problem is to be addressed, it should be addressed as part of a general rule that classifies the many "post-judgment motions in criminal cases that might, or might not, be deemed 'civil' and thus afforded 30 days for appeal." He suggests adding to FRAP either a general rule for classifying motions made in criminal cases — e.g., "an order formally in a criminal case is treated as civil for purposes of this rule unless it is a sentence of imprisonment or a criminal fine" — or a rule that lists various motions and classifies them as either civil or criminal. Judge Easterbrook says that the Seventh Circuit has had "no trouble classifying coram nobis as civil, but *lots* of trouble" with other motions, such as forfeiture and post-judgment motions for return of property.

The **National Association of Criminal Defense Lawyers** (00-AP-019) supports the proposal.

The **Advisory Committee on Procedures for the D.C. Circuit** (00-AP-020) supports the proposal.

Rule 4. Appeal as of Right — When Taken

(a) Appeal in a Civil Case.

* * * * *

(5) Motion for Extension of Time.

(A) The district court may extend the time to file a notice of appeal if:

(i) a party so moves no later than 30 days after the time prescribed by this Rule 4(a) expires; and

(ii) regardless of whether its motion is filed before or during the 30 days after the time prescribed by this Rule 4(a) expires, that party shows excusable neglect or good cause.

* * * * *

Committee Note

Subdivision (a)(5)(A)(ii). Rule 4(a)(5)(A) permits the district court to extend the time to file a notice of appeal if two conditions are met. First, the party seeking the extension must file its motion no later than 30 days after the expiration of the time originally prescribed by Rule 4(a). Second, the party seeking the extension must show either excusable neglect or good cause. The text of Rule 4(a)(5)(A) does not distinguish between motions filed prior to the expiration of the original deadline and those filed after the expiration of the original deadline. Regardless of whether the motion is filed before or during

the 30 days after the original deadline expires, the district court may grant an extension if a party shows either excusable neglect or good cause.

Despite the text of Rule 4(a)(5)(A), most of the courts of appeals have held that the good cause standard applies only to motions brought prior to the expiration of the original deadline and that the excusable neglect standard applies only to motions brought during the 30 days following the expiration of the original deadline. *See Pontarelli v. Stone*, 930 F.2d 104, 109-10 (1st Cir. 1991) (collecting cases from the Second, Fifth, Sixth, Seventh, Eighth, Ninth, and Eleventh Circuits). These courts have relied heavily upon the Advisory Committee Note to the 1979 amendment to Rule 4(a)(5). But the Advisory Committee Note refers to a draft of the 1979 amendment that was ultimately rejected. The rejected draft directed that the good cause standard apply only to motions filed prior to the expiration of the original deadline. Rule 4(a)(5), as actually amended, did not. *See* 16A CHARLES ALAN WRIGHT, ET AL., FEDERAL PRACTICE AND PROCEDURE § 3950.3, at 148-49 (2d ed. 1996).

The failure of the courts of appeals to apply Rule 4(a)(5)(A) as written has also created tension between that rule and Rule 4(b)(4). As amended in 1998, Rule 4(b)(4) permits the district court to extend the time for filing a notice of appeal in a *criminal* case for an additional 30 days upon a finding of excusable neglect or good cause. Both Rule 4(b)(4) and the Advisory Committee Note to the 1998 amendment make it clear that an extension can be granted for either excusable neglect or good cause, regardless of whether a motion for an extension is filed before or during the 30 days following the expiration of the original deadline.

Rule 4(a)(5)(A)(ii) has been amended to correct this misunderstanding and to bring the rule in harmony in this respect with

Rule 4(b)(4). A motion for an extension filed prior to the expiration of the original deadline may be granted if the movant shows either excusable neglect or good cause. Likewise, a motion for an extension filed during the 30 days following the expiration of the original deadline may be granted if the movant shows either excusable neglect or good cause.

The good cause and excusable neglect standards have "different domains." *Lorenzen v. Employees Retirement Plan*, 896 F.2d 228, 232 (7th Cir. 1990). They are not interchangeable, and one is not inclusive of the other. The excusable neglect standard applies in situations in which there is fault; in such situations, the need for an extension is usually occasioned by something within the control of the movant. The good cause standard applies in situations in which there is no fault — excusable or otherwise. In such situations, the need for an extension is usually occasioned by something that is not within the control of the movant.

Thus, the good cause standard can apply to motions brought during the 30 days following the expiration of the original deadline. If, for example, the Postal Service fails to deliver a notice of appeal, a movant might have good cause to seek a post-expiration extension. It may be unfair to make such a movant prove that its "neglect" was excusable, given that the movant may not have been neglectful at all. Similarly, the excusable neglect standard can apply to motions brought prior to the expiration of the original deadline. For example, a movant may bring a pre-expiration motion for an extension of time when an error committed by the movant makes it unlikely that the movant will be able to meet the original deadline.

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1. Recommendation

The Committee proposes to amend Rule 4(a)(5)(A)(ii) to provide that a district court may extend the time to file a notice of appeal upon timely motion of a party if the party shows either excusable neglect or good cause, regardless of whether the motion is filed within the unextended appeal time or within the next 30 days.

2. Changes Made After Publication and Comments

No changes were made to the text of the proposed amendment. The stylistic changes to the Committee Note suggested by Judge Newman were adopted. In addition, two paragraphs were added at the end of the Committee Note to clarify the difference between the good cause and excusable neglect standards.

3. Summary of Public Comments

The **United States Postal Service** (00-AP-003) agrees that Rule 4(a)(5)(A) should be amended to resolve the circuit split, but argues that the rule should endorse the view of the majority of the courts of appeals — i.e., that the good cause standard should apply to motions brought prior to the expiration of the original deadline and the excusable neglect standard should apply to motions brought after the expiration of the original deadline. As the owner or leaser of large amounts of real estate in the United States, the Postal Service "is extremely concerned with state and federal rules and statutes that determine when adjudications of disputes over title have become final." The Postal Service believes that the Committee's proposal makes it too easy for litigants to get permission to file untimely notices of appeal and thus to lengthen judicial proceedings.

The **Public Citizen Litigation Group** (00-AP-005) supports the proposal, agreeing that it reinforces the current text of the rule and promotes harmony with Rule 4(b)(4).

Judge Jon O. Newman (2d Cir.) (00-AP-008) suggests revising the Committee Note to correct two instances in which, in Judge Newman's view, the Committee Note implies that a motion for an extension can be filed *any* time after expiration of the original deadline, rather than just within 30 days. Judge Newman's suggested changes are as follows:

> Despite the text of Rule 4(a)(5)(A), most of the courts of appeals have held that the good cause standard applies only to motions brought prior to the expiration of the original deadline and that the excusable neglect standard applies only to motions brought ~~after the expiration of the original deadline~~ during the 30 days following the expiration of the original deadline. . . .
>
> Both Rule 4(b)(4) and the Advisory Committee Note to the 1998 amendment make it clear that an extension can be granted for either excusable neglect or good cause, regardless of whether a motion for an extension is filed before or ~~after the time prescribed by Rule 4(b) expires~~ during the 30 days following the expiration of the original deadline.

Committee on Federal Civil Procedure of the American College of Trial Lawyers (00-AP-010) agrees that the position of the majority of the circuits cannot be reconciled with the text of the existing rule. However, the Committee urges that "the Rule [be amended] to conform to existing practice, rather than requiring existing practice to change to conform to the amendment." The 30-day deadline for bringing appeals is extremely important, as it provides certainty to parties and attorneys. Few motions to extend brought

after the deadline expires are successful, as the excusable neglect standard is "quite strict." To permit such motions to be granted on a mere showing of good cause — that is, a showing of "neglect [that] was *not* excusable" — would introduce uncertainty and delay into appellate proceedings. "The Advisory Committee Note does not explain why, if a party's failure to act in a timely fashion is inexcusable, the prevailing adversary should be subject to upsetting what would otherwise be a final, nonappealable judgment. Nor . . . does the Advisor[y] Committee explain just what good cause is intended to convey in a circumstance in which the party has inexcusably failed to file a motion to extend within the original 30-day period."

Judge Frank H. Easterbrook (7th Cir.) (00-AP-012) does not object to the substance of the proposal, but finds it awkwardly worded. Judge Easterbrook complains that the rule, as drafted, takes the form: "The district court may extend the time if (a) a party so moves; and (b) regardless of whether the motion is filed at time T, then condition B holds." Such a structure — "A and, regardless whether T, then B" — is, Judge Easterbrook says, non-parallel and hard to follow. He suggests that the text of Rule 4(a)(5)(A) be left alone and that a new provision be added, either as an unnumbered paragraph or as a new subsection (B) (necessitating the renumbering of current subsections (B) and (C)).

The **Appellate Practice Committee of the Commercial and Federal Litigation Section of the New York State Bar Association** (00-AP-017) supports the proposal, although it regrets that the proposal is necessitated by the failure of courts to apply the rule as written.

The **Advisory Committee on Procedures for the D.C. Circuit** (00-AP-020) agrees that Rule 4(a)(5)(A) should be amended to

resolve the circuit split, but argues that the rule should endorse the view of the majority of the courts of appeals — i.e., that the good cause standard should apply to motions brought prior to the expiration of the original deadline and the excusable neglect standard should apply to motions brought after the expiration of the original deadline. Failing that, the Committee urges that the Committee Note be expanded to explain the difference between the good cause and excusable neglect standards, and to explain how the good cause standard could apply to "post-expiration" motions and how the excusable neglect standard could apply to "pre-expiration" motions.

Rule 4. Appeal as of Right — When Taken

(a) Appeal in a Civil Case.

* * * * *

(7) **Entry Defined.**

(A) A judgment or order is entered for purposes of this Rule 4(a):

(i) if Federal Rule of Civil Procedure 58(a)(1) does not require a separate document, when ~~it~~ the judgment or order is entered in ~~compliance with Rules 58 and~~ the civil docket under

Federal Rule of Civil Procedure 79(a);

or

(ii) if Federal Rule of Civil Procedure 58(a)(1) requires a separate document, when the judgment or order is entered in the civil docket under Federal Rule of Civil Procedure 79(a) and when the earlier of these events occurs:

- the judgment or order is set forth on a separate document, or
- 150 days have run from entry of the judgment or order in the civil docket under Federal Rule of Civil Procedure 79(a).

(B) A failure to set forth a judgment or order on a separate document when required by Federal Rule of Civil Procedure 58(a)(1) does

not affect the validity of an appeal from that judgment or order.

* * * * *

Committee Note

Subdivision (a)(7). Several circuit splits have arisen out of uncertainties about how Rule 4(a)(7)'s definition of when a judgment or order is "entered" interacts with the requirement in Fed. R. Civ. P. 58 that, to be "effective," a judgment must be set forth on a separate document. Rule 4(a)(7) and Fed. R. Civ. P. 58 have been amended to resolve those splits.

1. The first circuit split addressed by the amendments to Rule 4(a)(7) and Fed. R. Civ. P. 58 concerns the extent to which orders that dispose of post-judgment motions must be set forth on separate documents. Under Rule 4(a)(4)(A), the filing of certain post-judgment motions tolls the time to appeal the underlying judgment until the "entry" of the order disposing of the last such remaining motion. Courts have disagreed about whether such an order must be set forth on a separate document before it is treated as "entered." This disagreement reflects a broader dispute among courts about whether Rule 4(a)(7) independently imposes a separate document requirement (a requirement that is distinct from the separate document requirement that is imposed by the Federal Rules of Civil Procedure ("FRCP")) or whether Rule 4(a)(7) instead incorporates the separate document requirement as it exists in the FRCP. Further complicating the matter, courts in the former "camp" disagree among themselves about the scope of the separate document requirement that they interpret Rule 4(a)(7) as imposing, and courts in the latter "camp"

disagree among themselves about the scope of the separate document requirement imposed by the FRCP.

Rule 4(a)(7) has been amended to make clear that it simply incorporates the separate document requirement as it exists in Fed. R. Civ. P. 58. If Fed. R. Civ. P. 58 does not require that a judgment or order be set forth on a separate document, then neither does Rule 4(a)(7); the judgment or order will be deemed entered for purposes of Rule 4(a) when it is entered in the civil docket. If Fed. R. Civ. P. 58 requires that a judgment or order be set forth on a separate document, then so does Rule 4(a)(7); the judgment or order will not be deemed entered for purposes of Rule 4(a) until it is so set forth and entered in the civil docket (with one important exception, described below).

In conjunction with the amendment to Rule 4(a)(7), Fed. R. Civ. P. 58 has been amended to provide that orders disposing of the post-judgment motions listed in new Fed. R. Civ. P. 58(a)(1) (which post-judgment motions include, but are not limited to, the post-judgment motions that can toll the time to appeal under Rule 4(a)(4)(A)) do not have to be set forth on separate documents. *See* Fed. R. Civ. P. 58(a)(1). Thus, such orders are entered for purposes of Rule 4(a) when they are entered in the civil docket pursuant to Fed. R. Civ. P. 79(a). *See* Rule 4(a)(7)(A)(i).

2. The second circuit split addressed by the amendments to Rule 4(a)(7) and Fed. R. Civ. P. 58 concerns the following question: When a judgment or order is required to be set forth on a separate document under Fed. R. Civ. P. 58 but is not, does the time to appeal the judgment or order — or the time to bring post-judgment motions, such as a motion for a new trial under Fed. R. Civ. P. 59 — ever begin to run? According to every circuit except the First Circuit, the answer is "no." The First Circuit alone holds that parties will be deemed to have waived their right to have a judgment or order

entered on a separate document three months after the judgment or order is entered in the civil docket. *See Fiore v. Washington County Community Mental Health Ctr.*, 960 F.2d 229, 236 (1st Cir. 1992) (en banc). Other circuits have rejected this cap as contrary to the relevant rules. *See, e.g.*, *United States v. Haynes*, 158 F.3d 1327, 1331 (D.C. Cir. 1998); *Hammack v. Baroid Corp.*, 142 F.3d 266, 269-70 (5th Cir. 1998); *Rubin v. Schottenstein, Zox & Dunn*, 110 F.3d 1247, 1253 n.4 (6th Cir. 1997), *vacated on other grounds*, 143 F.3d 263 (6th Cir. 1998) (en banc). However, no court has questioned the wisdom of imposing such a cap as a matter of policy.

Both Rule 4(a)(7)(A) and Fed. R. Civ. P. 58 have been amended to impose such a cap. Under the amendments, a judgment or order is generally treated as entered when it is entered in the civil docket pursuant to Fed. R. Civ. P. 79(a). There is one exception: When Fed. R. Civ. P. 58(a)(1) requires the judgment or order to be set forth on a separate document, that judgment or order is not treated as entered until it is set forth on a separate document (in addition to being entered in the civil docket) or until the expiration of 150 days after its entry in the civil docket, whichever occurs first. This cap will ensure that parties will not be given forever to appeal (or to bring a post-judgment motion) when a court fails to set forth a judgment or order on a separate document in violation of Fed. R. Civ. P. 58(a)(1).

3. The third circuit split — this split addressed only by the amendment to Rule 4(a)(7) — concerns whether the appellant may waive the separate document requirement over the objection of the appellee. In *Bankers Trust Co. v. Mallis*, 435 U.S. 381, 387 (1978) (per curiam), the Supreme Court held that the "parties to an appeal may waive the separate-judgment requirement of Rule 58." Specifically, the Supreme Court held that when a district court enters an order and "clearly evidence[s] its intent that the . . . order . . . represent[s] the final decision in the case," the order is a "final

decision" for purposes of 28 U.S.C. § 1291, even if the order has not been set forth on a separate document for purposes of Fed. R. Civ. P. 58. *Id.* Thus, the parties can choose to appeal without waiting for the order to be set forth on a separate document.

Courts have disagreed about whether the consent of all parties is necessary to waive the separate document requirement. Some circuits permit appellees to object to attempted *Mallis* waivers and to force appellants to return to the trial court, request that judgment be set forth on a separate document, and appeal a second time. *See, e.g.*, *Selletti v. Carey*, 173 F.3d 104, 109-10 (2d Cir. 1999); *Williams v. Borg*, 139 F.3d 737, 739-40 (9th Cir. 1998); *Silver Star Enters., Inc. v. M/V Saramacca*, 19 F.3d 1008, 1013 (5th Cir. 1994). Other courts disagree and permit *Mallis* waivers even if the appellee objects. *See, e.g.*, *Haynes*, 158 F.3d at 1331; *Miller v. Artistic Cleaners*, 153 F.3d 781, 783-84 (7th Cir. 1998); *Alvord-Polk, Inc. v. F. Schumacher & Co.*, 37 F.3d 996, 1006 n.8 (3d Cir. 1994).

New Rule 4(a)(7)(B) is intended both to codify the Supreme Court's holding in *Mallis* and to make clear that the decision whether to waive the requirement that the judgment or order be set forth on a separate document is the appellant's alone. It is, after all, the appellant who needs a clear signal as to when the time to file a notice of appeal has begun to run. If the appellant chooses to bring an appeal without waiting for the judgment or order to be set forth on a separate document, then there is no reason why the appellee should be able to object. All that would result from honoring the appellee's objection would be delay.

4. The final circuit split addressed by the amendment to Rule 4(a)(7) concerns the question whether an appellant who chooses to waive the separate document requirement must appeal within 30 days (60 days if the government is a party) from the entry in the civil

docket of the judgment or order that should have been set forth on a separate document but was not. In *Townsend v. Lucas*, 745 F.2d 933 (5th Cir. 1984), the district court dismissed a 28 U.S.C. § 2254 action on May 6, 1983, but failed to set forth the judgment on a separate document. The plaintiff appealed on January 10, 1984. The Fifth Circuit dismissed the appeal, reasoning that, if the plaintiff waived the separate document requirement, then his appeal would be from the May 6 order, and if his appeal was from the May 6 order, then it was untimely under Rule 4(a)(1). The Fifth Circuit stressed that the plaintiff could return to the district court, move that the judgment be set forth on a separate document, and appeal from that judgment within 30 days. *Id.* at 934. Several other cases have embraced the *Townsend* approach. *See, e.g., Armstrong v. Ahitow*, 36 F.3d 574, 575 (7th Cir. 1994) (per curiam); *Hughes v. Halifax County Sch. Bd.*, 823 F.2d 832, 835-36 (4th Cir. 1987); *Harris v. McCarthy*, 790 F.2d 753, 756 n.1 (9th Cir. 1986).

Those cases are in the distinct minority. There are numerous cases in which courts have heard appeals that were not filed within 30 days (60 days if the government was a party) from the judgment or order that should have been set forth on a separate document but was not. *See, e.g., Haynes*, 158 F.3d at 1330-31; *Clough v. Rush*, 959 F.2d 182, 186 (10th Cir. 1992); *McCalden v. California Library Ass'n*, 955 F.2d 1214, 1218-19 (9th Cir. 1990). In the view of these courts, the remand in *Townsend* was "precisely the purposeless spinning of wheels abjured by the Court in the [*Mallis*] case." 15B CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 3915, at 259 n.8 (3d ed. 1992).

The Committee agrees with the majority of courts that have rejected the *Townsend* approach. In drafting new Rule 4(a)(7)(B), the Committee has been careful to avoid phrases such as "otherwise timely appeal" that might imply an endorsement of *Townsend*.

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1. Recommendation

The Committee proposes to amend Rule 4(a)(7) to resolve several circuit splits over questions that arise when a party seeks to appeal a judgment or order that is required to be set forth on a separate document but is not. In conjunction with concurrently proposed amendments to FRCP 58, the amendment to Rule 4(a)(7) would provide the following: (1) Orders disposing of the post-judgment motions that can toll the time to appeal under Rule 4(a)(4)(A) do not have to be set forth on separate documents. (2) When proposed FRCP 58 requires a judgment or order to be set forth on a separate document, that judgment or order is not entered until it is so set forth or until the expiration of 150 days after its entry in the civil docket, whichever occurs first. (3) An appellant may waive the separate document requirement and appeal an otherwise appealable judgment or order, even if the appellee objects. (4) An appellant may choose to waive the separate document requirement more than 30 days (60 days if the government is a party) after entry in the civil docket of the judgment or order that should have been set forth on a separate document but was not.

2. Changes Made After Publication and Comments

No changes were made to the text of proposed Rule 4(a)(7)(**B**) or to the third or fourth numbered sections of the Committee Note, except that, in several places, references to a judgment being "entered" on a separate document were changed to references to a judgment being "set forth" on a separate document. This was to maintain stylistic consistency. The appellate rules and the civil rules consistently refer to "entering" judgments on the civil docket and to "setting forth" judgments on separate documents.

Two major changes were made to the text of proposed Rule 4(a)(7)(A) — one substantive and one stylistic. The substantive change was to increase the "cap" from 60 days to 150 days. The Appellate Rules Committee and the Civil Rules Committee had to balance two concerns that are implicated whenever a court fails to enter its final decision on a separate document. On the one hand, potential appellants need a clear signal that the time to appeal has begun to run, so that they do not unknowingly forfeit their rights. On the other hand, the time to appeal cannot be allowed to run forever. A party who receives no notice whatsoever of a judgment has only 180 days to move to reopen the time to appeal from that judgment. *See* Rule 4(a)(6)(A). It hardly seems fair to give a party who *does* receive notice of a judgment an unlimited amount of time to appeal, merely because that judgment was not set forth on a separate piece of paper. Potential appellees and the judicial system need *some* limit on the time within which appeals can be brought.

The 150-day cap properly balances these two concerns. When an order is not set forth on a separate document, what signals litigants that the order is final and appealable is a lack of further activity from the court. A 60-day period of inactivity is not sufficiently rare to signal to litigants that the court has entered its last order. By contrast, 150 days of inactivity is much less common and thus more clearly signals to litigants that the court is done with their case.

The major stylistic change to Rule 4(a)(7) requires some explanation. In the published draft, proposed Rule 4(a)(7)(A) provided that "[a] judgment or order is entered for purposes of this Rule 4(a) when it is entered for purposes of Rule 58(b) of the Federal Rules of Civil Procedure." In other words, Rule 4(a)(7)(A) told readers to look to FRCP 58(b) to ascertain when a judgment is entered for purposes of starting the running of the time to appeal. Sending appellate lawyers to the civil rules to discover when time

began to run for purposes of the appellate rules was itself somewhat awkward, but it was made more confusing by the fact that, when readers went to proposed FRCP 58(b), they found this introductory clause: "Judgment is entered for purposes of Rules 50, 52, 54(d)(2)(B), 59, 60, and 62 when . . . ."

This introductory clause was confusing for both appellate lawyers and trial lawyers. It was confusing for appellate lawyers because Rule 4(a)(7) informed them that FRCP 58(b) would tell them when the time begins to run for purposes of the *appellate* rules, but when they got to FRCP 58(b) they found a rule that, by its terms, dictated only when the time begins to run for purposes of certain *civil* rules. The introductory clause was confusing for trial lawyers because FRCP 58(b) described when judgment is entered for some purposes under the civil rules, but then was completely silent about when judgment is entered for other purposes.

To avoid this confusion, the Civil Rules Committee, on the recommendation of the Appellate Rules Committee, changed the introductory clause in FRCP 58(b) to read simply: "Judgment is entered for purposes of *these Rules* when . . . ." In addition, Rule 4(a)(7)(A) was redrafted[1] so that the triggering events for the running of the time to appeal (entry in the civil docket, and being set forth on a separate document or passage of 150 days) were incorporated directly into Rule 4(a)(7), rather than indirectly through a reference to FRCP 58(b). This eliminates the need for appellate lawyers to examine Rule 58(b) and any chance that Rule 58(b)'s introductory clause (even as modified) might confuse them.

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[1] A redraft of Rule 4(a)(7) was faxed to members of the Appellate Rules Committee two weeks after our meeting in New Orleans. The Committee consented to the redraft without objection.

We do not believe that republication of Rule 4(a)(7) or FRCP 58 is necessary. In *substance*, rewritten Rule 4(a)(7)(A) and FRCP 58(b) operate identically to the published versions, except that the 60-day cap has been replaced with a 150-day cap — a change that was suggested by some of the commentators and that makes the cap more forgiving.

3. Summary of Public Comments

Jack E. Horsley, Esq. (00-AP-002) opposes proposed Rule 4(a)(7)(B), as he believes that it creates "an open window for evasion and possible concealment."

The **Committee on Federal Courts of the Association of the Bar of the City of New York** (00-AP-004) commented only on the 60-day provision — that is, the amendment to FRCP 58 that provides that a judgment or order required to be set forth on a separate document will be deemed "entered" when it is so set forth or 60 days after it is entered in the civil docket, whichever occurs first. The Association believes that the current separate document requirement protects parties from inadvertently losing their rights to appeal "by putting the losing party firmly on notice that a final and appealable judgment had been entered." The Association opposes any weakening of the separate document requirement.

The Association expressed sympathy with this Committee's desire to address the time bomb problem, but suggests that better alternatives exist: (1) Encourage district court judges and clerks to comply with the separate document requirement. If judges and clerks would simply enter judgments and orders on separate documents, the time bomb problem would disappear. (2) Amend the appellate and civil rules to provide that the prevailing party can start the time to appeal running on a judgment or order that was not entered on a

separate document by serving notice of the entry of that judgment or order on the other parties. (3) Amend FRCP 58 as proposed, but lengthen the 60-day "safe harbor" to at least 180 days. A 6-month hiatus in court proceedings is sufficiently rare that it would provide fair notice to litigants that "the case is over at the District Court level and . . . the time for appeal has arrived."

The **Public Citizen Litigation Group** (00-AP-005) supports some of the proposed amendments to Rule 4(a)(7) and FRCP 58 and opposes others:

1. The Group supports Rule 4(a)(7). It agrees that Rule 4 should be amended to make clear that the appellate rules do not impose a separate document requirement of their own, but simply incorporate the separate document requirement of the civil rules.

2. The Group does not support amending FRCP 58 to provide that orders disposing of post-trial motions do not have to be entered on a separate document. The Group confesses that it finds this a "close question," as orders disposing of post-judgment motions "are generally discrete and imbued with finality" and thus provide notice to the losing parties that the time to appeal is running. However, in some complex cases involving multiple parties and claims and in some cases involving requests for attorneys' fees, the "finality" of a post-judgment order may not be as apparent. The Group urges that, even if the Committee goes forward with the proposed amendment, it should make clear that the separate document rule is retained for orders that dispose of motions other than those listed in proposed FRCP 58(a)(1). The Group would, however, support an amendment to FRCP 58 that would clarify that an order appealable under the collateral order doctrine does not need to be entered on a separate document.

3. The Group strongly disagrees with the 60-day provision, which, it says, "is at odds with the most valuable purpose of the separate-document rule" — its "signaling function." The Group argues that the purpose of the separate document requirement is to give parties fair notice that the time to appeal has begun to run, so that parties will not inadvertently lose their rights to appeal. The Group believes that it makes no sense to "retain the separate-document requirement and then allow it to evaporate at some point after an appealable order is entered." The Group argues that, "in the ordinary case where the losing party has notice of the relevant order (but no separate document has been entered), and does not appeal within 30 days of the entry of that order, the mere passage of an additional 60 days generally will not alert the losing party that an appeal is necessary if that party was unaware beforehand."

As to the time bomb problem, the Group makes several comments: (a) The easiest way to eliminate the time bomb problem is for district court judges and clerks to simply enter judgments and orders on separate documents, which is not difficult. (b) The time bomb problem can also easily be avoided by the winning party, who can move for entry of the judgment or order on a separate document. (c) Although the Group concedes that there are a large number of published decisions addressing the failure to enter a judgment or order on a separate document, it does not believe that the time bomb problem is significant and, in any event, it believes that the number of cases involving time bombs are dwarfed by the number of cases "in which potential appellants are well served by the signaling function of FRCP 58." (d) Cases in which appeals are not brought until long after the judgment or order is entered "generally are cases of genuine ambiguity as to whether the underlying order is 'final' for purposes of appeal."

4. The Group supports proposed Rule 4(a)(7)(B). It agrees that the decision whether to waive the separate document requirement should be the appellant's alone, and it agrees with the rejection of *Townsend*'s holding. The Group points out, though, that the rejection of *Townsend* will have only limited practical consequences if the 60-day provision is retained.

Prof. Bradley Scott Shannon (00-AP-007) submitted a lengthy and complicated comment. He acknowledges the seriousness of the problems addressed by the amendments to Rule 4 and FRCP 58; in fact, he argues that "[d]ramatic reform in this area is desperately needed."

The thrust of Prof. Shannon's comment is that the problems that concern the Advisory Committee are rooted not in the separate document requirement of FRCP 58, but in the manner in which "judgment" is defined in FRCP 54(a). FRCP 58 requires that every "judgment" be entered on a separate document. According to Prof. Shannon, district court judges and clerks are aware of this requirement and try to comply with it. The problem is in deciding when the court has issued a "judgment." Under FRCP 54(a), whether a court action is a "judgment" turns upon whether that action is appealable, and ascertaining the appealability of court actions is often extremely difficult. In short, the reason for the widespread non-compliance with FRCP 58 is that judges and clerks often guess wrong in trying to ascertain whether a court action is appealable, and thus a "judgment" for purposes of FRCP 54(a).

Prof. Shannon discusses other problems with the way FRCP 54(a) defines judgment. He argues, for example, that court proceedings can be terminated with orders that are final but are not appealable. In such cases, nothing denominated a "final judgment" is ever entered on a separate document.

The Committee Note to the amendment to FRCP 58 acknowledges that a literal application of FRCP 54(a) would create "many horrid theoretical problems" that could be solved only by "[d]rastic surgery on Rules 54(a) and 58." The Civil Rules Committee declined to undertake such "[d]rastic surgery," as it believes that these theoretical problems "seem to have caused no real difficulty" in practice.

Prof. Shannon disagrees with the Committee. As noted, he believes that, among other problems, the definition of "judgment" in FRCP 54(a) creates the time bomb problem. Although Prof. Shannon "understand[s]" the Committee's "caution" in employing an "incremental approach," he urges a wholesale revision of FRCP 54(a). In particular, he urges that whether an order is defined as a "judgment" under FRCP 54(a) — and thus must be entered on a separate document under FRCP 58 — should turn not on whether the order is *appealable*, but on whether the order is *final*. Prof. Shannon cites as among the advantages of this approach the fact that ascertaining finality would be easier than ascertaining appealability. He also argues that his approach would assure that the *conclusion* of every civil action (the entry of a separate document entitled "final judgment") would be as clearly delineated as the *commencement* of every civil action (the filing of a complaint).

The **Advisory Committee on Rules of Practice & Internal Operating Procedure of the United States Court of Appeals for the Ninth Circuit** (00-AP-011) expresses no opinion on Rule 4(a)(7) specifically, but recommends changes to the proposed amendments to FRCP 58. The Committee is concerned that, as drafted, new FRCP 58 will lead parties to believe that the time to appeal does not begin to run on an appealable order until the order is entered on a separate document. The Committee fears that this will result in the inadvertent loss of appellate rights by parties who believe that, as long as an order

is not entered on a separate document, it does not have to be appealed. The Committee also fears that this will result in district courts being deluged by requests from winning parties to enter all orders on separate documents — even orders to which the separate document requirement does not apply — to ensure that the time to appeal begins to run.

The Committee proposes a redraft of FRCP 58. The redraft of FRCP 58(a) provides that only a judgment "that terminates a district court action" must be set forth on a separate document, and explicitly provides that "[a]ppealable interlocutory orders, partial judgments certified pursuant to FRCP 54(b), and appealable post-judgment orders do not require a separate document." The redraft of FRCP 58(b) adds language providing that, in cases in which a separate document is *not* required but nevertheless entered, the judgment will be deemed "entered" upon the later of (1) the entry date of the judgment or (2) the entry date of the separate document.

Judge Frank H. Easterbrook (7th Cir.) (00-AP-012) seems to have two major concerns about the proposed revisions to Rule 4(a)(7)(B).

First, Judge Easterbrook objects to the use of the word "validity." He states that appeals can be "proper" or "effective," but not "valid." He also contends that "the point of this change is not that notices of appeal are valid, but that particular decisions are deemed *final*, and it is finality that makes an appeal proper."

Second, Judge Easterbrook essentially opposes the 60-day provision and favors retaining the separate document requirement as it exists. He argues that, without the warning provided by a separate document, some litigants will fail to recognize that the time to appeal has begun to run and find themselves "hornswoggled out of their

appeals." He argues that other litigants will "pepper courts of appeals with arguments that one or another decision marked the 'real' end of the case, so that the clock must be deemed to have started more than 30 days before the notice of appeal." Still other litigants will "bombard[] the court with notices of appeal from everything that might in retrospect be deemed a conclusive order."

The **Appellate Practice Section of the State Bar of Michigan** (00-AP-13) opposes the 60-day provision, because of the possibility that litigants could find themselves foreclosed from being able to appeal without the "readily defined trigger" provided by the separate document requirement. As to the time bomb problem that the 60-day provision eliminates, the Section has three comments: (1) the problem would not exist if district courts would simply comply with the separate document requirement; (2) winning litigants can always protect themselves against time bombs by moving to have the judgment or order entered on a separate document; and (3) the Section questions "whether there are actually enough 'problem' cases to justify adoption of a 60-day rule."

The **Los Angeles County Bar Association Appellate Courts Committee** (00-AP-014) "heartily endorses" the proposal, which, it believes, will provide "greater certainty" in an area that is now "fraught with peril and confusion."

Michael Zachary, Esq. (00-AP-015), a supervisory staff attorney for the Second Circuit, does not object to the proposed changes to FRAP 4(a)(7), but has three concerns about the proposed changes to FRCP 58:

First, Mr. Zachary states that proposed FRCP 58(b) "appears to establish a new benchmark for determining a judgment's entry date: the date it is 'set forth' in a separate document, as opposed to the date

of entry in the civil docket." He complains that "set forth" is ambiguous; it is "not defined anywhere" and it could be interpreted to refer to "the date the separate document is written, or the date it is signed by a judge or clerk of court, or the date it is filed or entered."

Second, Mr. Zachary argues that the use of the word "it" in proposed FRCP 58(b)(1) is ambiguous, as the word "appears to refer to a 'judgment' in a situation where no document labeled 'judgment' will exist. The relevant document will be an order, which the subsection then deems to be a judgment for judgment entry purposes."

To meet these two concerns, Mr. Zachary recommends that FRCP 58(b) be amended as follows:

> **(b) Time of Entry.** Judgment is entered for purposes of Rules 50, 52, 54(d)(2)(B), 59, 60, and 62:
>
> (1) when ~~it~~ the order disposing of the motion is entered in the civil docket under Rule 79(a), and
>
> (2) if a separate document is required by Rule 58(a)(1), upon the earlier of these events:
>
> (A) when ~~it is set forth on a separate document~~ the separate document is entered in the civil docket under Rule 79(a), or
>
> (B) when 60 days have run from entry on the civil docket under Rule 79(a).

Finally, Mr. Zachary opposes the 60-day provision because "although it prevents reactivation of dormant cases, it will return us, in part, to the pre-1963 problem of litigants unfairly losing their right

to appeal when the order terminating the case is not clear or when certain types of motions which do not affect finality are still pending." He also fears that the provision will give litigants an incentive to file a notice of appeal from every order that, although not entered on a separate document, might have been intended by the district court to terminate the case. Finally, he does not think that the time bomb problem is serious. He has not seen many time bombs in his work for the Second Circuit, and winning litigants can easily protect against time bombs by asking the court to enter judgment on a separate document.

The **Appellate Practice Committee of the Commercial and Federal Litigation Section of the New York State Bar Association** (00-AP-017) objects only to the 60-day provision. It has no objection to the remainder of the Rule 4(a)(7)/FRCP 58 proposal, including the provisions that would make clear that the appellant alone can waive the separate document requirement and that orders disposing of certain post-judgment motions need not be entered on separate documents. The Committee does note, though, that it would prefer that FRCP 58 instead provide that *all* orders disposing of post-judgment motions be entered on separate documents.

As to the 60-day provision, the Committee believes that it undermines the fundamental purpose of the separate document requirement, which is to provide litigants with a clear warning of when a judgment has been issued and the time to appeal has begun to run. The Committee concedes that the time bomb problem is "a real concern," but winning litigants can easily protect themselves from time bombs simply by asking the district court to enter judgment on a separate document.

The **Litigation Section and the Courts, Lawyers, and the Administration of Justice Section of the District of Columbia Bar**

(00-AP-018) support proposed FRCP 58(a), which would make clear that orders disposing of certain post-trial motions need not be entered on separate documents. However, the Sections oppose the 60-day provision of proposed FRCP 58(b), which, they believe, would leave litigants without clear notice that judgment has been entered and the time to appeal has begun to run. The Sections argue that the solution to the time bomb problem is to clarify the separate document requirement so that district court judges and clerks will comply with it more often. Specifically, the Sections recommend that the following sentence be added to new FRCP 58(b): "If a separate document is required by Rule 58(a)(1), only entry of the separate document shall constitute entry of the judgment." The Sections also recommend that language be added to FRCP 58 making it clear that parties may move the court to set forth a judgment on a separate documents (when the court neglects to do so), and that the court must grant such a motion.

The Sections urge that proposed Rule 4(a)(7)(B) be deleted, based upon the Sections' understanding that it, like proposed FRCP 58(b), would "eliminate the requirement for entry of a separate document of judgment as a basis for appeal."

The **Conference of Chief Bankruptcy Judges of the Ninth Circuit** (00-CV-004) "wholeheartedly supports" the proposed amendments to FRCP 54 and 58.

The **Federal Magistrate Judges Association** (00-CV-006) supports the proposed amendments to FRCP 54 and 58, which would "help clarify requirements that have been ignored in many cases" and "establish[] a basis for insuring that appeal time does not go on indefinitely."

William J. Borah, Esq. (00-CV-012) opposes the proposed amendments to FRCP 54 and 58, which, he believes, would "make the

whole issue even more confusing and complicated." He thinks it "would not be a bad idea" to abandon the separate document requirement altogether.

The **Advisory Committee on Procedures for the D.C. Circuit** (00-AP-020) supports the 60-day provision, although it urges that Rule 4(a)(7) and FRCP 58(b) be rewritten to make them easier to follow. In particular, the Committee recommends that FRCP 58(b) should make clear that a judgment that is required to be set forth on a separate document is not "entered" until it is *both* set forth on a separate document *and* entered in the civil docket.

Rule 4. Appeal as of Right — When Taken

* * * * *

(b) Appeal in a Criminal Case.

(5) **Jurisdiction.** The filing of a notice of appeal under this Rule 4(b) does not divest a district court of jurisdiction to correct a sentence under Federal Rule of Criminal Procedure 35(a), nor does the filing of a motion under 35(a) affect the validity of a notice of appeal filed before entry of the order disposing of the motion. The filing of a motion under Federal Rule of Criminal Procedure 35(a)

does not suspend the time for filing a notice of appeal from a judgment of conviction.

* * * * *

Committee Note

Subdivision (b)(5). Federal Rule of Criminal Procedure 35(a) permits a district court, acting within 7 days after the imposition of sentence, to correct an erroneous sentence in a criminal case. Some courts have held that the filing of a motion for correction of a sentence suspends the time for filing a notice of appeal from the judgment of conviction. *See, e.g.*, *United States v. Carmouche*, 138 F.3d 1014, 1016 (5th Cir. 1998) (per curiam); *United States v. Morillo*, 8 F.3d 864, 869 (1st Cir. 1993). Those courts establish conflicting timetables for appealing a judgment of conviction after the filing of a motion to correct a sentence. In the First Circuit, the time to appeal is suspended only for the period provided by Fed. R. Crim. P. 35(a) for the district court to correct a sentence; the time to appeal begins to run again once 7 days have passed after sentencing, even if the motion is still pending. By contrast, in the Fifth Circuit, the time to appeal does not begin to run again until the district court actually issues an order disposing of the motion.

Rule 4(b)(5) has been amended to eliminate the inconsistency concerning the effect of a motion to correct a sentence on the time for filing a notice of appeal. The amended rule makes clear that the time to appeal continues to run, even if a motion to correct a sentence is filed. The amendment is consistent with Rule 4(b)(3)(A), which lists the motions that toll the time to appeal, and notably omits any mention of a Fed. R. Crim. P. 35(a) motion. The amendment also should

promote certainty and minimize the likelihood of confusion concerning the time to appeal a judgment of conviction.

If a district court corrects a sentence pursuant to Fed. R. Crim. P. 35(a), the time for filing a notice of appeal of the corrected sentence under Rule 4(b)(1) would begin to run when the court enters a new judgment reflecting the corrected sentence.

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1. Recommendation

The Committee proposes to amend Rule 4(b)(5) to provide that the filing of a motion to correct a sentence under FRCrP 35(a) does not toll the time to appeal the judgment of conviction.

2. Changes Made After Publication and Comments

The reference to Federal Rule of Criminal Procedure 35(c) was changed to Rule 35(a) to reflect the pending amendment of Rule 35. The proposed amendment to Criminal Rule 35, if approved, will take effect at the same time that the proposed amendment to Appellate Rule 4 will take effect, if approved.

3. Summary of Public Comments

Judge Frank H. Easterbrook (7th Cir.) (00-AP-012) does not oppose the proposal in substance, but he thinks that Rule 4(b)(5) — which "breaks up a single thought into three long phrases" — should be restyled in its entirety. He suggests: "Neither the filing of a motion under Fed. R. Crim. P. 35(c) nor the disposition of such a motion affects the proper time to file a notice of appeal, and the filing of a notice of appeal does not affect the district court's power to act on

such a motion." Judge Easterbrook concedes that his proposal "leaves open the question whether a new (or amended) notice of appeal is necessary if the district court modified the judgment under Rule 35(c)" and "may leave an unintended negative implication about the status and effect of other post-judgment motions in criminal cases."

The **Appellate Practice Section of the State Bar of Michigan** (00-AP-013) supports the proposal. However, the Section requests that Rule 4(b) be further amended to give prosecutors and defendants the same amount of time — 30 days — to bring appeals in criminal cases.

The **National Association of Criminal Defense Lawyers** (00-AP-019) agrees that Rule 4(b)(5) should be amended to resolve the circuit split, but urges that the split be resolved differently. "Rule 35(c) motions should be treated the same way the rules treat other motions to amend a judgment — as terminating the appeal time, with a new ten days commencing upon entry of the order on the motion. . . . At the least, the rule should provide that if a timely motion to correct a sentence is filed under Rule 35(c), the time to appeal does not commence until the later of (i) the date the motion is ruled upon, or seven days after imposition of sentence (when the court's power to act expires under that rule), whichever comes first, or (ii) the entry of judgment." The Association argues that, in some cases, a defendant may not file a notice of appeal if his or her concern can be addressed through a FRCrP 35(c) motion; the defendant should not have to decide whether or not to appeal "until the final contours of the sentence are settled." Also, as the last paragraph of the Committee Note acknowledges, the revised Rule 4(b)(5) would require two notices of appeal to be filed in some cases.

The Association further urges that Rule 4(b)(1)(B)(i) be amended to resolve a conflict between the rule and 18 U.S.C. § 3731. That conflict is described above, in the summary of the Association's comments about the proposed abrogation of Rule 1(b).

Members of the **Advisory Committee on Procedures for the D.C. Circuit** (00-AP-020) disagree about the proposal. Some support it. Others propose that Rule 4(b)(5) be amended so that FRCrP 35(c) motions toll the time to appeal, but only until the court disposes of the motion or the 7-day period expires, whichever is earlier. These members point out that all circuits agree that a FRCrP 35(c) motion tolls the time to appeal; the circuits simply disagree about the length of that tolling period. Proposed Rule 4(b)(5), by contrast, would provide that a FRCrP 35(c) motion does not toll the time to appeal at all.

Rule 5. Appeal by Permission

* * * * *

(c) Form of Papers; Number of Copies. All papers must conform to Rule ~~32(a)(1)~~ 32(c)(2). Except by the court's permission, a paper must not exceed 20 pages, exclusive of the disclosure statement, the proof of service, and the accompanying documents required by Rule 5(b)(1)(E). An original and 3 copies must be filed

unless the court requires a different number by local rule or by order in a particular case.

* * * * *

Committee Note

Subdivision (c). A petition for permission to appeal, a cross-petition for permission to appeal, and an answer to a petition or cross-petition for permission to appeal are all "other papers" for purposes of Rule 32(c)(2), and all of the requirements of Rule 32(a) apply to those papers, except as provided in Rule 32(c)(2). During the 1998 restyling of the Federal Rules of Appellate Procedure, Rule 5(c) was inadvertently changed to suggest that only the requirements of Rule 32(a)(1) apply to such papers. Rule 5(c) has been amended to correct that error.

Rule 5(c) has been further amended to limit the length of papers filed under Rule 5.

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1. Recommendation

The Committee proposes to amend Rule 5(c) to correct a typographical error in a cross-reference and to impose a 20-page limit on petitions for permission to appeal, cross-petitions for permission to appeal, and answers to petitions or cross-petitions for permission to appeal.

2. Changes Made After Publication and Comments

No changes were made to the text of the proposed amendment or to the Committee Note.

3. Summary of Public Comments

The **Public Citizen Litigation Group** (00-AP-005) supports the proposal, although it urges that the limitation on the length of Rule 5 papers be expressed in words rather than pages. It suggests that Rule 5 papers be limited to 5,600 words. (Dividing the old 50 page limit for briefs into the new 14,000-word limit for briefs results in a calculation of 280 words per page; 20 pages multiplied by 280 words is 5,600 words.) The Group also suggests that typeface requirements (similar to those applied to briefs in Rule 32(a)(5)) be imposed on Rule 5 papers.

Judge Frank H. Easterbrook (7th Cir.) (00-AP-012) urges that any limit on the length of Rule 5 papers be expressed in words rather than pages, to remove the incentive for counsel to play games with type size and line spacing. He suggests 5,600 words (for the same reason as the Public Citizen Litigation Group) "or, to be generous, 6,000 words."

The **Appellate Practice Section of the State Bar of Michigan** (00-AP-013) does not oppose placing a limit on Rule 5 papers, but believes that the limit should be expressed in words, rather than in pages.

The **Los Angeles County Bar Association Appellate Courts Committee** (00-AP-014) does not oppose placing limits on Rule 5 papers, but stresses that 20 pages will be insufficient in some complex cases, and recommends that the circumstances under which a court

will grant permission to exceed the 20-page limit should be specified. At present, the proposal says only that the limit can be exceeded with "the court's permission"; it says nothing about when such permission should be granted. The Committee suggests that a "good cause" standard be incorporated into the rule — "including a list of factors that might warrant relief from the 20-page limit."

The **Appellate Practice Committee of the Commercial and Federal Litigation Section of the New York State Bar Association** (00-AP-017) supports the proposal.

The **Advisory Committee on Procedures for the D.C. Circuit** (00-AP-020) supports the proposal.

Rule 15(f)

The Committee proposed to add a new Rule 15(f) to provide that when, under governing law, an agency order is rendered non-reviewable by the filing of a petition for rehearing or similar petition with the agency, any petition for review or application to enforce that non-reviewable order would be held in abeyance and become effective when the agency disposes of the last such review-blocking petition. Proposed Rule 15(f) was modeled after Rule 4(a)(4)(B)(i) and was intended to align the treatment of premature petitions for review of agency orders with the treatment of premature notices of appeal of judicial decisions. The Committee voted to defer action on this proposal in light of the strong opposition of the Advisory Committee on Procedures for the D.C. Circuit. The Committee hopes to meet with the chief judge and clerk of the D.C. Circuit about those objections.

Rule 21. Writs of Mandamus and Prohibition, and Other Extraordinary Writs

* * * * *

(d) Form of Papers; Number of Copies. All papers must conform to Rule ~~32(a)(1)~~ 32(c)(2). Except by the court's permission, a paper must not exceed 30 pages, exclusive of the disclosure statement, the proof of service, and the accompanying documents required by Rule 21(a)(2)(C). An original and 3 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). A petition for a writ of mandamus or prohibition, an application for another extraordinary writ, and an answer to such a petition or application are all "other papers" for purposes of Rule 32(c)(2), and all of the requirements of Rule 32(a) apply to those papers, except as provided in Rule 32(c)(2). During the 1998 restyling of the Federal Rules of Appellate Procedure, Rule 21(d) was inadvertently changed to suggest that only the requirements of Rule 32(a)(1) apply to such papers. Rule 21(d) has been amended to correct that error.

Rule 21(d) has been further amended to limit the length of papers filed under Rule 21.

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1. Recommendation

The Committee proposes to amend Rule 21(d) to correct a typographical error in a cross-reference and to impose a 30-page limit on petitions for extraordinary relief (such as mandamus) and answers to those petitions.

2. Changes Made After Publication and Comments

No changes were made to the text of the proposed amendment or to the Committee Note, except that the page limit was increased from 20 pages to 30 pages. The Committee was persuaded by some commentators that petitions for extraordinary writs closely resemble principal briefs on the merits and should be allotted more than 20 pages.

3. Summary of Public Comments

The **Public Citizen Litigation Group** (00-AP-005) supports the proposal, although it urges that Rule 21 papers be limited to 5,600 words instead of 20 pages.

The **Advisory Committee on Rules of Practice & Internal Operating Procedure of the United States Court of Appeals for the Ninth Circuit** opposes the proposal, insofar as it limits Rule 21 papers to 20 pages. "Twenty pages is not enough for extraordinary writs," which are submitted "in extraordinary situations" and "under extreme time pressure without the luxury of close editing." The

Committee recommends that, if Rule 21 papers are to be limited, they be limited to 14,000 words, as are principal briefs under Rule 32(a)(7)(B).

Judge Frank H. Easterbrook (7th Cir.) (00-AP-012) urges that any limit on the length of Rule 21 papers be expressed in words rather than pages, to remove the incentive for counsel to play games with type size and line spacing. He suggests 5,600 words.

The **Appellate Practice Section of the State Bar of Michigan** (00-AP-013) does not oppose placing a limit on Rule 21 papers, but believes that the limit should be expressed in words, rather than in pages.

The **Los Angeles County Bar Association Appellate Courts Committee** (00-AP-014) is "greatly concerned" about the proposed 20-page limit on Rule 21 papers. Petitions for extraordinary relief often must "set[] forth a complicated factual or procedural background" or "survey[] a voluminous body of cases in a rapidly evolving and complex area of law." In addition, some circuits require counsel petitioning for extraordinary relief "to address a whole list of independent factors required to justify extraordinary relief." Given that 20 pages will often be insufficient, the Committee urges that the circumstances under which a court should grant permission to exceed the limit should be set forth in detail.

The **Appellate Practice Committee of the Commercial and Federal Litigation Section of the New York State Bar Association** (00-AP-017) does not oppose placing a limit on Rule 21 papers but urges that, because such papers are similar to principal briefs filed in ordinary appeals, the limits expressed in Rule 32(a)(7) should apply.

The **National Association of Criminal Defense Lawyers** (00-AP-019) does not oppose placing a limit on Rule 21 papers, but argues that the 20-page limit is "too short," and that the limit should be stated in words, not in pages. It recommends a limit of 9,500 words, "about 35 pages of traditional 12 point Courier type." "A mandamus petition has more in common with a brief on the merits than it does with most appellate motions," and therefore the limit should be longer than that applied to motion papers. At the same time, "it is the rare mandamus petition that involves more than one issue," and therefore the limit should be shorter than that applied to briefs. The Association believes that 9,500 words is "a reasonable compromise."

The **Advisory Committee on Procedures for the D.C. Circuit** (00-AP-020) supports the proposal.

Rule 24. Proceeding in Forma Pauperis

(a) Leave to Proceed in Forma Pauperis.

(1) **Motion in the District Court.** Except as stated in Rule 24(a)(3), a party to a district-court action who desires to appeal in forma pauperis must file a motion in the district court. The party must attach an affidavit that:

(A) shows in the detail prescribed by Form 4 of the Appendix of Forms the party's inability to pay or to give security for fees and costs;

(B) claims an entitlement to redress; and

(C) states the issues that the party intends to present on appeal.

(2) **Action on the Motion.** If the district court grants the motion, the party may proceed on appeal without prepaying or giving security for fees and costs, unless a statute provides otherwise. If the district court denies the motion, it must state its reasons in writing.

(3) **Prior Approval.** A party who was permitted to proceed in forma pauperis in the district-court action, or who was determined to be financially unable to obtain an adequate defense in a criminal

case, may proceed on appeal in forma pauperis without further authorization, unless:

(A) the district court — before or after the notice of appeal is filed — certifies that the appeal is not taken in good faith or finds that the party is not otherwise entitled to proceed in forma pauperis. ~~In that event, the district court must~~ and states in writing its reasons for the certification or finding; or

(B) a statute provides otherwise.

* * * * *

Committee Note

Subdivision (a)(2). Section 804 of the Prison Litigation Reform Act of 1995 ("PLRA") amended 28 U.S.C. § 1915 to require that prisoners who bring civil actions or appeals from civil actions must "pay the full amount of a filing fee." 28 U.S.C. § 1915(b)(1). Prisoners who are unable to pay the full amount of the filing fee at the time that their actions or appeals are filed are generally required to pay part of the fee and then to pay the remainder of the fee in installments. 28 U.S.C. § 1915(b). By contrast, Rule 24(a)(2) has provided that, after the district court grants a litigant's motion to proceed on appeal

in forma pauperis, the litigant may proceed "without prepaying or giving security for fees and costs." Thus, the PLRA and Rule 24(a)(2) appear to be in conflict.

Rule 24(a)(2) has been amended to resolve this conflict. Recognizing that future legislation regarding prisoner litigation is likely, the Committee has not attempted to incorporate into Rule 24 all of the requirements of the current version of 28 U.S.C. § 1915. Rather, the Committee has amended Rule 24(a)(2) to clarify that the rule is not meant to conflict with anything required by the PLRA or any other statute.

Subdivision (a)(3). Rule 24(a)(3) has also been amended to eliminate an apparent conflict with the PLRA. Rule 24(a)(3) has provided that a party who was permitted to proceed in forma pauperis in the district court may continue to proceed in forma pauperis in the court of appeals without further authorization, subject to certain conditions. The PLRA, by contrast, provides that a prisoner who was permitted to proceed in forma pauperis in the district court and who wishes to continue to proceed in forma pauperis on appeal may not do so "automatically," but must seek permission. *See, e.g., Morgan v. Haro*, 112 F.3d 788, 789 (5th Cir. 1997) ("A prisoner who seeks to proceed IFP on appeal must obtain leave to so proceed despite proceeding IFP in the district court.").

Rule 24(a)(3) has been amended to resolve this conflict. Again, recognizing that future legislation regarding prisoner litigation is likely, the Committee has not attempted to incorporate into Rule 24 all of the requirements of the current version of 28 U.S.C. § 1915. Rather, the Committee has amended Rule 24(a)(3) to clarify that the rule is not meant to conflict with anything required by the PLRA or any other statute.

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1. Recommendation

The Committee proposes to amend Rule 24(a) — which governs the ability of parties to proceed in forma pauperis on appeal — to eliminate apparent conflicts with the Prison Litigation Reform Act of 1995.

2. Changes Made After Publication and Comments

No changes were made to the text of the proposed amendment or to the Committee Note, except that "a statute provides otherwise" was substituted in place of "the law requires otherwise" in the text of the rule and conforming changes (as well as a couple of minor stylistic changes) were made to the Committee Note.

3. Summary of Public Comments

The **Public Citizen Litigation Group** (00-AP-005) supports the proposal.

Judge Frank H. Easterbrook (7th Cir.) (00-AP-012) has two objections to the proposal. First, he does not agree that the PLRA and Rule 24(a) conflict, and he complains that "[t]he Committee Note does not cite the portion of the PLRA that it perceives to be in conflict with Rule 24(a)(2)." Second, he argues that, even if there is a conflict, it is not necessary to amend Rule 24(a). The PLRA was enacted after the pre-restylized Rule 24(a), and thus the PLRA "trumps" anything in Rule 24(a). The enactment of the restylized Rule 24(a) in 1998 should not change this result, as "all of the non-substantive changes made in 1998 contain Committee Notes with a no-change-intended clause, which should be enough to keep § 2072(b) out of the picture." Finally, he objects to the phrase "the law requires otherwise." He argues that the clause should instead

read "a statute requires otherwise" (as the appellate rules are themselves "laws") and, in any event, that the clause is unnecessary — again because "[a] more recent statute always overrides the rules."

The **National Association of Criminal Defense Lawyers** (00-AP-019) has several comments:

1. In Rule 24(a)(1)(A) (which is not affected by the proposed amendments), a comma should be inserted after "shows" or the comma that appears after "Forms" should be deleted.

2. In Rule 24(a)(2), "an introductory 'Except as otherwise expressly provided by statute,'" should be substituted for the "unnecessarily imprecise" phrase "unless the law requires otherwise." The Association points out that "the law" might be "understood to include circuit precedent, for example."

3. The Association argues that Rule 24(a)(3) — both as it now exists and as amended — conflicts with the Criminal Justice Act ("CJA"). The present version of Rule 24(a)(3) provides that a party who was permitted to proceed IFP in the district court "or who was determined to be financially unable to obtain an adequate defense in a criminal case" may automatically proceed IFP on appeal, with two exceptions: The party may not proceed IFP on appeal (a) if the district court finds that the appeal is not taken in good faith, or (b) if the district court finds that the party is no longer indigent. The proposed amendment to Rule 24(a)(3) would add a third exception — if "the law requires otherwise" — a reference to the fact that the PLRA does not permit "automatic" IFP status on appeal in the cases to which the PLRA applies.

The Association argues that, in the context of *direct appeals from criminal cases*, these exceptions conflict with the CJA. Under

18 U.S.C. § 3006A(d)(7), defendants who are "determined to be financially unable to obtain an adequate defense in a criminal case" (to quote Rule 24(a)(3)) are permitted to appeal "without prepayment of fees and costs or security therefor and without filing the affidavit required by section 1915(a) of title 28." The CJA does not give district courts any authority to disallow IFP status in direct appeals in criminal cases when the courts deem the appeals "not taken in good faith." If a district court finds that a defendant is no longer indigent, it can terminate the appointment of counsel under 18 U.S.C. § 3006A(c). And the PLRA does not apply at all to criminal cases. In other words, the first exception in Rule 24(a)(3) conflicts with the CJA, the second exception is unnecessary, and the third exception is inapplicable. Thus, Rule 24(a)(3) should be amended to make it clear that it does not apply to direct appeals in criminal cases; "[e]ither a new Rule 24(a)(4) reflecting the applicable provisions of the CJA should be inserted, or the matter of criminal cases should be entirely removed from the rule and left to statutory regulation."

The **Advisory Committee on Procedures for the D.C. Circuit** (00-AP-020) supports the proposal, except that it recommends that the amendment refer to "a statute" rather than to "the law."

Rule 25. Filing and Service

* * * * *

(c) Manner of Service.

(1) Service may be any of the following:

(A) personal, including delivery to a responsible person at the office of counsel;

(B) by mail~~, or~~ ;

(C) by third-party commercial carrier for delivery within 3 calendar days~~.~~ ; or

(D) by electronic means, if the party being served consents in writing.

(2) If authorized by local rule, a party may use the court's transmission equipment to make electronic service under Rule 25(c)(1)(D).

(3) When reasonable considering such factors as the immediacy of the relief sought, distance, and cost, service on a party must be by a manner at least as expeditious as the manner used to file the paper with the court.

(4) ~~Personal service includes delivery of the copy to a responsible person at the office of counsel.~~ Service by mail or by commercial carrier is complete on mailing or delivery to the carrier. Service by

electronic means is complete on transmission, unless the party making service is notified that the paper was not received by the party served.

* * * * *

Committee Note

Rule 25(a)(2)(D) presently authorizes the courts of appeals to permit papers to be *filed* by electronic means. Rule 25 has been amended in several respects to permit papers also to be *served* electronically. In addition, Rule 25(c) has been reorganized and subdivided to make it easier to understand.

Subdivision (c)(1)(D). New subdivision (c)(1)(D) has been added to permit service to be made electronically, such as by e-mail or fax. No party may be served electronically, either by the clerk or by another party, unless the party has consented in writing to such service.

A court of appeals may not, by local rule, forbid the use of electronic service on a party that has consented to its use. At the same time, courts have considerable discretion to use local rules to regulate electronic service. Difficult and presently unforeseeable questions are likely to arise as electronic service becomes more common. Courts have the flexibility to use their local rules to address those questions. For example, courts may use local rules to set forth specific procedures that a party must follow before the party will be deemed to have given written consent to electronic service.

Parties also have the flexibility to define the terms of their consent; a party's consent to electronic service does not have to be "all-or-nothing." For example, a party may consent to service by facsimile transmission, but not by electronic mail; or a party may consent to electronic service only if "courtesy" copies of all transmissions are mailed within 24 hours; or a party may consent to electronic service of only documents that were created with Corel WordPerfect.

Subdivision (c)(2). The courts of appeals are authorized under Rule 25(a)(2)(D) to permit papers to be filed electronically. Technological advances may someday make it possible for a court to forward an electronically filed paper to all parties automatically or semi-automatically. When such court-facilitated service becomes possible, courts may decide to permit parties to use the courts' transmission facilities to serve electronically filed papers on other parties who have consented to such service. Court personnel would use the court's computer system to forward the papers, but the papers would be considered served by the filing parties, just as papers that are carried from one address to another by the United States Postal Service are considered served by the sending parties. New subdivision (c)(2) has been added so that the courts of appeals may use local rules to authorize such use of their transmission facilities, as well as to address the many questions that court-facilitated electronic service is likely to raise.

Subdivision (c)(4). The second sentence of new subdivision (c)(4) has been added to provide that electronic service is complete upon transmission. Transmission occurs when the sender performs the last act that he or she must perform to transmit a paper electronically; typically, it occurs when the sender hits the "send" or "transmit" button on an electronic mail program. There is one exception to the rule that electronic service is complete upon

transmission: If the sender is notified — by the sender's e-mail program or otherwise — that the paper was not received, service is not complete, and the sender must take additional steps to effect service. A paper has been "received" by the party on which it has been served as long as the party has the ability to retrieve it. A party cannot defeat service by choosing not to access electronic mail on its server.

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1. Recommendation

The Committee proposes to amend Rule 25(c) to authorize parties to use electronic means to serve other parties who have consented to electronic service, to permit parties to use the court's transmission facilities to make electronic service (when authorized by local rule), and to define when electronic service is complete. In addition, the Committee proposes to reorganize and subdivide Rule 25(c) to make it easier to understand.

2. Changes Made After Publication and Comments

No changes were made to the text of the proposed amendment. A paragraph was added to the Committee Note to clarify that consent to electronic service is not an "all-or-nothing" matter.

3. Summary of Public Comments

The **Public Citizen Litigation Group** (00-AP-005) generally supports the electronic service rules, but raises three concerns:

1. What does it mean to say that a party must consent "in writing"? Does an exchange of e-mail suffice? Must there be a "hard

copy" writing with an original signature? Does the consent, in whatever form, have to be filed with the court?

2. Parties should be required to serve and file a hard copy of every document that is served electronically. A document that is attached to an e-mail will be paginated differently for every recipient who opens and prints it, due to differences among e-mail and word processing programs and printers. Thus, if the parties and the court are to be able to refer to the particular page of a document, hard copies of that document will have to be served and filed.

3. There is an inconsistency between the proposed rules — which seem to envision that electronic service can serve as the sole means of serving a document — and Rule 31(b) — which requires that two copies of briefs be served on every party. The Committee should either require that parties serve hard copies of every electronically served document (as suggested above) or amend Rule 31(b) to eliminate the two-copy requirement when electronic service is used.

The **Advisory Committee on Rules of Practice & Internal Operating Procedure of the United States Court of Appeals for the Ninth Circuit** (00-AP-011) believes that several issues need to be clarified: (1) The Committee suggests that the proposed rule should "explain the difference between non-receipt of a message (it never got there) as opposed to a message that has yet to be read (the automated 'I'm out of the office' messages)." (2) The Committee also seeks clarification about "what a litigant is required to tell the court; if a party notified the court that he served a document by e-mail and then found out it didn't get there, is he required to provide the court with that update or tell the court what he did thereafter?" (3) The Committee asks what "steps or obligations" are triggered when "a

document is served by e-mail, but it cannot be read by the recipient due to formatting or other problems?"

Judge Frank H. Easterbrook (7th Cir.) (00-AP-012) is "enthusiastic" about the electronic service rules, but he objects to requiring consent "in writing." "The implication of Rule 25(c)(1)(D) that agreement must be recorded on paper before the parties may move forward electronically is incompatible with [the Electronic Signatures in Global and National Commerce Act, 15 U.S.C. §§ 7001 et seq., which permits people to make and "sign" agreements electronically]. Let people signify their agreement in whatever way they find satisfactory."

The **Appellate Practice Section of the State Bar of Michigan** (00-AP-013) generally supports the electronic service rules, but urges that "the proposed amendment [be] modified to require that electronic service be accompanied by traditional service of a hard copy of the document." The Section is concerned that, unlike service by mail or hand, electronic service will "generally go straight to an attorney's computer" rather than be "channeled through support staff." If an attorney is away from the office for several days, no one may discover that a document has been served, and a deadline to respond to the document may pass. The Section concedes that attorneys could avoid this problem by, for example, forwarding their e-mail to support staff or activating an automatic reply feature which informs senders that their e-mails will not be read until a particular date. However, "not all attorneys have access to this technology or know of its availability." The Section also is concerned about the pagination problem described by the Public Citizen Litigation Group.

The **Appellate Practice Committee of the Commercial and Federal Litigation Section of the New York State Bar Association** (00-AP-017) supports the proposal.

The **National Association of Criminal Defense Lawyers** (00-AP-019) supports the electronic services rules, but stresses that it is critical that electronic service only be allowed if the recipient consents in writing. Electronic service will raise many issues, such as what happens when an attachment can't be opened or when each recipient's copy of a brief is paginated differently. For these reasons, "[a]dvance consent is essential."

The **Advisory Committee on Procedures for the D.C. Circuit** (00-AP-020) supports the proposal, although it suggests that language be added to the Committee Note to clarify that consent to electronic service is not an "all-or-nothing" affair. Parties should be able to define the terms of their consent; for example, they should be able to consent to service by fax but not by e-mail. The Committee also asks how a party served electronically will know that a paper has been signed under proposed Rule 32(d) (the Committee suggests requiring a "certificate of signature") and asks when service will be deemed complete in the situation in which service does not completely fail, but is simply delayed for a few days, and the serving party is made aware of that delay.

Rule 25. Filing and Service

* * * * *

(d) Proof of Service.

(1) A paper presented for filing must contain either of the following:

(A) an acknowledgment of service by the person served; or

(B) proof of service consisting of a statement by the person who made service certifying:

(i) the date and manner of service;

(ii) the names of the persons served; and

(iii) their mailing or electronic addresses, facsimile numbers, or the addresses of the places of delivery, as appropriate for the manner of service.

* * * * *

Committee Note

Subdivision (d)(1)(B)(iii). Subdivision (d)(1)(B)(iii) has been amended to require that, when a paper is served electronically, the proof of service of that paper must include the electronic address or facsimile number to which the paper was transmitted.

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1. Recommendation

The Committee proposes to amend Rule 25(d) to require that a proof of electronic service must state the electronic address or facsimile number of the party served.

2. Changes Made After Publication and Comments

The text of the proposed amendment was changed to refer to "electronic" addresses (instead of to "e-mail" addresses), to include "facsimile numbers," and to add the concluding phrase "as appropriate for the manner of service." Conforming changes were made to the Committee Note.

3. Summary of Public Comments

Judge Frank H. Easterbrook (7th Cir.) (00-AP-012) objects to the phrase "mail or e-mail addresses." He points out that "[e]-mail is just one means of exchanging information." Litigants may, for example, "post information on each other's web or FTP sites." Judge Easterbrook suggests substituting "physical or electronic addresses."

The **Advisory Committee on Procedures for the D.C. Circuit** (00-AP-020) suggests that "facsimile numbers" be added after "e-mail

addresses" and that "as appropriate for the method of service" be added at the end of the subdivision.

Rule 26. Computing and Extending Time

* * * * *

(c) Additional Time after Service. When a party is required or permitted to act within a prescribed period after a paper is served on that party, 3 calendar days are added to the prescribed period unless the paper is delivered on the date of service stated in the proof of service. For purposes of this Rule 26(c), a paper that is served electronically is not treated as delivered on the date of service stated in the proof of service.

Committee Note

Subdivision (c). Rule 26(c) has been amended to provide that when a paper is served on a party by electronic means, and that party is required or permitted to respond to that paper within a prescribed period, 3 calendar days are added to the prescribed period. Electronic service is usually instantaneous, but sometimes it is not, because of technical problems. Also, if a paper is electronically transmitted to a party on a Friday evening, the party may not realize that he or she has

been served until two or three days later. Finally, extending the "3-day rule" to electronic service will encourage parties to consent to such service under Rule 25(c).

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1. Recommendation

The Committee proposes to amend Rule 26(c) to provide that when a paper is served on a party by electronic means, and that party is required or permitted to respond to that paper within a prescribed period after service, 3 calendar days are added to the prescribed period.

2. Changes Made After Publication and Comments

No changes were made to the text of the proposed amendment or to the Committee Note.

3. Summary of Public Comments

The **Public Citizen Litigation Group** (00-AP-005) supports the proposal.

Roy H. Wepner, Esq. (00-AP-006) did not take a position on the proposed amendment to Rule 26(c), but, in commenting on the proposed amendment to Rule 26(a)(2), described an ambiguity in the way the two rules intersect. (See Mr. Wepner's comments on Rule 26(a)(2), summarized below.)

Judge Frank H. Easterbrook (7th Cir.) (00-AP-012) objects to extending the 3-day rule to electronic service, which, he says, will "slow[] litigation down." He argues that one of the reasons cited in

the Committee Note — the possibility of "technical problems" — can also occur in hand delivery (e.g., a law firm's receptionist or mail room may fail to get a hand-delivered package to a lawyer). The 3-day rule does not apply to hand delivery, and Judge Easterbrook believes that electronic service should be treated likewise.

Even if the 3-day rule is to be applied to electronic service, Judge Easterbrook suggests that the last sentence of Rule 26(c) be rewritten to state simply: "For purposes of this Rule 26(c), electronic service is treated the same as service by mail." As drafted, Judge Easterbrook says, the last sentence of Rule 26(c) "is phrased in the negative and will leave many readers scratching their heads."

Most members of the **Advisory Committee on Procedures for the D.C. Circuit** (00-AP-020) oppose extending the 3-day rule to electronic service. The government attorneys on the Committee support the proposal.

Rule 36. Entry of Judgment; Notice

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(b) Notice. On the date when judgment is entered, the clerk must ~~mail to~~ serve on all parties a copy of the opinion — or the judgment, if no opinion was written — and a notice of the date when the judgment was entered.

Committee Note

Subdivision (b). Subdivision (b) has been amended so that the clerk may use electronic means to serve a copy of the opinion or judgment or to serve notice of the date when judgment was entered upon parties who have consented to such service.

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1. Recommendation

The Committee proposes to amend Rule 36(b) so that the clerk may use electronic means to serve a copy of an opinion or judgment or to serve notice of the date when judgment was entered upon parties who have consented to electronic service.

2. Changes Made After Publication and Comments

No changes were made to the text of the proposed amendment or to the Committee Note.

3. Summary of Public Comments

The **Public Citizen Litigation Group** (00-AP-005) supports the proposal.

Judge Frank H. Easterbrook (7th Cir.) (00-AP-012) supports the proposal.

The **Advisory Committee on Procedures for the D.C. Circuit** (00-AP-020) supports the proposal.

Rule 45. Clerk's Duties

* * * * *

(c) Notice of an Order or Judgment. Upon the entry of an order or judgment, the circuit clerk must immediately serve ~~by mail~~ a notice of entry on each party ~~to the proceeding~~, with a copy of any opinion, and must note the ~~mailing~~ date of service on the docket. Service on a party represented by counsel must be made on counsel.

* * * * *

Committee Note

Subdivision (c). Subdivision (c) has been amended so that the clerk may use electronic means to serve notice of entry of an order or judgment upon parties who have consented to such service.

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1. Recommendation

The Committee proposes to amend Rule 45(c) so that the clerk may use electronic means to serve notice of entry of an order or judgment upon parties who have consented to electronic service.

2. Changes Made After Publication and Comments

No changes were made to the text of the proposed amendment or to the Committee Note.

3. Summary of Public Comments

The **Public Citizen Litigation Group** (00-AP-005) supports the proposal.

Judge Frank H. Easterbrook (7th Cir.) (00-AP-012) supports the proposal.

The **Advisory Committee on Procedures for the D.C. Circuit** (00-AP-020) supports the proposal.

Rule 26. Computing and Extending Time

(a) Computing Time. The following rules apply in computing any period of time specified in these rules or in any local rule, court order, or applicable statute:

(1) Exclude the day of the act, event, or default that begins the period.

(2) Exclude intermediate Saturdays, Sundays, and legal holidays when the period is less than ~~7~~ 11 days, unless stated in calendar days.

* * * * *

Committee Note

Subdivision (a)(2). The Federal Rules of Civil Procedure and the Federal Rules of Criminal Procedure compute time differently than the Federal Rules of Appellate Procedure. Fed. R. Civ. P. 6(a) and Fed. R. Crim. P. 45(a) provide that, in computing any period of time, "[w]hen the period of time prescribed or allowed is less than 11 days, intermediate Saturdays, Sundays, and legal holidays shall be excluded in the computation." By contrast, Rule 26(a)(2) provides that, in computing any period of time, a litigant should "[e]xclude intermediate Saturdays, Sundays, and legal holidays when the period is less than 7 days, unless stated in calendar days." Thus, deadlines of 7, 8, 9, and 10 days are calculated differently under the rules of civil and criminal procedure than they are under the rules of appellate procedure. This creates a trap for unwary litigants. No good reason for this discrepancy is apparent, and thus Rule 26(a)(2) has been amended so that, under all three sets of rules, intermediate Saturdays, Sundays, and legal holidays will be excluded when computing deadlines under 11 days but will be counted when computing deadlines of 11 days and over.

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1. Recommendation

The Committee proposes to amend Rule 26(a)(2) to provide that, in computing deadlines under FRAP, intermediate Saturdays, Sundays, and legal holidays should be excluded when computing deadlines under 11 days but should be counted when computing deadlines of 11 days and over. At present, time is computed one way

under the appellate rules and another way under the rules of civil and criminal procedure; the amendment would eliminate that disparity.

2. Changes Made After Publication and Comments

No changes were made to the text of the proposed amendment or to the Committee Note.

3. Summary of Public Comments

Jack E. Horsley, Esq. (00-AP-002) supports the proposal.

The **Public Citizen Litigation Group** (00-AP-005) supports the proposal.

Roy H. Wepner, Esq. (00-AP-006) "heartily concur[s]" with the proposal, but urges the Committee to address an ambiguity in the way Rule 26(a)(2) interacts with Rule 26(c). Under amended Rule 26(a)(2), the question whether intermediate Saturdays, Sundays, and legal holidays are counted in calculating a deadline will turn on whether the deadline is less than 11 days. The ambiguity is this: In deciding whether a deadline is less than 11 days, should the court first count the 3 days that are added to the deadline under the 3-day rule of Rule 26(c)? (Rule 26(c) provides that "[w]hen a party is required or permitted to act within a prescribed period after a paper is served on that party, 3 calendar days are added to the prescribed period unless the paper is delivered on the date of service stated in the proof of service.") Or should the court add those 3 days only after it first calculates the deadline under Rule 26(a)(2)?

A lot turns on the issue. Suppose that, on the face of a rule, a party has 10 days to respond to a paper that has been served by mail. If the 3 days are added to the deadline before asking whether the

deadline is less than 11 days for purposes of Rule 26(a)(2), then the deadline is not less than 11 days, intermediate Saturdays, Sundays, and legal holidays do count, and the party has 13 calendar days from the date of service to respond (unless the 13th day falls on a weekend or holiday). If the 3 days are not added to the deadline before asking whether the deadline is less than 11 days for purposes of Rule 26(a)(2), then the deadline *is* less than 11 days, and intermediate Saturdays, Sundays, and legal holidays do *not* count. The party would have at least 14 calendar days to respond to the motion. If the 3 days are then added on top of that deadline, the party would have no less than 17 days to respond.

Mr. Wepner reports that there has been extensive litigation over this question. Mr. Wepner urges that any change made to Rule 26 to address this ambiguity also be made to FRCP 6, so that time is computed similarly under both sets of rules.

Judge Jon O. Newman (2d Cir.) (00-AP-008) supports the proposal, except that he "suggest[s] that this process be carried to its logical conclusion by eliminating from the appellate rules the concept of 'calendar days,' which now appears in the appellate rules, but not in the civil or criminal rules." Judge Newman expresses the belief that deadlines expressed in "calendar days" now appear "only [in] Rule 25(c) and Rule 26(c), both of which concern three-day additions for service by mail." He argues that "[s]ince the three-day provisions of civil Rule 6(e) and criminal Rule 45(e) have no 'calendar day' exception, the appellate rules also should have none."

Judge Frank H. Easterbrook (7th Cir.) (00-AP-012) gives his "unqualified approval" to the proposed change to Rule 26(a)(2) and the related changes, which, he says, "are nicely done and long overdue."

The **Appellate Practice Committee of the Commercial and Federal Litigation Section of the New York State Bar Association** (00-AP-017) supports this "long overdue" change to Rule 26(a)(2). The Committee believes that FRAP could be "further improve[d]" if the concept of "calendar days" was eliminated.

The **National Association of Criminal Defense Lawyers** (00-AP-019) "strongly supports" the proposal. Given that the time for a criminal defendant to appeal is 10 days — a deadline that is currently calculated one way in the criminal rules and another way in the appellate rules — the proposal is particularly welcome to criminal defense attorneys. The proposal will "remove a source of confusion and inadvertent error . . . for some inexperienced practitioners" and "will also have the welcome effect of extending by at least two days the time for defendants to appeal in a criminal case."

The **Advisory Committee on Procedures for the D.C. Circuit** (00-AP-020) supports the proposal.

Rule 4. Appeal as of Right — When Taken

(a) Appeal in a Civil Case.

* * * * *

(4) **Effect of a Motion on a Notice of Appeal.**

(A) If a party timely files in the district court any of the following motions under the Federal Rules of Civil Procedure, the time to file an

appeal runs for all parties from the entry of the order disposing of the last such remaining motion:

* * * * *

(vi) for relief under Rule 60 if the motion is filed no later than 10 days ~~(computed using Federal Rule of Civil Procedure 6(a))~~ after the judgment is entered.

* * * * *

Committee Note

Subdivision (a)(4)(A)(vi). Rule 4(a)(4)(A)(vi) has been amended to remove a parenthetical that directed that the 10-day deadline be "computed using Federal Rule of Civil Procedure 6(a)." That parenthetical has become superfluous because Rule 26(a)(2) has been amended to require that all deadlines under 11 days be calculated as they are under Fed. R. Civ. P. 6(a).

1. Recommendation

The Committee proposes to amend Rule 4(a)(4)(A)(vi) to delete a parenthetical that will become superfluous in light of the amendment to Rule 26(a)(2) (described above).

2. Changes Made After Publication and Comments

No changes were made to the text of the proposed amendment or to the Committee Note.

3. Summary of Public Comments

The **Public Citizen Litigation Group** (00-AP-005) supports the proposal.

Judge Frank H. Easterbrook (7th Cir.) (00-AP-012) supports the proposal.

The **Advisory Committee on Procedures for the D.C. Circuit** (00-AP-020) opposes the proposal. The Committee acknowledges that the proposal will have no practical impact, as 10-day deadlines will now be calculated identically under the civil and appellate rules, but argues that "[a] Rule 60 motion would be governed by the timing provisions of the federal civil rules, and it seems better for the federal appellate rules to say so explicitly."

Rule 27. Motions

(a) **In General.**

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(3) **Response.**

(A) **Time to file.** Any party may file a response to a motion; Rule 27(a)(2) governs its contents. The response must be filed within ~~10~~ 8 days after service of the motion unless the court shortens or extends the time. A motion authorized by Rules 8, 9, 18, or 41 may be granted before the ~~10~~8-day period runs only if the court gives reasonable notice to the parties that it intends to act sooner.

* * * * *

Committee Note

Subdivision (a)(3)(A). Subdivision (a)(3)(A) presently requires that a response to a motion be filed within 10 days after service of the motion. Intermediate Saturdays, Sundays, and legal holidays are counted in computing that 10-day deadline, which means that, except when the 10-day deadline ends on a weekend or legal holiday, parties generally must respond to motions within 10 actual days.

Fed. R. App. P. 26(a)(2) has been amended to provide that, in computing any period of time, a litigant should "[e]xclude

intermediate Saturdays, Sundays, and legal holidays when the period is less than 11 days, unless stated in calendar days." This change in the method of computing deadlines means that 10-day deadlines (such as that in subdivision (a)(3)(A)) have been lengthened as a practical matter. Under the new computation method, parties would never have less than 14 actual days to respond to motions, and legal holidays could extend that period to as much as 18 days.

Permitting parties to take two weeks or more to respond to motions would introduce significant and unwarranted delay into appellate proceedings. For that reason, the 10-day deadline in subdivision (a)(3)(A) has been reduced to 8 days. This change will, as a practical matter, ensure that every party will have at least 10 actual days — but, in the absence of a legal holiday, no more than 12 actual days — to respond to motions. The court continues to have discretion to shorten or extend that time in appropriate cases.

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1. Recommendation

The Committee proposes to amend Rule 27(a)(3)(A) to change the time within which a party must file a response to a motion from 10 days to 8 days. This amendment is proposed in conjunction with the proposed amendment to Rule 26(a)(2) (described above), under which intermediate Saturdays, Sundays, and legal holidays will no longer be counted when computing deadlines under 11 days.

2. Changes Made After Publication and Comments

In response to the objections of commentators, the time to respond to a motion was increased from the proposed 7 days to 8

days. No other changes were made to the text of the proposed amendment or to the Committee Note.

3. Summary of Public Comments

The **Public Citizen Litigation Group** (00-AP-005) has "no objection in principle" to shortening the time to respond to a motion in light of the proposed amendment to Rule 26(a)(2). However, it points out that, under the current 10-day rule, litigants always have at least 10 actual days, whereas under the proposed 7-day rule, litigants will sometimes have only 9 actual days. The Group objects to this 1-day reduction in the time to respond to motions, particularly since "the time periods under FRAP 27 can be quite difficult to meet, especially as they apply to certain substantive motions, such as those relating to complex issues of appellate jurisdiction." The Group urges that the Committee reduce the deadline to 8 days, rather than to 7. The Group also recommends that the current 10-day rule — calculated under the amended Rule 26(a)(2) — be retained for *dispositive* motions.

Judge Frank H. Easterbrook (7th Cir.) (00-AP-012) supports the proposal.

The **Appellate Practice Section of the State Bar of Michigan** (00-AP-013) does not oppose abbreviating the time to respond to a motion in light of the change in the manner in which deadlines will be calculated under amended Rule 26(a)(2). However, it urges that the deadline be reduced to 8 days, rather than 7 days, for the reasons described by the Public Citizen Litigation Group. The Section argues that busy practitioners already have difficulty meeting the current deadline of at least 10 actual days and that reducing the deadline to at least 9 actual days would create a hardship.

The **National Association of Criminal Defense Lawyers** (00-AP-019) supports the proposal, but urges that Rule 27(a)(3)(A) be clarified "to say that the response time can be shortened by order in a particular case, or by local rule with respect to a class or type of motion . . ., but not by local rule applicable to all motions."

The Association also points out that Rule 27(d)(2) now limits motions and responses to motions to "20 pages" and limits replies to "10 pages." It urges that Rule 27(d)(2) be amended to express the limits in words, rather than in pages. It also suggests that a cross-reference to Rule 32(c)(2) should be inserted into Rule 27(d)(1)(D), to remind practitioners that the typeface and type style provisions of Rule 32 apply to motion papers.

The **Advisory Committee on Procedures for the D.C. Circuit** (00-AP-020) supports the proposal, except that it urges that the deadline be reduced to 8 days, rather than 7 days, for the reasons described by the Public Citizen Litigation Group.

Rule 27. Motions

(a) In General.

* * * * *

(4) **Reply to Response.** Any reply to a response must be filed within ~~7~~ 5 days after service of the response. A reply must not present matters that do not relate to the response.

* * * * *

Committee Note

Subdivision (a)(4). Subdivision (a)(4) presently requires that a reply to a response to a motion be filed within 7 days after service of the response. Intermediate Saturdays, Sundays, and legal holidays are counted in computing that 7-day deadline, which means that, except when the 7-day deadline ends on a weekend or legal holiday, parties generally must reply to responses to motions within one week.

Fed. R. App. P. 26(a)(2) has been amended to provide that, in computing any period of time, a litigant should "[e]xclude intermediate Saturdays, Sundays, and legal holidays when the period is less than 11 days, unless stated in calendar days." This change in the method of computing deadlines means that 7-day deadlines (such as that in subdivision (a)(4)) have been lengthened as a practical matter. Under the new computation method, parties would never have less than 9 actual days to reply to responses to motions, and legal holidays could extend that period to as much as 13 days.

Permitting parties to take 9 or more days to reply to a response to a motion would introduce significant and unwarranted delay into appellate proceedings. For that reason, the 7-day deadline in subdivision (a)(4) has been reduced to 5 days. This change will, as a practical matter, ensure that every party will have 7 actual days to file replies to responses to motions (in the absence of a legal holiday).

1. Recommendation

The Committee proposes to amend Rule 27(a)(4) to change the time within which a party must file a reply to a response to a motion from 7 days to 5 days. This amendment is proposed in conjunction with the proposed amendment to Rule 26(a)(2) (described above), under which intermediate Saturdays, Sundays, and legal holidays will no longer be counted when computing deadlines under 11 days.

2. Changes Made After Publication and Comments

No changes were made to the text of the proposed amendment or to the Committee Note.

3. Summary of Public Comments

Judge Frank H. Easterbrook (7th Cir.) (00-AP-012) supports the proposal.

The **Advisory Committee on Procedures for the D.C. Circuit** (00-AP-020) supports the proposal.

Rule 41. Mandate: Contents; Issuance and Effective Date; Stay

* * * * *

(b) When Issued. The court's mandate must issue 7 calendar days after the time to file a petition for rehearing expires, or 7 calendar days after entry of an

order denying a timely petition for panel rehearing, petition for rehearing en banc, or motion for stay of mandate, whichever is later. The court may shorten or extend the time.

* * * * *

Committee Note

Subdivision (b). Subdivision (b) directs that the mandate of a court must issue 7 days after the time to file a petition for rehearing expires or 7 days after the court denies a timely petition for panel rehearing, petition for rehearing en banc, or motion for stay of mandate, whichever is later. Intermediate Saturdays, Sundays, and legal holidays are counted in computing that 7-day deadline, which means that, except when the 7-day deadline ends on a weekend or legal holiday, the mandate issues exactly one week after the triggering event.

Fed. R. App. P. 26(a)(2) has been amended to provide that, in computing any period of time, one should "[e]xclude intermediate Saturdays, Sundays, and legal holidays when the period is less than 11 days, unless stated in calendar days." This change in the method of computing deadlines means that 7-day deadlines (such as that in subdivision (b)) have been lengthened as a practical matter. Under the new computation method, a mandate would never issue sooner than 9 actual days after a triggering event, and legal holidays could extend that period to as much as 13 days.

Delaying mandates for 9 or more days would introduce significant and unwarranted delay into appellate proceedings. For that reason, subdivision (b) has been amended to require that mandates issue 7 *calendar* days after a triggering event.

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1. Recommendation

The Committee proposes to amend Rule 41(b) to provide that the mandate of a court must issue 7 *calendar* days after the time to file a petition for rehearing expires or 7 *calendar* days after the court denies a timely petition for panel rehearing, petition for rehearing en banc, or motion for stay of mandate, whichever is later. This amendment is proposed in conjunction with the proposed amendment to Rule 26(a)(2) (described above), under which intermediate Saturdays, Sundays, and legal holidays will no longer be counted when computing deadlines under 11 days, unless the deadline is stated in "calendar days."

2. Changes Made After Publication and Comments

No changes were made to the text of the proposed amendment or to the Committee Note.

3. Summary of Public Comments

The **Public Citizen Litigation Group** (00-AP-005) supports the proposal.

Judge Jon O. Newman (2d Cir.) (00-AP-008) opposes the proposal. Judge Newman believes that the concept of "calendar days" should be eliminated entirely from the appellate rules. (See the

summary of Judge Newman's comments about the proposed amendment to Rule 26(a)(2).) Judge Newman argues that, "[i]f 'calendar days' cannot be eliminated entirely, at least they should not be added, as is now proposed for Appellate Rule 41(b)." As to the rationale for that change — that leaving the period at "7 days," calculated under new Rule 26(a)(2), would mean that mandates would not issue until 9 to 13 days after a triggering event — Judge Newman has three responses: (1) The harm of the added delay is not as great as the harm that would be caused by "the added confusion of 'calendar days.'" (2) The court of appeals can always shorten the time for issuing the mandate in a particular case. (3) If the 7-day period is too long, it should be shortened to 5 days, not stated in "calendar days."

Judge Frank H. Easterbrook (7th Cir.) (00-AP-012) supports the proposal.

The **Appellate Practice Committee of the Commercial and Federal Litigation Section of the New York State Bar Association** (00-AP-017) opposes the proposal. It doubts that delaying mandates for 9 or more days would cause any real harm and points out that courts always retain authority to order that their mandates issue whenever they want.

The **Advisory Committee on Procedures for the D.C. Circuit** (00-AP-020) supports the proposal.

a. Alternative One[2]

Rule 26.1. ~~Corporate~~ Disclosure Statement

(a) Who Must File.

(1) **Nongovernmental corporate party.** Any nongovernmental corporate party to a proceeding in a court of appeals must file a statement that:

(A) identify~~ingies all its~~ any parent corporations and ~~listing~~ any publicly held ~~company~~ corporation that owns 10% or more of ~~the party's~~ its stock or states that there is no such corporation, and

(B) discloses any additional information that may be publicly designated by the Judicial Conference of the United States.

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[2] At its June 7-8, 2001, meeting, the Committee on Rules of Practice and Procedure voted to reject Alternative One.

(2) **Other party.** Any other party to a proceeding in a court of appeals must file a statement that discloses any information that may be publicly designated by the Judicial Conference of the United States.

(b) Time for Filing; Supplemental Filing. A party must file the Rule 26.1(a) statement with the principal brief or upon filing a motion, response, petition, or answer in the court of appeals, whichever occurs first, unless a local rule requires earlier filing. Even if the statement has already been filed, the party's principal brief must include the statement before the table of contents. A party must supplement its statement whenever the information that must be disclosed under Rule 26.1(a) changes.

(c) Number of Copies. If the Rule 26.1(a) statement is filed before the principal brief, or if a supplemental statement is filed, the party must file an original and 3

copies unless the court requires a different number by local rule or by order in a particular case.

Committee Note

Subdivision (a). Rule 26.1(a) presently requires nongovernmental corporate parties to file a "corporate disclosure statement." In that statement, a nongovernmental corporate party is required to identify all of its parent corporations and all publicly held corporations that own 10% or more of its stock. The corporate disclosure statement is intended to assist judges in determining whether they must recuse themselves by reason of "a financial interest in the subject matter in controversy." Code of Judicial Conduct, Canon 3C(1)(c) (1972).

Rule 26.1(a) has been amended to require that nongovernmental corporate parties who currently do not have to file a corporate disclosure statement — that is, nongovernmental corporate parties who do not have any parent corporations and at least 10% of whose stock is not owned by any publicly held corporation — inform the court of that fact. At present, when a corporate disclosure statement is not filed, courts do not know whether it has not been filed because there was nothing to report or because of ignorance of Rule 26.1(a).

Rule 26.1(a) does not require the disclosure of all information that could conceivably be relevant to a judge who is trying to decide whether he or she has a "financial interest" in a case. Experience with divergent disclosure practices and improving technology may provide the foundation for more comprehensive disclosure requirements. The Judicial Conference, supported by the committees that work regularly with the Code of Judicial Conduct and by the Administrative Office of the United States Courts, is in the best position to develop any

additional requirements and to adjust those requirements as technological and other developments warrant. Thus, Rule 26.1(a) has been amended to authorize the Judicial Conference to promulgate more detailed financial disclosure requirements — requirements that might apply beyond nongovernmental corporate parties.

As has been true in the past, Rule 26.1(a) does not forbid the promulgation of local rules that require disclosures in addition to those required by Rule 26.1(a) itself. However, along with the authority provided to the Judicial Conference to require additional disclosures is the authority to preempt any local rulemaking on the topic of financial disclosure.

Subdivision (b). Rule 26.1(b) has been amended to require parties to file supplemental disclosure statements whenever there is a change in the information that Rule 26.1(a) requires the parties to disclose. For example, if a publicly held corporation acquires 10% or more of a party's stock after the party has filed its disclosure statement, the party should file a supplemental statement identifying that publicly held corporation.

Subdivision (c). Rule 26.1(c) has been amended to provide that a party who is required to file a supplemental disclosure statement must file an original and 3 copies, unless a local rule or an order entered in a particular case provides otherwise.

b. Alternative Two[3]

Rule 26.1. Corporate Disclosure Statement

(a) Who Must File. Any nongovernmental corporate party to a proceeding in a court of appeals must file a statement that identifyingies all its any parent corporations and listing any publicly held company corporation that owns 10% or more of the party's its stock or states that there is no such corporation.

(b) Time for Filing; Supplemental Filing. A party must file the Rule 26.1(a) statement with the principal brief or upon filing a motion, response, petition, or answer in the court of appeals, whichever occurs first, unless a local rule requires earlier filing. Even if the statement has already been filed, the party's principal brief must include the statement before the table of contents. A party must

[3] At its June 7-8, 2001, meeting, the Committee on Rules of Practice and Procedure voted to approve Alternative Two.

supplement its statement whenever the information that must be disclosed under Rule 26.1(a) changes.

(c) **Number of Copies.** If the Rule 26.1(a) statement is filed before the principal brief, or if a supplemental statement is filed, the party must file an original and 3 copies unless the court requires a different number by local rule or by order in a particular case.

Committee Note

Subdivision (a). Rule 26.1(a) requires nongovernmental corporate parties to file a "corporate disclosure statement." In that statement, a nongovernmental corporate party is required to identify all of its parent corporations and all publicly held corporations that own 10% or more of its stock. The corporate disclosure statement is intended to assist judges in determining whether they must recuse themselves by reason of "a financial interest in the subject matter in controversy." Code of Judicial Conduct, Canon 3C(1)(c) (1972).

Rule 26.1(a) has been amended to require that nongovernmental corporate parties who have not been required to file a corporate disclosure statement — that is, nongovernmental corporate parties who do not have any parent corporations and at least 10% of whose stock is not owned by any publicly held corporation — inform the court of that fact. At present, when a corporate disclosure statement is not filed, courts do not know whether it has not been filed because there was nothing to report or because of ignorance of Rule 26.1.

Subdivision (b). Rule 26.1(b) has been amended to require parties to file supplemental disclosure statements whenever there is a change in the information that Rule 26.1(a) requires the parties to disclose. For example, if a publicly held corporation acquires 10% or more of a party's stock after the party has filed its disclosure statement, the party should file a supplemental statement identifying that publicly held corporation.

Subdivision (c). Rule 26.1(c) has been amended to provide that a party who is required to file a supplemental disclosure statement must file an original and 3 copies, unless a local rule or an order entered in a particular case provides otherwise.

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1. Recommendation

The Committee proposes to amend Rule 26.1 to require a nongovernmental corporate party not only to file a disclosure statement in which it identifies any parent corporation and any publicly held corporation that owns 10% or more of its stock (as a nongovernmental corporate party is required to do under existing Rule 26.1), but also to file a statement indicating that there are no such corporations if that is true, to include in any disclosure statement any additional information that may be required by the Judicial Conference of the United States, and to supplement any disclosure statement when circumstances warrant. The Committee also proposes to amend Rule 26.1 to require parties other than nongovernmental corporate parties to file a disclosure statement in which they disclose any information that may be required by the Judicial Conference of the United States and to supplement any disclosure statement when circumstances warrant.

2. Changes Made After Publication and Comments

The Committee is submitting two versions of proposed Rule 26.1 for the consideration of the Standing Committee.

The first version — "Alternative One" — is the same as the version that was published, except that the rule has been amended to refer to "any information that may be *publicly designated* by the Judicial Conference" instead of to "any information that may be *required* by the Judicial Conference." At its April meeting, the Committee gave unconditional approval to all of "Alternative One," except the Judicial Conference provisions. The Committee conditioned its approval of the Judicial Conference provisions on the Standing Committee's assuring itself that lawyers would have ready access to any standards promulgated by the Judicial Conference and that the Judicial Conference provisions were consistent with the Rules Enabling Act.

The second version — "Alternative Two" — is the same as the version that was published, except that the Judicial Conference provisions have been eliminated. The Civil Rules Committee met several days after the Appellate Rules Committee and joined the Bankruptcy Rules Committee in disapproving the Judicial Conference provisions. Given the decreasing likelihood that the Judicial Conference provisions will be approved by the Standing Committee, I asked Prof. Schiltz to draft, and the Appellate Rules Committee to approve, a version of Rule 26.1 that omitted those provisions. "Alternative Two" was circulated to and approved by the Committee in late April.

I should note that, at its April meeting, the Appellate Rules Committee discussed the financial disclosure provision that was approved by the Bankruptcy Rules Committee. That provision defines

the scope of the financial disclosure obligation much differently than the provisions approved by the Appellate, Civil, and Criminal Rules Committees, which are based on existing Rule 26.1. For example, the bankruptcy provision requires disclosure when a party "directly or indirectly" owns 10 percent or more of "any class" of a publicly *or* privately held corporation's "equity interests." Members of the Appellate Rules Committee expressed several concerns about the provision approved by the Bankruptcy Rules Committee, objecting both to its substance and to its ambiguity.

3. Summary of Public Comments

Jack E. Horsley, Esq. (00-AP-002) supports the amendment, which, he says, "will strip away a veil of concealment."

The **Committee on Federal Courts of the Association of the Bar of the City of New York** (00-AP-004) sympathizes with the practical considerations that led to the proposal that the Judicial Conference have authority to modify disclosure requirements without going through the Rules Enabling Act process, but the Association fears that "the necessary contents of a disclosure statement may be less accessible to the bar and to the public if they are not set forth in the rules themselves."

The **Public Citizen Litigation Group** (00-AP-005) supports the proposal.

The **Committee on Federal Civil Procedure of the American College of Trial Lawyers** (00-AP-10) supports expanding the obligation to file disclosure statements to non-corporate parties, as Rule 26.1(a)(2) does. However, the Committee opposes granting authority to the Judicial Conference to modify disclosure obligations without going through the Rules Enabling Act process. Lawyers will

not be able to know the nature of their obligations without contacting the Judicial Conference directly before every case, which will create an administrative burden for the staff of the Conference and waste the time of attorneys. "It is difficult to see the merit of referencing a set of requirements that are not included in the Rules, may not exist and are not readily available."

Judge Frank H. Easterbrook (7th Cir.) (00-AP-012) strongly supports two aspects of the proposal — extending the disclosure obligation to non-corporate parties and requiring supplementation — but is "appalled" by a third — giving authority to the Judicial Conference to modify the disclosure obligation without going through the Rules Enabling Act process. Judge Easterbrook's objections to the Judicial Conference provision are several: (1) The provision short-circuits the Rules Enabling Act process. The judicial branch keeps telling Congress not to short-circuit the process; the judicial branch impairs its credibility when it short-circuits the process itself. (2) The provision would weaken the role of the Standing Committee. "Other Committees of the Conference will see (and use) an opening into rules-related issues, and the ability of the Standing Committee to coordinate matters of practice and procedure will be undermined." (3) The provision would create a hardship for lawyers, as the Judicial Conference does not publish its standards in any central, readily accessible location. Judge Easterbrook recalls that some years ago the Advisory Committee on Appellate Rules proposed that the Judicial Conference be given authority to set technical standards for briefs, and that the proposal was rejected by the Standing Committee on the grounds described above. He urges that the Judicial Conference provision of proposed Rule 26.1 suffer a similar fate.

Judge Easterbrook also questions the assertion in the Committee Note that standards on disclosure issued by the Judicial Conference could preempt local rules. He points out that Rule 47(a)(1) provides

that local rules "must be consistent with — but not duplicative of — Acts of Congress and rules adopted under 28 U.S.C. § 2072 and must conform to any uniform numbering system prescribed by the Judicial Conference of the United States." Judge Easterbrook interprets Rule 47(a)(1) to provide that "[o]nly statutes, rules, and one *particular* Judicial Conference action supersede local rules."

The **Advisory Committee on Procedures for the D.C. Circuit** (00-AP-020) opposes the proposal. The Committee believes that "more than enough information is already being disclosed pursuant to the current version of Rule 26[.1] and the various local rules." It objects to the Judicial Conference provision because attorneys will have difficulty ascertaining what the Judicial Conference requires and because the provision is not authorized by the Rules Enabling Act.

Rule 27. Motions

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(d) Form of Papers; Page Limits; and Number of Copies

(1) **Format.**

* * * * *

(B) **Cover.** A cover is not required, but there must be a caption that includes the case number, the name of the court, the title of the case, and a brief descriptive title indicating the

purpose of the motion and identifying the party or parties for whom it is filed. If a cover is used, it must be white.

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Committee Note

Subdivision (d)(1)(B). A cover is not required on motions, responses to motions, or replies to responses to motions. However, Rule 27(d)(1)(B) has been amended to provide that if a cover is nevertheless used on such a paper, the cover must be white. The amendment is intended to promote uniformity in federal appellate practice.

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1. Recommendation

The Committee proposes to amend Rule 27(d)(1)(B) to provide that, if a cover is voluntarily used on a motion, response to a motion, or reply to a response to a motion, the cover must be white.

2. Changes Made After Publication and Comments

No changes were made to the text of the proposed amendment or to the Committee Note.

3. Summary of Public Comments

The **Public Citizen Litigation Group** (00-AP-005) supports the proposal.

Judge Frank H. Easterbrook (7th Cir.) (00-AP-012) opposes the proposal — and the other "cover color" proposals. (See Judge Easterbrook's comments on Rule 32(a)(2).)

The **Appellate Practice Committee of the Commercial and Federal Litigation Section of the New York State Bar Association** (00-AP-017) supports the proposal, which, it notes, reflects what "is currently the general practice in the Courts of Appeals."

The **Advisory Committee on Procedures for the D.C. Circuit** (00-AP-020) supports the proposal.

Rule 32. Form of Briefs, Appendices, and Other Papers

(a) Form of a Brief.

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(2) **Cover.** Except for filings by unrepresented parties, the cover of the appellant's brief must be blue; the appellee's, red; an intervenor's or amicus curiae's, green; ~~and~~ any reply brief, gray; and any

supplemental brief, tan. The front cover of a brief must contain:

(A) the number of the case centered at the top;

(B) the name of the court;

(C) the title of the case (see Rule 12(a));

(D) the nature of the proceeding (e.g., Appeal, Petition for Review) and the name of the court, agency, or board below;

(E) the title of the brief, identifying the party or parties for whom the brief is filed; and

(F) the name, office address, and telephone number of counsel representing the party for whom the brief is filed.

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Committee Note

Subdivision (a)(2). On occasion, a court may permit or order the parties to file supplemental briefs addressing an issue that was not addressed — or adequately addressed — in the principal briefs.

Rule 32(a)(2) has been amended to require that tan covers be used on such supplemental briefs. The amendment is intended to promote uniformity in federal appellate practice. At present, the local rules of the circuit courts conflict. *See, e.g.*, D.C. Cir. R. 28(g) (requiring yellow covers on supplemental briefs); 11th Cir. R. 32, I.O.P. 1 (requiring white covers on supplemental briefs).

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1. Recommendation

The Committee proposes to amend Rule 32(a)(2) to provide that the cover on a supplemental brief must be tan.

2. Changes Made After Publication and Comments

No changes were made to the text of the proposed amendment or to the Committee Note.

3. Summary of Public Comments

The **Public Citizen Litigation Group** (00-AP-005) supports the proposal.

Judge Frank H. Easterbrook (7th Cir.) (00-AP-012) opposes the proposal — and the other "cover color" proposals — which, he says, are "more fiddly changes that will lead courts to reject documents without promoting any important interest." He argues that the lack of uniformity among circuits "poses no practical problems for lawyers," as it is no worse than the lack of uniformity on other matters. If lack of uniformity is a problem, he suggests simply providing that "lawyers [may] choose their own colors."

The **Appellate Practice Committee of the Commercial and Federal Litigation Section of the New York State Bar Association** (00-AP-017) does not object to the proposal, but it doubts the seriousness of the problem that the proposal is intended to address. "The rationale for the colored covers is to allow the court to pick out a brief by seeing the color. Because supplemental briefs often are filed after argument (or submission) picking them out is no problem." The Committee added that "a good case can be made" for requiring that a supplemental brief be the same color as the principal brief it supplements.

The Committee urged that the Advisory Committee on Appellate Rules consider further changes to Rule 32 to address the colors of briefs filed in cases involving cross-appeals. It noted conflicting practice within the circuits and asked "that the Advisory Committee . . . impose some uniformity in covers on cross-appeals."

The **Advisory Committee on Procedures for the D.C. Circuit** (00-AP-020) supports the proposal.

Rule 32. Form of Briefs, Appendices, and Other Papers

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(c) Form of Other Papers.

(1) **Motion.** The form of a motion is governed by Rule 27(d).

(2) **Other Papers.** Any other paper, including a petition for panel rehearing and a petition for

hearing or rehearing en banc, and any response to such a petition, must be reproduced in the manner prescribed by Rule 32(a), with the following exceptions:

(A) A ~~a~~ cover is not necessary if the caption and signature page of the paper together contain the information required by Rule 32(a)(2)~~;~~ ~~and~~. If a cover is used, it must be white.

(B) Rule 32(a)(7) does not apply.

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Committee Note

Subdivision (c)(2)(A). Under Rule 32(c)(2)(A), a cover is not required on a petition for panel rehearing, petition for hearing or rehearing en banc, answer to a petition for panel rehearing, response to a petition for hearing or rehearing en banc, or any other paper. Rule 32(d) makes it clear that no court can require that a cover be used on any of these papers. However, nothing prohibits a court from providing in its local rules that if a cover on one of these papers is "voluntarily" used, it must be a particular color. Several circuits have adopted such local rules. *See, e.g.*, Fed. Cir. R. 35(c) (requiring yellow covers on petitions for hearing or rehearing en banc and brown covers on responses to such petitions); Fed. Cir. R. 40(a) (requiring

yellow covers on petitions for panel rehearing and brown covers on answers to such petitions); 7th Cir. R. 28 (requiring blue covers on petitions for rehearing filed by appellants or answers to such petitions, and requiring red covers on petitions for rehearing filed by appellees or answers to such petitions); 9th Cir. R. 40-1 (requiring blue covers on petitions for panel rehearing filed by appellants and red covers on answers to such petitions, and requiring red covers on petitions for panel rehearing filed by appellees and blue covers on answers to such petitions); 11th Cir. R. 35-6 (requiring white covers on petitions for hearing or rehearing en banc).

These conflicting local rules create a hardship for counsel who practice in more than one circuit. For that reason, Rule 32(c)(2)(A) has been amended to provide that if a party chooses to use a cover on a paper that is not required to have one, that cover must be white. The amendment is intended to preempt all local rulemaking on the subject of cover colors and thereby promote uniformity in federal appellate practice.

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1. Recommendation

The Committee proposes to amend Rule 32(c)(2)(A) to provide that, if a cover is voluntarily used on a petition for panel rehearing, petition for hearing or rehearing en banc, answer to a petition for panel rehearing, or response to a petition for hearing or rehearing en banc, the cover must be white.

2. Changes Made After Publication and Comments

No changes were made to the text of the proposed amendment or to the Committee Note.

3. Summary of Public Comments

The **Public Citizen Litigation Group** (00-AP-005) supports the proposal.

Judge Frank H. Easterbrook (7th Cir.) (00-AP-012) opposes the proposal — and the other "cover color" proposals. (See Judge Easterbrook's comments on Rule 32(a)(2).) If Rule 32(c)(2)(A) is to specify colors, then Judge Easterbrook urges "different colors for petitions and responses," just as different colors are used for appellants' and appellees' briefs. He points out that the Supreme Court requires tan covers on petitions and orange covers on responses, and suggests that Rule 32 do likewise, so as to achieve "vertical as well as horizontal uniformity." Alternatively, he suggests the Seventh Circuit's approach of requiring that the colors of the petitions and responses be the same as the colors of the filing parties' briefs on the merits.

The **Appellate Practice Committee of the Commercial and Federal Litigation Section of the New York State Bar Association** (00-AP-017) supports the proposal.

The **Advisory Committee on Procedures for the D.C. Circuit** (00-AP-020) supports the proposal.

Rule 28. Briefs

* * * * *

(j) Citation of Supplemental Authorities. If pertinent and significant authorities come to a party's attention after

the party's brief has been filed — or after oral argument but before decision — a party may promptly advise the circuit clerk by letter, with a copy to all other parties, setting forth the citations. The letter must state ~~without argument~~ the reasons for the supplemental citations, referring either to the page of the brief or to a point argued orally. The body of the letter must not exceed 350 words. Any response must be made promptly and must be similarly limited.

Committee Note

Subdivision (j). In the past, Rule 28(j) has required parties to describe supplemental authorities "without argument." Enforcement of this restriction has been lax, in part because of the difficulty of distinguishing "state[ment] . . . [of] the reasons for the supplemental citations," which is required, from "argument" about the supplemental citations, which is forbidden.

As amended, Rule 28(j) continues to require parties to state the reasons for supplemental citations, with reference to the part of a brief or oral argument to which the supplemental citations pertain. But Rule 28(j) no longer forbids "argument." Rather, Rule 28(j) permits parties to decide for themselves what they wish to say about supplemental authorities. The only restriction upon parties is that the

body of a Rule 28(j) letter — that is, the part of the letter that begins with the first word after the salutation and ends with the last word before the complimentary close — cannot exceed 350 words. All words found in footnotes will count toward the 350-word limit.

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1. Recommendation

The Committee proposes to amend Rule 28(j) to eliminate the prohibition on "argument" in letters that draw the court's attention to supplemental authorities and to impose a 350-word limit on such letters.

2. Changes Made After Publication and Comments

No changes were made to the text of the proposed amendment or to the Committee Note, except that the word limit was increased from 250 to 350 in response to the complaint of some commentators that parties would have difficulty bringing multiple supplemental authorities to the attention of the court in one 250-word letter.

3. Summary of Public Comments

The **Committee on Federal Courts of the Association of the Bar of the City of New York** (00-AP-004) strongly supports the amendment, as the prohibition on argument in the current version of Rule 28(j) "is regularly and blatantly flouted." In order to prevent similar disregard of amended Rule 28(j), the Association proposes that the penultimate sentence be rewritten as follows: "The letter (including all contents, footnotes, and attachments other than the supplemental authorities which are the subject of the letter, but excluding the address, salutation, signature, and copy recipients) must

not exceed 250 words, and the number of such words shall be set forth at the foot of the letter." The Association further recommends that Rule 25(a)(4) be amended to instruct clerks to refuse to accept letters that do not comply with Rule 28(j).

The **Public Citizen Litigation Group** (00-AP-005) supports the proposal, except that it urges that Rule 28(j) letters be limited to 400 words, instead of 250 words. The Group argues that "a 250-word limit . . . will be unduly restrictive in some circumstances," such as in "complex cases [when] it is often difficult to state the holding of the new authority and its relationship to the arguments made in the briefs . . . in fewer than 250 words, even without argument." The Group also expresses concern about imposing a word limit — whether it be 250 words or 400 words — to Rule 28(j) letters that address multiple authorities. The Group is concerned that counsel, finding that 250 or 400 words is insufficient to discuss multiple authorities, will instead submit a separate letter on each authority, which will be burdensome for all involved. The Group recommends that the word limit "be imposed on a per-issue basis."

Eric A. Johnson, Esq. (00-AP-009) opposes the proposal. He believes that permitting parties to argue in Rule 28(j) submissions would "exacerbate the unfairness that often arises from inequality of resources." He recommends retention of the prohibition on argument.

The **Advisory Committee on Rules of Practice & Internal Operating Procedure of the United States Court of Appeals for the Ninth Circuit** raises a number of concerns about the proposal. Some members of the Committee oppose any change to the rule; they fear that courts may be "inundated" with Rule 28(j) letters "because the new language contemplates a response to a [Rule 28(j)] letter" and because "[t]he proposed rule places no limitation on the number of 250-word letters any party would be entitled to submit." Other

members believe that the 250-word limit is too low, especially when the party seeks to bring several new cases to the attention of the court. These members suggest that, at a minimum, the amendment provide that the words and numerals contained in the citations themselves not count toward the 250-word limit. The Committee also suggests that consideration be given to requiring that Rule 28(j) letters be accompanied by a certificate of compliance.

Judge Frank H. Easterbrook (7th Cir.) (00-AP-012) views the proposal as "sound in principle."

The **Appellate Practice Section of the State Bar of Michigan** supports the proposal, except that it recommends that "case names and citations" not count toward the 250-word limit.

The **Appellate Practice Committee of the Commercial and Federal Litigation Section of the New York State Bar Association** (00-AP-017) supports the proposal. It agrees that the current prohibition on "argument" is violated in "almost all letters to Courts of Appeals."

The **National Association of Criminal Defense Lawyers** (00-AP-019) supports the proposal.

The **Advisory Committee on Procedures for the D.C. Circuit** (00-AP-020) supports the proposal, although it expresses concern that the 250-word limit is insufficient when a party wishes to bring several supplemental authorities to the attention of the court. It suggests revising Rule 28(j) "to allow 250 words, or 150 words for each new authority, whichever is longer."

Rule 31. Serving and Filing Briefs

* * * * *

(b) Number of Copies. Twenty-five copies of each brief must be filed with the clerk and 2 copies must be served on each unrepresented party and on counsel for each separately represented party. An unrepresented party proceeding in forma pauperis must file 4 legible copies with the clerk, and one copy must be served on each unrepresented party and on counsel for each separately represented party. The court may by local rule or by order in a particular case require the filing or service of a different number.

* * * * *

Committee Note

Subdivision (b). In requiring that two copies of each brief "must be served on counsel for each separately represented party," Rule 31(b) may be read to imply that copies of briefs need not be served on unrepresented parties. The Rule has been amended to

clarify that briefs must be served on all parties, including those who are not represented by counsel.

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1. Recommendation

The Committee proposes to amend Rule 31(b) to clarify that briefs must be served on all parties, including those not represented by counsel.

2. Changes Made After Publication and Comments

No changes were made to the text of the proposed amendment or to the Committee Note.

3. Summary of Public Comments

The **Public Citizen Litigation Group** (00-AP-005) supports the proposal. It recommends that Rule 31(b) be further amended to require service of one copy of each brief on each known amicus. (At present, the rule requires service only on parties.)

Judge Frank H. Easterbrook (7th Cir.) (00-AP-012) believes that the proposal represents "[a]n improvement."

The **Advisory Committee on Procedures for the D.C. Circuit** (00-AP-020) supports the proposal.

~~(ii)~~ • the number of lines of monospaced type in the brief.

(ii) Form 6 in the Appendix of Forms is a suggested form of a certificate of compliance. Use of Form 6 must be regarded as sufficient to meet the requirements of Rule 32(a)(7)(C)(i).

* * * * *

Committee Note

Subdivision (a)(7)(C). If the principal brief of a party exceeds 30 pages, or if the reply brief of a party exceeds 15 pages, Rule 32(a)(7)(C) provides that the party or the party's attorney must certify that the brief complies with the type-volume limitation of Rule 32(a)(7)(B). Rule 32(a)(7)(C) has been amended to refer to Form 6 (which has been added to the Appendix of Forms) and to provide that a party or attorney who uses Form 6 has complied with Rule 32(a)(7)(C). No court may provide to the contrary, in its local rules or otherwise.

Form 6 requests not only the information mandated by Rule 32(a)(7)(C), but also information that will assist courts in enforcing the typeface requirements of Rule 32(a)(5) and the type style requirements of Rule 32(a)(6). Parties and attorneys are not required to use Form 6, but they are encouraged to do so.

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1. Recommendation

The Committee proposes to amend Rule 32(a)(7)(C) to provide that the filing of a new Form 6 must be regarded as sufficient to meet the obligation imposed by Rule 32(a)(7)(C) to certify that a brief complies with the type-volume limitation of Rule 32(a)(7)(B). The Committee also proposes to add a new Form 6 as a suggested form of a certificate of compliance with the type-volume limitation of Rule 32(a)(7)(B).

Form 6. Certificate of Compliance With Rule 32(a)

Certificate of Compliance With Type-Volume Limitation, Typeface Requirements, and Type Style Requirements

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because:

- ☐ this brief contains [*state the number of*] words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii), *or*

- ☐ this brief uses a monospaced typeface and contains [*state the number of*] lines of text, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because:

- ☐ this brief has been prepared in a proportionally spaced typeface using [*state name and version of word processing program*] in [*state font size and name of type style*], *or*
- ☐ this brief has been prepared in a monospaced typeface using [*state name and version of word processing program*] with [*state number of characters per inch and name of type style*].

(s)_____

Attorney for _____

Dated: _____

2. Changes Made After Publication and Comments

No changes were made to the text of the proposed amendment or to the Committee Note.

3. Summary of Public Comments

The **Advisory Committee on Procedures for the D.C. Circuit** (00-AP-020) supports the proposal, although it suggests that Form 6 be amended to refer to "the *applicable* type-volume limitation" rather than to "the type-volume limitation of Fed. R. App. P. 32(a)(7)(B)," to account for the fact that, in some cases, the length of briefs will be controlled by court order rather than by Rule 32(a)(7)(B).

Rule 32. Form of Briefs, Appendices, and Other Papers

* * * * *

(d) **Signature.** Every brief, motion, or other paper filed with the court must be signed by the party filing the paper or, if the party is represented, by one of the party's attorneys.

(de) **Local Variation.** Every court of appeals must accept documents that comply with the form requirements of this rule. By local rule or order in a particular case a court of appeals may accept documents that do not meet all of the form requirements of this rule.

Committee Note

Subdivisions (d) and (e). Former subdivision (d) has been redesignated as subdivision (e), and a new subdivision (d) has been added. The new subdivision (d) requires that every brief, motion, or other paper filed with the court be signed by the attorney or unrepresented party who files it, much as Fed. R. Civ. P. 11(a) imposes a signature requirement on papers filed in district court. Only the original copy of every paper must be signed. An appendix filed with the court does not have to be signed at all.

By requiring a signature, subdivision (d) ensures that a readily identifiable attorney or party takes responsibility for every paper. The courts of appeals already have authority to sanction attorneys and parties who file papers that contain misleading or frivolous assertions, *see, e.g.*, 28 U.S.C. § 1912, Fed. R. App. P. 38 & 46(b)(1)(B), and thus subdivision (d) has not been amended to incorporate provisions similar to those found in Fed. R. Civ. P. 11(b) and 11(c).

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1. Recommendation

The Committee proposes to amend Rule 32(d) to provide that every brief, motion, or other paper filed with the court must be signed by the attorney or unrepresented party who files it.

2. Changes Made After Publication and Comments

No changes were made to the text of the proposed amendment. A line was added to the Committee Note to clarify that only the original copy of a paper needs to be signed.

3. Summary of Public Comments

Jack E. Horsley, Esq. (00-AP-002) supports the proposal.

Judge Frank H. Easterbrook (7th Cir.) (00-AP-012) calls the proposal "a thoroughly bad idea" and raises numerous objections: (1) The signature requirement is pointless. It is not necessary to require a signature in order to "ensure[] that a readily identifiable attorney or party takes responsibility for every paper." Right now, "[e]very lawyer whose name appears on a brief or other paper . . . is responsible." (2) The signature requirement would not work. Papers

are most likely to be signed not by the lawyer who truly is responsible, but by "some junior associate." (3) The signature requirement would create a hardship for counsel. Lawyers will have to visit printers or duplicators (such as Kinko's) to sign briefs, or printers or duplicators will have to ship briefs back to the law firm for signing, rather than shipping the briefs directly to the clerk for filing. (4) The signature requirement would be "retrograde." We live in the electronic age; "the world is moving in the direction of dispensing with manuscript signatures."

Judge Easterbrook further suggests that if the Advisory Committee wants to fix responsibility for a paper on a particular attorney, it should follow Supreme Court practice, and require that every paper must designate the "counsel of record." That fixes responsibility without requiring anyone to waste time signing papers.

Finally, Judge Easterbrook argues that, if there is to be a signing requirement, Rule 32(d) should be rewritten to make two things clear: (1) Only one copy of any document must be signed. (2) The signature must be of the lawyer principally responsible for the substance (not necessarily the drafting) of the document.

The **National Association of Criminal Defense Lawyers** (00-AP-019) does not oppose the proposal, but raises several questions: "Does the committee mean that the original of each must be personally signed manually, in ink, although some or all of the rest may be conformed? Or would it comply to sign the brief before copying, so that all copies would bear a copy of counsel's signature, but none would have an original ink signature? May counsel delegate the right to sign his or her name to a secretary . . . or must the signature be affixed personally?"

The Association also suggests that a reference to 28 U.S.C. § 1927 should be added to the discussion of sanctions in the Committee Note. Finally, the Association suggests that a reference to new Rule 32(d) be added to Rule 28, which lists the contents of briefs.

The **Advisory Committee on Procedures for the D.C. Circuit** (00-AP-020) supports the proposal.

Rule 44. Case Involving a Constitutional Question When the United States or the Relevant State is Not a Party

(a) Constitutional Challenge to Federal Statute. If a party questions the constitutionality of an Act of Congress in a proceeding in which the United States or its agency, officer, or employee is not a party in an official capacity, the questioning party must give written notice to the circuit clerk immediately upon the filing of the record or as soon as the question is raised in the court of appeals. The clerk must then certify that fact to the Attorney General.

(b) Constitutional Challenge to State Statute. If a party questions the constitutionality of a statute of a State in a

proceeding in which that State or its agency, officer, or employee is not a party in an official capacity, the questioning party must give written notice to the circuit clerk immediately upon the filing of the record or as soon as the question is raised in the court of appeals. The clerk must then certify that fact to the attorney general of the State.

Committee Note

Rule 44 requires that a party who "questions the constitutionality of an Act of Congress" in a proceeding in which the United States is not a party must provide written notice of that challenge to the clerk. Rule 44 is designed to implement 28 U.S.C. § 2403(a), which states that:

> In any action, suit or proceeding in a court of the United States to which the United States or any agency, officer or employee thereof is not a party, wherein the constitutionality of any Act of Congress affecting the public interest is drawn in question, the court shall certify such fact to the Attorney General, and shall permit the United States to intervene . . . for argument on the question of constitutionality.

The subsequent section of the statute — § 2403(*b*) — contains virtually identical language imposing upon the courts the duty to notify the attorney general of a *state* of a constitutional challenge to any statute of that state. But § 2403(b), unlike § 2403(a), was not implemented in Rule 44.

Rule 44 has been amended to correct this omission. The text of former Rule 44 regarding constitutional challenges to federal statutes now appears as Rule 44(a), while new language regarding constitutional challenges to state statutes now appears as Rule 44(b).

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1. Recommendation

The Committee proposes to add a Rule 44(b) to require a party to give written notice to the clerk if the party questions the constitutionality of a state statute in a proceeding in which the state is not a party, and to require the clerk to notify the state's attorney general of that challenge. Rule 44(b) is intended to implement 28 U.S.C. § 2403(b).

2. Changes Made After Publication and Comments

No changes were made to the text of the proposed amendment or to the Committee Note.

3. Summary of Public Comments

Judge Barbara B. Crabb (W.D. Wis.) (00-AP-001) supports the proposed amendment as a helpful reminder to judges. She suggests that something akin to Rule 44 be added to the FRCP.

Jack E. Horsley, Esq. (00-AP-002) suggests that the following clause be added to Rule 44(b): "Absent certification and/or failure to raise a constitu[t]ional question at the outset precludes asserting a[] [c]onstitutional violation on appeal."

Public Service Litigation Group (00-AP-005) supports the proposal. It notes that § 2403(b) refers only to statutes "affecting the public interest," but agrees that the rule should not be so restricted, given the uncertain scope of that clause.

Judge Frank H. Easterbrook (7th Cir.) (00-AP-012) supports the proposal — "[a] genuine improvement, nicely executed."

The **National Association of Criminal Defense Lawyers** (00-AP-019) recommends that the phrase "in a proceeding" be replaced by the phrase "in any civil or criminal case" to highlight the fact that the constitutionality of state statutes sometimes is challenged in federal criminal cases. State criminal statutes are often incorporated into federal criminal statutes (e.g., the Assimilative Crimes Act), and state statutes sometimes govern the legality of an arrest or search by state law enforcement officers. The change suggested by the Association would highlight the fact that Rule 44(b) may have some application in criminal cases.

The **Advisory Committee on Procedures for the D.C. Circuit** (00-AP-020) supports the proposal.

General Comments

Jack E. Horsley, Esq. (00-AP-002) said that the "work product of [the] Committee is so good" that "[i]t is a challenge to submit viable suggestions."

The **United States Postal Service** (00-AP-003) agrees with many of the proposals and believes that the others will not have a substantial effect on the Postal Service. It opposes only the amendment to Rule 4(a)(5)(A)(ii).

The **Appellate Practice Section of the State Bar of Michigan** (00-AP-013) supports all of the proposed amendments, save the amendments on which it specifically commented.

Sidney Powell, Esq. and **Deborah Pearce Reggio, Esq.** (00-AP-016) fully endorse the "thorough and considered comments" of the Public Citizen Litigation Group.

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

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CRIMINAL RULES

MILTON I. SHADUR
EVIDENCE RULES

TO: Honorable Anthony J. Scirica, Chair
Standing Committee on Rules of Practice and Procedure

FROM: Honorable A. Thomas Small, Chair
Advisory Committee on Bankruptcy Rules

DATE: May 15, 2001

RE: Report of the Advisory Committee on Bankruptcy Rules

I. Introduction

The Advisory Committee on Bankruptcy Rules met on March 15-16, 2001, in New Orleans, Louisiana. The Advisory Committee considered public comments regarding proposed amendments to the Bankruptcy Rules that were published in August, 2000.

The proposed amendments published in 2000 include revisions to seven Bankruptcy Rules (Rules 1004, 2004, 2014, 2015, 4004, 9014, and 9027). Also proposed were a new rule, Rule 1004.1, and amendments to Official Form 1. The Advisory Committee received twenty-four written comments on the proposals. Several of the comments were offered on behalf of groups, including bankruptcy judges from several districts, the Commercial Law League of America, the National Bankruptcy Conference, the Insolvency Committee of the State Bar of California, Committees of the Association of the Bar of the City of New York, and Bar Association Committees from Detroit and the State of Michigan.

A public hearing was held in Washington, D.C. on January 26, 2001, to consider the proposals. Four witnesses were scheduled to testify at the hearing, but Judith Greenstone-Miller, Esq., was unable

to attend. Judy B. Calton, Esq., testified in place of Ms. Greenstone-Miller. Ms. Calton's testimony was offered on behalf of the Commercial Law League (for Ms. Greenstone-Miller), and on behalf of the Committees of the State Bar of Michigan and the Detroit Metropolitan Bar Association. Robert A. Greenfield, Esq., testified on behalf of the National Bankruptcy Conference. Professor Todd Zywicki of George Mason University School of Law testified in his personal capacity at the public hearing.

At the March 2001 meeting, the Advisory Committee considered the written comments and the testimony presented at the public hearing. The Advisory Committee approved each of the proposed amendments to the rules and will present them to the Standing Committee at its June 2001 meeting for final approval and transmission to the Judicial Conference. The Advisory Committee also will present amendments to Official Forms 1 (Voluntary Petition) and 15 (Order Confirming Plan) to the Standing Committee for final approval and transmission to the Judicial Conference.

The Advisory Committee also approved a preliminary draft of proposed amendments to Bankruptcy Rules 1007, 2003, 2009, 2016, and 7007.1, and will present them to the Standing Committee at its June 2001 meeting with a request that they be published for comment. The Advisory Committee also approved a preliminary draft of proposed amendments to Official Forms 1 (Voluntary Petition), 5 (Involuntary Petition), and 17 (Notice of Appeal), and will present them to the Standing Committee at its June 2001 meeting with a request that they be published for comment.

II. Action Items

A. Proposed Amendments to Bankruptcy Rules 1004, 2004, 2014, 2015, 4004, 9014, and 9027, Proposed New Rule 1004.1, and Proposed Amendments to Official Forms 1 and 15 Submitted for Final Approval by the Standing Committee and Transmittal to the Judicial Conference.

1. *Public Comment.*

The preliminary draft of the proposed amendments to the Federal Rules of Bankruptcy Procedure and related committee notes were published for comment by the bench and bar in August 2000, and a public hearing on the preliminary draft was held on January 26, 2001. Three persons testified at the public hearing held in Washington, D.C.

There were twenty-four written comments received concerning the proposed amendments to the rules. These comments, and the testimony provided at the public hearing are summarized on a rule-by-rule basis following the text of each rule set out below. The Advisory Committee reviewed these comments and the testimony, and made several revisions to the published draft. The post-publication revisions are identified under the heading Changes Made After Publication and Comments.

2. *Synopsis of Proposed Amendments:*

(a) Rule 1004 is amended to clarify that the rule implements § 303(b)(3)(A) of the Bankruptcy Code and is not intended to establish any substantive standard for the commencement of a voluntary case by a partnership.

(b) Rule 1004.1 is added to set out the manner in which a case is commenced on behalf of an infant or incompetent person. Rule 1004.1 is derived from Rule 17(c) F.R. Civ. P.

(c) Rule 2004 is amended to clarify that an examination ordered under that rule may be held outside of the district in which the case is pending. The court where the examination will be held issues the subpoena, and it is served in

the manner provided in Rule 45 F.R.Civ.P., made applicable by Rule 9016. Moreover, the rule makes clear that an attorney authorized to practice either in the court in which the case is pending or in the court for the district in which the examination will be held may issue and sign the subpoena on behalf of the court for the district in which the examination will be held.

(d) Rule 2014 is rewritten to make the rule conform more closely to the applicable provisions of the Bankruptcy Code and to make stylistic changes. The rule will require the disclosure of all connections that professionals seeking employment have with the debtor. The professionals also must disclose any connection that might cause the court or interested third parties reasonably to question the propriety of the employment. It also sets out service requirements for the application.

(e) Rule 2015(a)(5) is amended to conform to 28 U.S.C. § 1930(a)(6), which was amended in 1996.

(f) Rule 4004(c) is amended to provide that the filing of a motion under § 707 of the Bankruptcy Code to dismiss a case postpones the entry of the discharge. Currently, only motions brought under § 707(b) postpone entry of the discharge.

(g) Rule 9014 is amended to include Rule 7009 on pleading special matters, and Rule 7017 on real parties in interest, infants and incompetent persons, to the list of Rules applicable in contested matters. It is also amended to permit service of papers, other than the initial motion, under Rule 5(b) F.R.Civ.P. Subdivision (d) is added to clarify that testimony regarding

material disputed factual matters is to be taken in the same manner as in an adversary proceeding. Subdivision (e) is added to address problems of local variation in procedures for the appearance of witnesses by requiring that the court provide a mechanism to enable attorneys to know whether the presence of a witness is necessary for a particular hearing.

(h) Rule 9027(a)(3) is amended to clarify that the time limits for filing a notice of removal of a claim or cause of action apply to any claim or cause of action initiated after the commencement of a bankruptcy case, whether the bankruptcy case is still pending or has been suspended, dismissed, or closed.

(i) Official Form 1 is the form of a voluntary petition, and it is amended to require the debtor to disclose ownership or possession of property that poses or is alleged to pose a threat of imminent and identifiable harm to public health or safety.

(j) Official Form 15 is the form of an order confirming a plan, and it is amended to conform to amendments to Rule 3020 that will take effect December 1, 2001.

3. *Text of Proposed Amendments to Rules 1004, 2004, 2014, 2015, 4004, 9014, and 9027, and Text of New Rule 1004.1*

PROPOSED AMENDMENTS TO THE FEDERAL RULES OF BANKRUPTCY PROCEDURE*

Rule 1004. ~~Partnership Petition~~ Involuntary Petition Against a Partnership.

~~(a) *VOLUNTARY PETITION.* A voluntary petition may be filed on behalf of a partnership by one or more general partners if all general partners consent to the petition~~

~~(b) *INVOLUNTARY PETITION; NOTICE AND SUMMONS.*~~ After filing of an involuntary petition under § 303(b)(3) of the Code, (1) the petitioning partners or other petitioners shall ~~cause forthwith a copy of the petition to be sent~~ promptly send to or ~~served~~ serve on each general partner who is not a petitioner a copy of the petition; and (2) the clerk shall promptly issue ~~forthwith~~ a summons for service on each general partner who is not a petitioner. Rule 1010 applies to the form and service of the summons.

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

COMMITTEE NOTE

Section 303(b)(3)(A) of the Code provides that fewer than all of the general partners in a partnership may commence an involuntary case against the partnership. There is no counterpart provision in the Code setting out the manner in which a partnership commences a voluntary case. The Supreme Court has held in the corporate context that applicable nonbankruptcy law determines whether authority exists for a particular debtor to commence a bankruptcy case. *See Price v. Gurney*, 324 U.S. 100 (1945). The lower courts have followed this rule in the partnership context as well. *See, e.g., Jolly v. Pittore*, 170 B.R. 793 (S.D.N.Y. 1994); *Union Planters National Bank v. Hunters Horn Associates*, 158 B.R. 729 (Bankr. M.D. Tenn. 1993); *In re Channel 64 Joint Venture*, 61 B.R. 255 (Bankr. S.D. Oh. 1986). Rule 1004(a) could be construed as requiring the consent of all of the general partners to the filing of a voluntary petition, even if fewer than all of the general partners would have the authority under applicable nonbankruptcy law to commence a bankruptcy case for the partnership. Since this is a matter of substantive law beyond the scope of these rules, Rule 1004(a) is deleted as is the designation of subdivision (b).

The rule is retitled to reflect that it applies only to involuntary petitions filed against partnerships.

Public Comment on Proposed Amendments to Rule 1004:

1. Patricia L. Meravi (Deputy Clerk, Bankr. D.N.J.) suggested that the Rule be moved to a subdivision of 1003 and that proposed Rule 1004.1 be renumbered Rule 1004 in order to avoid the use of extensions that may be misleading given the use of extensions for local rules.

Changes Made After Publication and Comments. No changes since publication.

Rule 1004.1. Petition for an Infant or Incompetent Person.

If an infant or incompetent person has a representative, including a general guardian, committee, conservator, or similar fiduciary, the representative may file a voluntary petition on behalf of the infant or incompetent person. An infant or incompetent person who does not have a duly appointed representative may file a voluntary petition by next friend or guardian ad litem. The court shall appoint a guardian ad litem for an infant or incompetent person who is a debtor and is not otherwise represented or shall make any other order to protect the infant or incompetent debtor.

COMMITTEE NOTE

This rule is derived from Rule 17(c) F.R. Civ. P. It does not address the commencement of a case filed on behalf of a missing person. *See, e.g., In re King*, 234 B.R. 515 (Bankr. D.N.M. 1999).

Public Comment on Proposed Rule 1004.1:

1. Patricia L. Meravi (Deputy Clerk, Bankr. D.N.J.) suggested that the Rule be renumbered as Rule 1004 and that the proposed amendment to current Rule 1004 (set out above) be moved to a subdivision of current Rule 1003 to avoid the use of extensions on the rule numbers that may be misleading given the use of extensions for local rules.

Changes Made After Publication and Comments. No changes were made.

Rule 2004. Examination

* * * * *

(c) COMPELLING ATTENDANCE AND PRODUCTION OF DOCUMENTS ~~DOCUMENTARY EVIDENCE~~. The attendance of an entity for examination and for the production of ~~documentary evidence~~ documents, whether the examination is to be conducted within or without the district in which the case is pending, may be compelled ~~in the manner~~ as provided in Rule 9016 for the attendance of a witness ~~witnesses~~ at a hearing or trial. As an officer of the court, an attorney may issue and sign a subpoena on behalf of the court for the district in which the examination is to be held if the attorney is admitted to practice in that court or in the court in which the case is pending.

* * * * *

COMMITTEE NOTE

Subdivision (c) is amended to clarify that an examination ordered under Rule 2004(a) may be held outside the district in which the case is pending if the subpoena is issued by the court for the district in which the examination is to be held and is served in the manner provided in Rule 45 F.R.Civ.P., made applicable by Rule 9016.

The subdivision is amended further to clarify that, in addition to the procedures for the issuance of a subpoena set forth in Rule 45 F.R.Civ.P., an attorney may issue and sign a subpoena on behalf of the court for the district in which a Rule 2004 examination is to be held if the attorney is authorized to practice, even if admitted pro hac vice, either in the court in which the case is pending or in the court for the district in which the examination is to be held. This provision supplements the procedures for the issuance of a subpoena set forth in Rule 45(a)(3)(A) and (B) F.R.Civ.P. and is consistent with one of the purposes of the 1991 amendments to Rule 45, to ease the burdens of interdistrict law practice.

Public Comment on Proposed Amendments to Rule 2004:

1. Professor R. Joseph Kimble offered several suggestions on style matters for the rule.

2. Hon. Paul Mannes noted a typographical error in the published rule.

3. Guy Miller Struve, Esq., on behalf of the Association of the Bar of the City of New York and its Committees on Federal Courts and Bankruptcy and Court Reorganization, expressed general agreement with the amendments to Rule 2004(c).

Changes Made After Publication and Comments. The typographical error was corrected, but no other changes were made.

Rule 2014. Employment of a Professional Person.

~~(a) APPLICATION FOR AN ORDER OF EMPLOYMENT. An order approving the employment of attorneys, accountants, appraisers, auctioneers, agents, or other professionals pursuant to § 327, § 1103, or § 1114 of~~

~~the Code shall be made only on application of the trustee or committee. The application shall be filed and, unless the case is a chapter 9 municipality case, a copy of the application shall be transmitted by the applicant to the United States trustee. The application shall state the specific facts showing the necessity for the employment, the name of the person to be employed, the reasons for the selection, the professional services to be rendered, any proposed arrangement for compensation, and, to the best of the applicant's knowledge, all of the person's connections with the debtor, creditors, any other party in interest, their respective attorneys and accountants, the United States trustee, or any person employed in the office of the United States trustee. The application shall be accompanied by a verified statement of the person to be employed setting forth the person's connections with the debtor, creditors, any other party in interest, their respective attorneys and accountants, the United States trustee, or any person employed in the office of the United States trustee.~~

~~(b) SERVICES RENDERED BY MEMBER OR ASSOCIATE OF FIRM OF ATTORNEYS OR ACCOUNTANTS. If, under the Code and this rule, a law partnership or corporation is employed as an attorney, or an accounting partnership or corporation is employed as an accountant, or if a named attorney or accountant is employed, any partner, member, or regular associate of the partnership, corporation or individual may act as attorney or accountant so employed, without further order of the court.~~

(a) APPLICATION FOR ORDER APPROVING EMPLOYMENT. An application for an order approving the employment of a professional person under §327, §1103, or §1114 of the Code shall be in writing and may be made only by the trustee or committee. The application shall state:

(1) specific facts showing why the employment is necessary;

(2) the name of the person to be employed and the reasons for the selection;

(3) the professional services to be rendered;

(4) any proposed arrangement for compensation; and

(5) that, to the best of the trustee's or committee's knowledge, the person to be employed is eligible under the Code for employment for the purposes set forth in the application.

(b) STATEMENT OF PROFESSIONAL. The application shall be accompanied by a verified statement of the person to be employed, made according to the best of that person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances, which shall state:

(1) that the person is eligible under the Code for employment for the purposes set forth in the application;

(2) any interest that the person holds or represents that is adverse to the estate;

(3) any interest in, relationship to, or connection the person has with the debtor;

(4) any interest, connection, or relationship the person has that may cause the court or a party in interest

reasonably to question whether the person is disinterested under § 101;

(5) any relationship the person has with the United States trustee, or with any employee of the United States trustee, for the region in which the case is pending;

(6) the information required to be disclosed under § 329(a) if the person is an attorney; and

(7) whether the person shared or has agreed to share any compensation with any person, other than a partner, employee, or regular associate of the person to be employed, and if so, the details.

(c) SERVICE AND TRANSMITTAL OF APPLICATION.

(1) The applicant shall serve a copy of the application on:

(A) the trustee;

(B) the debtor and the debtor's attorney;

(C) any committee elected under §705 or appointed under § 1102, or, if the case is a chapter 9 case or a chapter 11 case and no committee of

unsecured creditors has been appointed, on the creditors included on the list filed under Rule 1007(d); and

(D) any other entity as the court may direct.

(2) Unless the case is a chapter 9 case, the applicant shall transmit a copy of the application to the United States trustee.

(d) SERVICES RENDERED BY MEMBER OR ASSOCIATE OF FIRM OF EMPLOYED PROFESSIONAL. If the court approves the employment of an individual, partnership, or corporation, any partner, member, or regular associate of the individual, partnership, or corporation may act as the person so employed, without further order of the court. If a partnership is employed, a further order approving employment is not required if the partnership has dissolved solely because a partner was added or withdrew.

(e) SUPPLEMENTAL STATEMENT OF PROFESSIONAL. Within 15 days after becoming aware of any undisclosed matter that is required to be disclosed under Rule 2014(b), a person employed under this rule shall file a

supplemental statement, serve a copy on each entity listed in Rule 2014(c), and, unless the case is a chapter 9 case, transmit a copy to the United States trustee.

COMMITTEE NOTE

This rule has been rewritten to make stylistic changes and to make it conform more closely to the applicable provisions of the Code. Professionals seeking court approval of their employment must disclose any interest in, relationship with, or connection to the debtor. The professional also must disclose any interests, relationships, or connections that would cause the court or any party in interest reasonably to question whether the person is disinterested. The rule thus requires the professional to evaluate the need to disclose the information from the perspective of the court and other parties in interest. If the information would cause those persons reasonably to question whether the professional is disinterested, it must be disclosed. This permits the United States trustee and other parties in interest an opportunity to evaluate whether to oppose the application.

As with any disclosure requirement, the person obligated to make the disclosure must first determine whether the rule requires disclosure of the particular information in question. The information may be so unrelated to the issue that it is unnecessary to make the disclosure. Or, the information may identify a direct connection with an entity other than the debtor, but the connection may be de minimus. In either instance, the professional must make an initial determination whether to investigate for the existence of these connections, and, if they exist, whether there is a need to disclose the connections. Notwithstanding this initial determination by the professional, the court still makes the ultimate determination as to whether the employment is proper under the circumstances. Moreover, since the United States trustee and other parties in interest can be heard on these issues, a professional must not fail to disclose any known or believed connection that reasonably could place into question the professional's disinterestedness.

The rule also sets out the service requirements for the application for the approval of employment. There is no provision requiring a hearing on the application. In most cases, an order approving the employment will be entered without a hearing. The court may set a hearing sua sponte or on request or may vacate an order issued under the rule upon motion of an interested party.

The rule does not address the standards that courts should apply in ruling on an application for employment of a professional.

Public Comment on Proposed Amendments to Rule 2014:

1. Richard C. Friedman, Esq., Trial Attorney, Office of United States Trustee, asserted that the proposed rule places too much discretion in the professional seeking employment. He prefers the existing language of Rule 2014.

2. Leon S. Forman, Esq., considers the proposal a significant improvement over the existing rule. He also suggested that disclosure requirements be limited to materially adverse interests rather than simply adverse interests. He also called for a mechanism to make the court aware of any supplemental statements filed by the professional.

3. Hon. Paul Mannes (Bankr. D. Md.) suggests that the rule be amended to provide that the Office of the United States Trustee be "served" rather than have documents transmitted to that office.

4. Hon. Carolyn Dineen King (5th Cir.) asserted that the proposed amendments would place undue discretion in the professional to make decisions regarding the relevance and materiality of important information. Furthermore, the complexities of relationships among lenders and advisors, both nationally and internationally, is creating additional potential for conflicts. In her view, the proposed amendments would reduce the amount of information available to the court and third parties to evaluate the potential for conflicts. Therefore, she believes the existing rule is superior.

5. Judith Greenstone-Miller, Esq., on behalf of the Commercial Law League of America, did not state a specific position on the proposal. Nevertheless, her written comments expressed concern about the requirement that professionals undertake an affirmative inquiry to determine the propriety of their employment. She expressed concern that this might create a trap for the unwary who later are found to have conducted an insufficient inquiry. Generally, however, the comments she offered were favorable to the proposal.

6. Robert A. Greenfield, Esq., on behalf of the National Bankruptcy Conference, supported adoption of the proposed amendment. He suggested that a potential ambiguity existed in the proposed Rule 2014(d) that would permit the employment of a partner of an employed professional when the partner is not himself or herself a professional.

7. Professor Todd J. Zywicki, George Mason University School of Law, argued that the existing rule is preferable to the proposed amendment. In his view, the amendment places too much discretion in the professional seeking employment. He also argued that the Rules should require greater disclosure than what might be required under the Bankruptcy Code in order to insure the efficient operation of and public confidence in the bankruptcy system.

8. Hon. Edith H. Jones (5th Cir.) stated that the proposed amendments will dilute the current disclosure requirements and unduly hinder both the courts and the United States Trustees in their efforts to monitor and maintain the integrity of the process of the employment of professionals in bankruptcy cases. She asserted that the elimination of the disclosure of all "connections" places the responsibility for determining the existence of adverse interests exclusively in the hands of the professional seeking the employment. Requiring greater disclosure would better enable the court to evaluate the propriety of any particular proposed employment.

9. Louis W. Levitt, Esq., found the preliminary draft to be a marked improvement over the existing rule. He suggested also that the rule be amended to include a statement describing the procedures the professional followed and investigation made in obtaining the

information concerning potential conflicts. He also suggested that the rule be amended to exclude disclosure of relationships with the United States trustee that are inherent in the regular practice of bankruptcy law in a region.

10. Joseph A. Guzinski, Esq., on behalf of the United States Trustee Program, argued that the existing rule is superior to the proposed amendments because it requires more complete disclosure of connections the professional has. Similarly, he argues that the professional should not be in the position to make relevancy determinations that are more properly seeded with the court and the United States trustee. Furthermore, he suggested deleting subdivision (b)(5) of the proposed rule that requires attorneys to disclose information required by Section 329(a) of the Bankruptcy Code.

11. The Insolvency Law Committee of the Business Law Section of the State Bar of California viewed the proposed amendment as generally desirable but suggested the insertion of a "good faith" safe harbor for professionals submitting applications for employment. The Committee found the rule generally acceptable but suggested that a person who conducts a conflict check in good faith and in accordance with customary practice should be protected from an order requiring disgorgement or denial of fees for services rendered under an employment order if subsequent information becomes available that leads to disqualification.

Testimony on Proposed Amendments to Rule 2014:

1. Judith B. Calton, Esq., testified on behalf of the Commercial Law League of America and the State Bar of Michigan Debtor-Creditors Rights Committee and the Detroit Metropolitan Bar Association Debtor/Creditors Section. She spoke generally in favor of the proposed rule. She noted that it is sometimes difficult, if not impossible, to identify all "connections" that a large law firm might have with creditors of the debtor. These "connections" must be disclosed under the current law, but compliance with the requirement is nearly impossible. She supported the proposed amendments to the rule that would narrow those reporting obligations.

2. Robert A. Greenfield, Esq., on behalf of the National Bankruptcy Conference, also testified in support of the rule. He expressed surprise that others viewed the proposed amendments as likely to lead to professionals withholding information in order to gain employment when they are not otherwise eligible. In his view, professionals likely would continue to "overdisclose" in order to protect against the risk that a judge would ultimately conclude that the employment was improper and that fees should be returned.

3. Professor Todd J. Zywicki reiterated his position as set out in his written comments. During his testimony, he conceded that a number of "connections" that the current rule technically requires to be disclosed generally are not disclosed. He also agreed that those failures to disclose these connections would not violate the spirit of the rule. He was unable to offer a solution to the problem of drafting language that would require the disclosure of the information necessary for courts and third parties to reach a conclusion as to the propriety of the appointment of a professional in a case.

Changes Made After Publication and Comments.

Several comments on the published proposal included concerns that the disclosure standards would be eased under the new version of the rule. While others commented that the proposal would not operate in that manner, the rule was revised to address that issue. Subdivision (b)(3) in the published version of the rule required that the professional disclose any interest, relationship, or connection that might be relevant to a determination of disinterestedness. That provision is replaced by subdivisions (b)(3) and (4). Subdivision (b)(3) requires the professional to disclose all interests in, connections, or relationships the person has with the debtor. As regards interests, connections, and relationships with persons other than the debtor (or the United States trustee, see subdivision (b)(5)), the disclosure requirement is triggered if the information may cause a court or party in interest reasonably to question the person's disinterestedness.

This change is intended to clarify that the professional making the disclosure must evaluate interests, connections, and relationships from the perspective of the court and other parties in interest. The disclosure obligation must ensure that interested parties have sufficient

information to evaluate whether the person is disinterested, and the court must have the information to determine disinterestedness. Thus, even if professionals do not believe that a particular interest, connection, or relationship affects their disinterestedness, they still must disclose the information if it may cause the court or a third party reasonably to question the professionals' disinterestedness.

Subdivisions (b)(4) through (6) are redesignated as subdivisions (b)(5) through (7).

The Committee Note was amended to reflect the changes made in the text of the rule.

Rule 2015. Duty to Keep Records, Make Reports and Give Notice of Case

(a) TRUSTEE OR DEBTOR IN POSSESSION. A trustee or debtor in possession shall

* * * * *

(5) in a chapter 11 reorganization case, on or before the last day of the month after each calendar quarter during which there is a duty to pay fees under 28 U.S.C. § 1930(a)(6). ~~until a plan is confirmed or the case is converted or dismissed,~~ file and transmit to the United States trustee a statement of ~~the~~ any disbursements made during ~~such calendar~~ that quarter and ~~a statement of the amount~~ of ~~the~~ any fees payable under ~~required pursuant~~

to 28 U.S.C. § 1930(a)(6) ~~that has been paid~~ for ~~such~~ ~~calendar~~ that quarter.

* * * * *

COMMITTEE NOTE

Subdivision (a)(5) is amended to provide that the duty to file quarterly disbursement reports continues only so long as there is an obligation to make quarterly payments to the United States trustee under 28 U.S.C. § 1930(a)(6).

Other amendments are stylistic.

Public Comment on Proposed Amendments to Rule 2015: There were no comments on the proposed amendments to Rule 2015.

Changes Made After Publication and Comments. No changes were made.

Rule 4004. Grant or Denial of Discharge.

* * * * *

(c) GRANT OF DISCHARGE

(1) In a chapter 7 case, on expiration of the time fixed for filing a complaint objecting to discharge and the time fixed for filing a motion to dismiss the case under Rule 1017(e), the court shall forthwith grant the discharge unless:

(A) the debtor is not an individual,

(B) a complaint objecting to the discharge has been filed,

(C) the debtor has filed a waiver under § 727(a)(10),

(D) a motion to dismiss the case under ~~Rule 1017(c)~~ § 707 is pending,

(E) a motion to extend the time for filing a complaint objecting to the discharge is pending,

(F) a motion to extend the time for filing a motion to dismiss the case under Rule 1017(e) is pending, or

(G) the debtor has not paid in full the filing fee prescribed by 28 U.S.C. § 1930(a) and any other fee prescribed by the Judicial Conference of the United States under 28 U.S.C. § 1930(b) that is payable to the clerk upon the commencement of a case under the Code.

* * * * *

COMMITTEE NOTE

Subdivision (c)(1)(D) is amended to provide that the filing of a motion to dismiss under § 707 of the Bankruptcy Code postpones the

entry of the discharge. Under the present version of the rule, only motions to dismiss brought under § 707(b) cause the postponement of the discharge. This amendment would change the result in cases such as *In re Tanenbaum*, 210 B.R. 182 (Bankr. D. Colo. 1997).

Public Comment on Proposed Amendments to Rule 4004:

There were no comments on proposed amendments to Rule 4004.

Changes Made After Publication and Comments. No changes were made.

Rule 9014. Contested Matters

(a) MOTION. In a contested matter ~~in a case under the Code~~ not otherwise governed by these rules, relief shall be requested by motion, and reasonable notice and opportunity for hearing shall be afforded the party against whom relief is sought. No response is required under this rule unless the court ~~orders an answer to a motion~~ directs otherwise.

(b) SERVICE. The motion shall be served in the manner provided for service of a summons and complaint by Rule 7004. ~~and, unless the court otherwise directs,~~ Any paper served after the motion shall be served in the manner provided by Rule 5(b) F.R. Civ.P.

(c) APPLICATION OF PART VII RULES. Unless the court directs otherwise, the following rules shall apply: 7009, 7017, 7021, 7025, 7026, 7028-7037, 7041, 7042, 7052, 7054-7056, 7064, 7069, and 7071. An entity that desires to perpetuate testimony may proceed in the same manner as provided in Rule 7027 for the taking of a deposition before an adversary proceeding. The court may at any stage in a particular matter direct that one or more of the other rules in Part VII shall apply. The court shall give the parties notice of any order issued under this paragraph to afford them a reasonable opportunity to comply with the procedures prescribed by the order. ~~An entity that desires to perpetuate testimony may proceed in the same manner as provided in Rule 7027 for the taking of a deposition before an adversary proceeding. The clerk shall give notice to the parties of the entry of any order directing that additional rules of Part VII are applicable or that certain of the rules of Part VII are not applicable. The notice shall be given within such time as is necessary to afford the parties a reasonable opportunity to comply with the procedures made applicable by the order.~~

(d) TESTIMONY OF WITNESSES. Testimony of witnesses with respect to disputed material factual issues shall be taken in the same manner as testimony in an adversary proceeding.

(e) ATTENDANCE OF WITNESSES. The court shall provide procedures that enable parties to ascertain at a reasonable time before any scheduled hearing whether the hearing will be an evidentiary hearing at which witnesses may testify.

COMMITTEE NOTE

The list of Part VII rules that are applicable in a contested matter is extended to include Rule 7009 on pleading special matters, and Rule 7017 on real parties in interest, infants and incompetent persons, and capacity. The discovery rules made applicable in adversary proceedings apply in contested matters unless the court directs otherwise.

Subdivision (b) is amended to permit parties to serve papers, other than the original motion, in the manner provided in Rule 5(b) F.R. Civ.P. When the court requires a response to the motion, this amendment will permit service of the response in the same manner as an answer is served in an adversary proceeding.

Subdivision (d) is added to clarify that if the motion cannot be decided without resolving a disputed material issue of fact, an evidentiary hearing must be held at which testimony of witnesses is taken in the same manner as testimony is taken in an adversary proceeding or at a trial in a district court civil case. Rule 43(a), rather than Rule 43(e), F.R. Civ.P. would govern the evidentiary hearing on the factual dispute. Under Rule 9017, the Federal Rules of Evidence

also apply in a contested matter. Nothing in the rule prohibits a court from resolving any matter that is submitted on affidavits by agreement of the parties.

Subdivision (e). Local procedures for hearings and other court appearances in a contested matter vary from district to district. In some bankruptcy courts, an evidentiary hearing at which witnesses may testify usually is held at the first court appearance in the contested matter. In other courts, it is customary for the court to delay the evidentiary hearing on disputed factual issues until some time after the initial hearing date. In order to avoid unnecessary expense and inconvenience, it is important for attorneys to know whether they should bring witnesses to a court appearance. The purpose of the final sentence of this rule is to require that the court provide a mechanism that will enable attorneys to know at a reasonable time before a scheduled hearing whether it will be necessary for witnesses to appear in court on that particular date.

Other amendments to this rule are stylistic.

Public Comment on Proposed Amendments to Rule 9014:

1. Hon. Kathleen P. March (Bankr. C.D. Cal.) opposes the proposed amendment to Rule 9014 to the extent that it would change the practice in the Ninth Circuit that permits the submission of testimony by declaration rather than live testimony of a witness. Judge March also suggested that the rule be clarified to state more clearly what evidentiary hearings would be governed by the scope of the rule.

2. Hon. Paul Mannes (Bankr. D. Md.) stated that the proposed amendment to Rule 9014(e) would create confusion. He views the rule as unnecessary because persons practicing in a particular court would be aware of the court's regular procedures regarding the attendance of witnesses at hearings.

3. Judith Greenstone-Miller, Esq., on behalf of the Commercial Law League of America, expressed concern that the proposed amendment to Rule 9014 would lead to evidentiary hearings whenever a disputed issue of fact arises. She would limit those hearings to situations in which "material" facts are at issue.

4. Judy B. Calton, Esq., on behalf of the State Bar of Michigan Debtors/Creditors Rights Committee and the Detroit Metropolitan Bar Association Debtor/Creditors Section, argued that Rule 9014(d) should be limited to disputes involving material issues of fact rather than all disputed factual issues. She also urged that the bankruptcy judges be allowed to use their discretion to determine whether live testimony is necessary in particular matters.

5. Robert A. Greenfield, Esq., on behalf of the National Bankruptcy Conference, also argued that the language of Rule 9014(d) be limited to disputes over material facts. Additionally, he argued that discretion be retained in the bankruptcy judges to determine whether live testimony or testimony by declaration be employed in a particular hearing.

6. Hon. Albert E. Radcliffe (Bankr. D.Ore.), on behalf of the Conference of Chief Bankruptcy Judges of the Ninth Circuit, opposed the apparent elimination of a court's discretion to permit direct testimony by affidavit or declarations. The Conference urged that the rule be retained in its current form to continue that discretion as well as to reduce the expense to litigants in matters where the amounts in controversy are fairly small.

7. Hon. Wesley W. Steen (Bankr. S.D. Tex.) suggested that the language of proposed Rule 9014(d) be clarified to require live testimony only in the face of a "bonafide" dispute. He also suggested that the language be changed to clarify that the restriction on testimony by affidavit or declaration is limited to matters in dispute, and matters not in dispute could still be resolved by declaration or affidavit. Judge Steen also expressed concern that proposed Rule 9014(e) could be used strategically by parties to avoid their obligations to be fully prepared for hearings.

8. Hon. Philip H. Brandt (Bankr. W.D. Wash.) indicated that proposed Rule 9014(d) should be limited to disputed material factual issues. He noted especially the burden that would be placed on parties involved in matters with limited amounts at stake.

9. Thomas R. Phinney, Esq., on behalf of the Sacramental County Bar Association Bankruptcy & Commercial Law Section, opposed the proposed amendment to Rule 9014(d). He asserted that the current practice which permits court discretion in the allowance of testimony by affidavit or declaration is superior to the practice that would ensue under the proposed amendment. He asserted as well that the current practice is more economically efficient and appropriate given the limited amount at stake in much litigation covered by the rule.

10. Hon. Samuel L. Bufford (Bankr. C.D. Cal.) opposed the proposed amendment to Rule 9014(d). He asserted that F.R. Civ. P. 43(e) should govern motions in bankruptcy matters just as it does in litigation in the district courts. He suggests that this consistency in the application of the rules is both warranted and preferable.

11. Hon. Robin L. Riblet (Bankr. C.D. Cal.), on behalf of the Rules Committee of the United States Bankruptcy Court for the Central District of California and the Bankruptcy Judges of the Central District of California, opposed the proposed amendment to Rule 9014(d) because it would remove the court's discretion to take testimonial evidence by affidavit or declaration under F.R. Civ. P. 43(e). She asserted that the current practice under Ninth Circuit authority should continue, and that the proposed amendments to the rule would prohibit that method for taking evidence.

12. Carolyn B. Buffington, Esq., (Law Clerk to the Hon. Vincent J. Aug, Bankr. S.D. Oh.) opposed the proposed amendment to Rule 9014(d). She argued that constraints of time or money make the use of affidavits the most appropriate way in which to present certain forms of evidence. The bankruptcy judges, in her view, should be given the discretion to accept testimony in this form.

13. Guy Miller Struve, Esq., on behalf of the Federal Courts and Bankruptcy and Court Reorganization Committees of the

Association of the Bar of the City of New York, supported the proposed amendment to Bankruptcy Rule 9014(d). The Committee found that it serves the salutary purpose of increasing uniformity between the practice in the district and bankruptcy courts.

14. The Insolvency Law Committee of the Business Law Section of the State Bar of California opposed the proposed amendment to Rule 9014(d). It asserted that the existing practice in the Ninth Circuit was proper in that it permits the courts discretion to allow testimony by affidavit or declaration. The Committee noted that the amounts in controversy often make it unrealistic to present evidence by live testimony.

Changes Made After Publication and Comments:

The Advisory Committee made two changes to subdivision (d) after considering the comments received addressing the proposed rule. First, the word "material" is inserted to make explicit that which was implied in the published version of the proposed rule. Second, the reference to F.R.Civ.P. 43(a) was removed. The purpose of proposed subdivision (d) was to recognize that testimony should be taken in the same manner in both contested matters and adversary proceedings. The revision to the published rule states this more directly.

The Committee Note was amended to reflect the changes made in the text of the rule.

Rule 9027. Removal

(a) NOTICE OF REMOVAL.

* * * * *

(3) *Time for filing; civil action initiated after commencement of the case under the Code.* ~~If a case under the Code is pending when a claim or cause of action is asserted in another court,~~ If a claim or cause of

action is asserted in another court after the commencement of a case under the Code, a notice of removal may be filed with the clerk only within the shorter of (A) 30 days after receipt, through service or otherwise, of a copy of the initial pleading setting forth the claim or cause of action sought to be removed, or (B) 30 days after receipt of the summons if the initial pleading has been filed with the court but not served with the summons.

* * * * *

COMMITTEE NOTE

Subdivision (a)(3) is amended to clarify that if a claim or cause of action is initiated after the commencement of a bankruptcy case, the time limits for filing a notice of removal of the claim or cause of action apply whether the case is still pending or has been suspended, dismissed, or closed.

Public Comment on Proposed Amendments to Rule 9027(a):

1. Hon. Robin L. Riblet (Bankr. C.D. Cal.), on behalf of the bankruptcy judges of the Central District of California, expressed concern that the amendment would permit removal of state court actions to the bankruptcy court when the underlying bankruptcy case has been dismissed or closed for some time. Judge Riblet expressed concern that the parties would institute frivolous removal actions for strategic purposes. She asserted also that existing procedures

adequately protect parties who need to obtain relief in the Bankruptcy Court when conflicting state actions are pending.

Changes Made After Publication and Comments: No changes were made.

AMENDMENTS TO OFFICIAL FORMS 1 and 15

In addition to requesting approval of the amendments to these forms and transmittal to the Judicial Conference, the Advisory Committee requests that the amendments be effective as of December 1, 2001, rather than upon their adoption by the Judicial Conference. The delay in the effective date of these amendments is necessary for two reasons. First, the amendment to Official Form 15 conforms it to the proposed amendments to Rule 3020 that the Supreme Court promulgated on April 23, 2001. The amendments to the rule will become effective on December 1, 2001, if Congress takes no action to the contrary. Therefore, delaying the effective date of the form will coincide with the effective date of the rule amendment that the form implements.

Official Form 1 is the form of a voluntary petition. It is used in the vast majority of bankruptcy cases. The public and the bar rely heavily on commercial publishers for copies of the forms for use in their cases. The Administrative Office cannot provide copies of the form prior to its adoption by the Judicial Conference. Therefore, it is appropriate to set a delayed effective date for the form. This will provide an opportunity for court personnel to familiarize themselves with the form and will permit publishers and software vendors to distribute the new form to their customers in a timely fashion. Since December 1 is the date on which rules amendments generally become effective, it is appropriate to use that date for the effective date of these amendments to the Official Forms.

(Official Form 1) (12/01)

FORM B1	United States Bankruptcy Court District of _____	Voluntary Petition

Name of Debtor (if individual, enter Last, First, Middle):	Name of Joint Debtor (Spouse) (Last, First, Middle):
All Other Names used by the Debtor in the last 6 years (include married, maiden, and trade names):	All Other Names used by the Joint Debtor in the last 6 years (include married, maiden, and trade names):
Soc. Sec./Tax I.D. No. (if more than one, state all):	Soc. Sec./Tax I.D. No. (if more than one, state all):
Street Address of Debtor (No. & Street, City, State & Zip Code):	Street Address of Joint Debtor (No. & Street, City, State & Zip Code):
County of Residence or of the Principal Place of Business:	County of Residence or of the Principal Place of Business:
Mailing Address of Debtor (if different from street address):	Mailing Address of Joint Debtor (if different from street address):
Location of Principal Assets of Business Debtor (if different from street address above):	

Information Regarding the Debtor (Check the Applicable Boxes)

Venue (Check any applicable box)

☐ Debtor has been domiciled or has had a residence, principal place of business, or principal assets in this District for 180 days immediately preceding the date of this petition or for a longer part of such 180 days than in any other District.

☐ There is a bankruptcy case concerning debtor's affiliate, general partner, or partnership pending in this District.

Type of Debtor (Check all boxes that apply)

☐ Individual(s) ☐ Railroad
☐ Corporation ☐ Stockbroker
☐ Partnership ☐ Commodity Broker
☐ Other _____

Chapter or Section of Bankruptcy Code Under Which the Petition is Filed (Check one box)

☐ Chapter 7 ☐ Chapter 11 ☐ Chapter 13
☐ Chapter 9 ☐ Chapter 12
☐ Sec. 304 - Case ancillary to foreign proceeding

Nature of Debts (Check one box)

☐ Consumer/Non-Business ☐ Business

Filing Fee (Check one box)

☐ Full Filing Fee attached
☐ Filing Fee to be paid in installments (Applicable to individuals only) Must attach signed application for the court's consideration certifying that the debtor is unable to pay fee except in installments. Rule 1006(b). See Official Form No. 3.

Chapter 11 Small Business (Check all boxes that apply)

☐ Debtor is a small business as defined in 11 U.S.C. § 101
☐ Debtor is and elects to be considered a small business under 11 U.S.C. § 1121(e) (Optional)

Statistical/Administrative Information (Estimates only)

☐ Debtor estimates that funds will be available for distribution to unsecured creditors.
☐ Debtor estimates that, after any exempt property is excluded and administrative expenses paid, there will be no funds available for distribution to unsecured creditors.

THIS SPACE IS FOR COURT USE ONLY

Estimated Number of Creditors	1-15	16-49	50-99	100-199	200-999	1000-over
	☐	☐	☐	☐	☐	☐

Estimated Assets	$0 to $50,000	$50,001 to $100,000	$100,001 to $500,000	$500,001 to $1 million	$1,000,001 to $10 million	$10,000,001 to $50 million	$50,000,001 to $100 million	More than $100 million
	☐	☐	☐	☐	☐	☐	☐	☐

Estimated Debts	$0 to $50,000	$50,001 to $100,000	$100,001 to $500,000	$500,001 to $1 million	$1,000,001 to $10 million	$10,000,001 to $50 million	$50,000,001 to $100 million	More than $100 million
	☐	☐	☐	☐	☐	☐	☐	☐

Voluntary Petition
(This page must be completed and filed in every case)

Name of Debtor(s):

Prior Bankruptcy Case Filed Within Last 6 Years (If more than one, attach additional sheet)

Location Where Filed:	Case Number:	Date Filed:

Pending Bankruptcy Case Filed by any Spouse, Partner or Affiliate of this Debtor (If more than one, attach additional sheet)

Name of Debtor:	Case Number:	Date Filed:
District:	Relationship:	Judge:

Signatures

Signature(s) of Debtor(s) (Individual/Joint)

I declare under penalty of perjury that the information provided in this petition is true and correct.
[If petitioner is an individual whose debts are primarily consumer debts and has chosen to file under chapter 7] I am aware that I may proceed under chapter 7, 11, 12 or 13 of title 11, United States Code, understand the relief available under each such chapter, and choose to proceed under chapter 7.
I request relief in accordance with the chapter of title 11, United States Code, specified in this petition.

X _____
Signature of Debtor

X _____
Signature of Joint Debtor

_____
Telephone Number (If not represented by attorney)

_____
Date

Signature of Attorney

X _____
Signature of Attorney for Debtor(s)

_____
Printed Name of Attorney for Debtor(s)

_____
Firm Name

_____
Address

_____

_____
Telephone Number

_____
Date

Signature of Debtor (Corporation/Partnership)

I declare under penalty of perjury that the information provided in this petition is true and correct, and that I have been authorized to file this petition on behalf of the debtor.

The debtor requests relief in accordance with the chapter of title 11, United States Code, specified in this petition.

X _____
Signature of Authorized Individual

_____
Printed Name of Authorized Individual

_____
Title of Authorized Individual

_____
Date

Exhibit A

(To be completed if debtor is required to file periodic reports (e.g., forms 10K and 10Q) with the Securities and Exchange Commission pursuant to Section 13 or 15(d) of the Securities Exchange Act of 1934 and is requesting relief under chapter 11)

☐ Exhibit A is attached and made a part of this petition.

Exhibit B

(To be completed if debtor is an individual whose debts are primarily consumer debts)

I, the attorney for the petitioner named in the foregoing petition, declare that I have informed the petitioner that [he or she] may proceed under chapter 7, 11, 12, or 13 of title 11, United States Code, and have explained the relief available under each such chapter.

X _____
Signature of Attorney for Debtor(s) Date

Exhibit C

Does the debtor own or have possession of any property that poses or is alleged to pose a threat of imminent and identifiable harm to public health or safety?

☐ Yes, and Exhibit C is attached and made a part of this petition.
☐ No

Signature of Non-Attorney Petition Preparer

I certify that I am a bankruptcy petition preparer as defined in 11 U.S.C. § 110, that I prepared this document for compensation, and that I have provided the debtor with a copy of this document.

_____
Printed Name of Bankruptcy Petition Preparer

_____
Social Security Number

_____
Address

_____

Names and Social Security numbers of all other individuals who prepared or assisted in preparing this document:

If more than one person prepared this document, attach additional sheets conforming to the appropriate official form for each person.

X _____
Signature of Bankruptcy Petition Preparer

_____
Date

A bankruptcy petition preparer's failure to comply with the provisions of title 11 and the Federal Rules of Bankruptcy Procedure may result in fines or imprisonment or both 11 U.S.C. §110; 18 U.S.C. §156.

Form B1, Exhibit C
(12/01)

Exhibit "C"

[If, to the best of the debtor's knowledge, the debtor owns or has possession of property that poses or is alleged to pose a threat of imminent and identifiable harm to the public health or safety, attach this Exhibit "C" to the petition.]

[Caption as in Form 16B]

Exhibit "C" to Voluntary Petition

1. Identify and briefly describe all real or personal property owned by or in possession of the debtor that, to the best of the debtor's knowledge, poses or is alleged to pose a threat of imminent and identifiable harm to the public health or safety (attach additional sheets if necessary):

.....
.....
.....
.....

2. With respect to each parcel of real property or item of personal property identified in question 1, describe the nature and location of the dangerous condition, whether environmental or otherwise, that poses or is alleged to pose a threat of imminent and identifiable harm to the public health or safety (attach additional sheets if necessary):

.....
.....
.....
.....

COMMITTEE NOTE

The form has been amended to require the debtor to disclose whether the debtor owns or had possession of any property that poses or is alleged to pose a threat of imminent and identifiable harm to public health or safety. If any such property exists, the debtor must complete and attach Exhibit "C" describing the property, its location, and the potential danger it poses. Exhibit "C" will alert the United States trustee and any person selected as trustee that immediate precautionary action may be necessary.

Form 15. ORDER CONFIRMING PLAN

[Caption as in Form 16A]

ORDER CONFIRMING PLAN

The plan under chapter 11 of the Bankruptcy Code filed by _____, on _____ [*if applicable*, as modified by a modification filed on _____,] or a summary thereof, having been transmitted to creditors and equity security holders; and

It having been determined after hearing on notice that the requirements for confirmation set forth in 11 U.S.C. § 1129(a) [*or, if appropriate,* 11 U.S.C. § 1129(b)] have been satisfied;

IT IS ORDERED that:

The plan filed by _____, on _____, *[If appropriate, include dates and any other pertinent details of modifications to the plan]* is confirmed. *[If the plan provides for an injunction against conduct not otherwise enjoined under the Code, include the information required by Rule 3020.]*

A copy of the confirmed plan is attached.

Dated: _____

BY THE COURT

_____
United States Bankruptcy Judge.

COMMITTEE NOTE

The form is amended to conform to the December 1, 2001, amendments to Rule 3020.

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

ANTHONY J. SCIRICA
CHAIR

PETER G. McCABE
SECRETARY

CHAIRS OF ADVISORY COMMITTEES

WILL L. GARWOOD
APPELLATE RULES

A. THOMAS SMALL
BANKRUPTCY RULES

DAVID F. LEVI
CIVIL RULES

W. EUGENE DAVIS
CRIMINAL RULES

MILTON I. SHADUR
EVIDENCE RULES

To: Honorable Anthony J. Scirica, Chair
Standing Committee on Rules of Practice and Procedure

From: David F. Levi, Chair, Advisory Committee on the Federal Rules of Civil Procedure

Date: May 14, 2001

Re: Report of the Civil Rules Advisory Committee

Introduction

The Civil Rules Advisory Committee met on March 12, 2001, and April 23 and 24, 2001, at the Administrative Office of the United States Courts in Washington, D.C. It voted to recommend adoption of a new rule and rules amendments that were published for comment in August 2000 and January 2001, with modifications in response to the public comments. Part I of this report details these recommendations in four parts. The first relates to new Civil Rule 7.1, governing corporate disclosure; this proposal parallels published proposals to amend Appellate Rule 26.1 and to adopt a new Criminal Rule 12.4, and may be affected by the proposal to publish a Bankruptcy Rule that would depart from these other proposals in significant ways. The second relates to amendments of Civil Rule 58 aimed at the "separate document" requirement, including a conforming amendment of Civil Rule 54; these proposals are integrated with proposals to amend Appellate Rule 4(a)(7), and indeed began with the Appellate Rules Committee. The third relates to Civil Rule 81, which would be amended to integrate better with the separate rules governing § 2254 and § 2255 proceedings; it began in conjunction

with review of those rules, but can be separated from them as the Criminal Rules Committee continues its work on them. The fourth and final part is a set of technical amendments to conform forfeiture provisions of the Supplemental Admiralty Rules to legislative changes that occurred too late to be recognized in the Admiralty Rules amendments that took effect on December 1, 2000.

Part II describes Advisory Committee recommendations to publish for comment three sets of rules amendments. Each involves a project that has been long on the Advisory Committee agenda. The first set, which would amend Civil Rule 23, grows out of ten years of Advisory Committee work, important empirical studies, and the Report of the Ad Hoc Mass Torts Working Group. The central focus is on improving review of class-action settlements, addressing some of the most pressing problems that arise from competing and overlapping class actions, and providing for the first time in Rule 23 for appointment of class counsel and approval of fee awards. Additional changes address notice and also the times for acting to determine whether to certify a class and to consider revision of a certification decision.

The second proposed amendment would rewrite Civil Rule 51 to express clearly the many jury-instruction rules that have grown out of its moderately opaque text. New provisions are added to address such matters as the time for requesting instructions and the court's obligation to inform the parties of all proposed instructions.

The third proposed amendment would rewrite Civil Rule 53 to reflect the vast changes that have overtaken the use of special masters. This work was assisted by a study undertaken by the Federal Judicial Center. The amendment is not intended either to encourage or to discourage the pretrial and post-judgment uses of special masters that

have grown up since Rule 53 was framed to address the use of trial masters. It is intended to give guidelines for these new practices. Special attention is devoted to the relationship between the appointment of special masters and a judicial institution — magistrate judges — that did not exist when Rule 53 was written. In addition, the draft reduces the many cumbersome details that have been written into present Rule 53.

Finally, Part III provides a brief summary of ongoing Advisory Committee work.

Attachments: Enabling Act Memorandum
Notes on § 2283

I Action Items: Rules Published For Comment

A. RULES PUBLISHED FOR COMMENT IN AUGUST 2000

Three sets of rules proposals were published for comment in August 2000. The hearing scheduled for January 29, 2001 was cancelled because no one wished to testify. Summaries of the written comments are provided with the discussion of each proposal. Almost all of the comments were devoted to issues that were discussed thoroughly before the proposals were published. Although the debates are familiar, the views of experienced practitioners and widely representative bar groups lend added support to some of the competing positions.

Discussion of each of these proposals is complicated by the fact that none of them is the sole responsibility of the Civil Rules Advisory Committee among the advisory committees. Indeed, it is fair to say that none of them originated with the Civil Rules Committee. It was possible to coordinate discussion in the Civil Rules Committee with actions taken at the earlier meetings of the Appellate Rules and Bankruptcy Rules Advisory Committees. As to the Criminal Rules Committee, consultation between the reporters was all that was possible.

Each proposal is presented in the form recommended for adoption. Changes from the published versions are described after the summary of comments for each rule.

PROPOSED AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE*

Rule 7.1. Disclosure Statement

(a) **Who Must File: Nongovernmental Corporate Party.** A nongovernmental corporate party to an action or proceeding in a district court must file two copies of a statement that identifies any parent corporation and any publicly held corporation that owns 10% or more of its stock or states that there is no such corporation.

(b) **Time for Filing; Supplemental Filing.** A party must:

(1) file the Rule 7.1(a) statement with its first appearance, pleading, petition, motion, response, or other request addressed to the court; and

(2) promptly file a supplemental statement upon any change in the information that the statement requires.

---

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

Committee Note

Rule 7.1 is drawn from Rule 26.1 of the Federal Rules of Appellate Procedure, with changes to adapt to the circumstances of district courts that dictate different provisions for the time of filing, number of copies, and the like. The information required by Rule 7.1(a) reflects the "financial interest" standard of Canon 3C(1)(c) of the Code of Conduct for United States Judges. This information will support properly informed disqualification decisions in situations that call for automatic disqualification under Canon 3C(1)(c). It does not cover all of the circumstances that may call for disqualification under the financial interest standard, and does not deal at all with other circumstances that may call for disqualification.

Although the disclosures required by Rule 7.1(a) may seem limited, they are calculated to reach a majority of the circumstances that are likely to call for disqualification on the basis of financial information that a judge may not know or recollect. Framing a rule that calls for more detailed disclosure will be difficult. Unnecessary disclosure requirements place a burden on the parties and on courts. Unnecessary disclosure of volumes of information may create a risk that a judge will overlook the one bit of information that might require disqualification, and also may create a risk that unnecessary disqualifications will be made rather than attempt to unravel a potentially difficult question. It has not been feasible to dictate more detailed disclosure requirements in Rule 7.1(a).

Rule 7.1 does not prohibit local rules that require disclosures in addition to those required by Rule 7.1. Developing experience with local disclosure practices and advances in electronic technology may provide a foundation for adopting more detailed disclosure requirements by future amendments of Rule 7.1.

Recommendation

The comments summarized below raise two fundamental questions, each of which was discussed extensively by several committees before Rule 7.1, Appellate Rule 26.1, and Criminal Rule 12.4 were published for comment. As extensive as it was, the prior discussion achieved compromise positions rather than clearly dispositive conclusions. As published for comment, Rule 7.1(a)(1)(B) required nongovernmental corporate parties to "disclose any additional information that may be required by the Judicial Conference of the United States." Rule 7.1(a)(2) imposed the same requirement on any other party. This provision was challenged as a delegation of rulemaking authority to the Judicial Conference, in defiance of full Enabling Act procedures. And there is a difficult question whether and when Rule 7.1 might preempt local district rules that impose additional disclosure requirements. The Committee Note stated that Rule 7.1 does not prohibit local disclosure rules "unless the Judicial Conference adopts a form that preempts additional disclosures." This observation prompted additional challenges asserting that the Judicial Conference lacks authority to preempt local rules. Discussion of these issues persuaded the Advisory Committee that it is better to retract the Judicial Conference provisions. These provisions were designed to serve an important purpose, and to achieve a wise integration of the Enabling Act with the special competence of the Judicial Conference and its Committee on Codes of Conduct. But the prospect that the Judicial Conference will act in the mid-term future to adopt new disclosure requirements is too slender to justify further testing of the Enabling Act questions.

The recommendation, then, is to delete the provisions for requirements to be adopted by the Judicial Conference and to recommend that the Judicial Conference adopt the remainder of Rule 7.1 as published.

Delegation to Judicial Conference

One concern expressed in the comments is that Judicial Conference exactions are not readily available to practicing lawyers. This concern would be addressed by stating each required disclosure explicitly in Rule 7.1. By itself, this concern did not seem especially troubling. Implementation of any Judicial Conference requirements should be readily accomplished. The requirements should be expressed in forms that are widely available and that become an automatic part of routine filing procedure. There may be brief transition problems, but they could be handled with common sense.

The more fundamental concern is that an Enabling Act Rule should not mandate adherence to requirements formulated by a process outside the Enabling Act, even under auspices so prestigious as the Judicial Conference. In one sense, there is precedent for "delegation" to the Judicial Conference. Rule 83(a)(1) dictates that a local rule "shall conform to any uniform numbering system prescribed by the Judicial Conference of the United States." Rule 5(e) provides that a local rule may "permit papers to be filed, signed, or verified by electronic means that are consistent with technical standards, if any, that the Judicial Conference of the United States establishes." But the Judicial Conference action provided for by each of these rules is narrow and does not involve any fundamental policy. Development of additional disclosure requirements for nongovernmental corporate parties, and development of all disclosure requirements that may be imposed on other parties, is a far more important endeavor. The precedents established by Rules 5(e) and 83(a)(1) do not resolve the doubts that may be felt on this score.

A powerful expression of the Enabling Act concern is provided by Judge Easterbrook's comments on the parallel provisions in Appellate Rule 26.1, as quoted and summarized by Reporter Schiltz.

The core of the argument is that it ill becomes the rules committees to urge regularly that Congress should respect the Enabling Act process and then to recommend rules that abridge, enlarge, or modify the Enabling Act process. The history of the disclosure rules project should serve at the same time to exacerbate this concern and to alleviate it.

Many members of the various committees that have developed the disclosure rules have expressed doubts whether any of the rules of procedure should address disclosure requirements. If Appellate Rule 26.1 had not led the way more than a decade ago, these doubts might have prevailed now. None of the rules committees expresses any sense of special competence in the problems that arise from the Code of Conduct for United States Judges. Another Judicial Conference committee, the Committee on Codes of Conduct, works constantly with these problems. That Committee should have a better-informed sense of the inevitable compromises that must be made in this area. It is not possible to require disclosure and judicial review of every bit of information about every litigant that might give rise to disqualification. The most that can be attempted is disclosure of information that accounts for the most common grounds of disqualification. It might be better for the rules committees to do nothing in this area. The Committee on Codes of Conduct, however, has taken the lead in urging that formal rules of procedure be adopted. Deference to their experience and wisdom has led to the published proposals.

Deference to the Codes of Conduct Committee did not account for the full sweep of Rule 7.1 and the parallel proposals. The Codes of Conduct Committee urged adoption of Appellate Rule 26.1 in all the sets of rules with only minor changes. The history of Appellate Rule 26.1, however, led to consideration of the need for additional disclosure requirements. Before Rule 26.1 was adopted, a draft that

required extensive disclosures was circulated among circuit judges for comment. The reactions were so diverse and hostile that the advisory committee withdrew to a much narrower version. Recognizing the limited nature of the disclosures required, the advisory committee observed that the circuits might wish to adopt circuit rules calling for additional disclosures. Rule 26.1 has been further narrowed since its adoption by deleting the former requirement for disclosures relating to corporate subsidiaries. Most of the circuits have adopted local rules; some of the local rules call for far more information than Rule 26.1 requires. Predictably, wide variations have emerged among the local circuit rules.

A number of district courts have adopted local disclosure rules. A local district rule is likely to resemble the local circuit rule, a circumstance that may contribute to the wide diversity of local district disclosure requirements.

Against this background, the "local rule problem" provoked the usual reactions. Proliferation of local rules is not favored by many of those engaged in the national rules process. At the same time, it was recognized that proposed Rule 7.1, modeled on current Appellate Rule 26.1, requires less disclosures than many local variations. The outcome of the debates was captured in the final sentence of the Committee Note: "Rule 7.1 does not prohibit local rules that require disclosures in addition to those required by Rule 7.1 unless the Judicial Conference adopts requirements that preempt additional disclosures." This sentence reflects an understanding that real benefits may emerge from experience with local rules that supplement Rule 7.1, not only in directly avoiding tardy discovery of disqualification problems but also in paving the way for more detailed national disclosure requirements that really work. At the same time it reflects the hope that one day it may be possible to adopt uniform national requirements. Uniform requirements not only make life easier for the

lawyers who practice in multiple districts, but also make life much easier for institutional litigants who engage in litigation in many different districts.

This history provides, paradoxically, the strongest argument for putting aside the concern that the proposed rules effect an improper delegation of Enabling Act authority. The argument is that disclosure requirements could be adopted by the Judicial Conference, on advice of the Committee on Codes of Conduct, without any exercise of Enabling Act authority. The question is not one of the procedural rules that govern litigation but one of court administration. There is a sufficient touch of "practice and procedure" to support formal rules, and some advantage in providing notice to the bar through the formal rules. But reliance on the Judicial Conference does not reflect any "delegation" of Enabling Act authority. The proposed rules serve only to reflect — and provide notice to the bar of — the independent Judicial Conference authority to regulate these matters.

The argument for independent Judicial Conference authority is subject to its own constraints. The fourth paragraph of 28 U.S.C. § 331 authorizes the Judicial Conference to "submit suggestions and recommendations to the various courts to promote uniformity of management procedures and the expeditious conduct of court business." The authority to submit suggestions and recommendations may impliedly defeat authority to impose requirements. The third-from-last paragraph of § 331 directs the Judicial Conference to review rules prescribed under § 2071 by federal courts "other than the Supreme Court and the district courts." Coupled with provisions directing the judicial councils of the circuits to review local district rules, § 332(d)(4) and § 2071(c), these provisions create obstacles to achieving national uniformity by combining Rule 7.1, which could directly supersede local rules, with reliance on the Judicial Conference.

Deferring to doubts about "delegation" to the Judicial Conference does not defeat the original purpose of adopting Rule 7.1. The Committee on Codes of Conduct originally recommended adoption of Appellate Rule 26.1 in all the separate sets of rules. Paring Rule 7.1 back to this core, for these reasons, likely does not require a second publication for comment.

Other Rule 7.1 Revisions

The Bankruptcy Rules Committee has proposed publication of disclosure requirements that would depart significantly from Rule 7.1 as published. The disclosure must identify "any nongovernmental corporation that directly or indirectly owns 10% or more of any class of the corporation's equity interests or states that there are not such entities to report * * *." The Civil Rules Committee has not independently considered the terms of present Appellate Rule 26.1; they were adopted for Rule 7.1 for the reasons described above. It has not independently considered the reasons for the changes proposed by the Bankruptcy Rules Committee. It defers consideration of these matters to the Standing Committee.

Summary of Comments on Rule 7.1

00-CV-001, Committee on Federal Courts, Association of the Bar of the City of New York: The practical reasons that lead to delegating responsibility to the Judicial Conference are understandable. But "[t]he committee is concerned * * * that the necessary contents of a disclosure statement may be less accessible to the bar and to the public if they are not set forth in the rules themselves."

00-CV-002, Public Citizen Litigation Group (Brian Wolfman): Supports Rule 7.1, and Appellate Rule 26.1, for the reasons stated in the Committee Note. The Note should state that the rule applies to

cases pending when the rule takes effect, and that the parties must file disclosure statements within a reasonable time (perhaps 60 days) in such cases.

00-CV-004, Ninth Circuit Conference of Chief Bankruptcy Judges, Hon. Louise De Carl Adler: The Bankruptcy Rules Advisory Committee is working on disclosure rules for contested matters and adversary proceedings. Pending development of these rules, "there [should] be an express exemption from application of proposed Rule 7.1 to cases and proceedings in bankruptcy."

00-CV-005, Federal Civil Procedure Committee, American College of Trial Lawyers, Gregory P. Joseph: Supports two aspects of the proposal: (1) It is desirable to address disclosure in the Civil Rules "so that there is a uniform national standard." (2) "[T]hese disclosure statements ought not be limited to corporations, but extended to nongovernmental parties generally." But disagrees with delegation of further work to the Judicial Conference. There is a trap for the unwary in "referencing a set of requirements that are not included in the Rules, may not exist and are not readily available." The Judicial Conference is part of the process of making Civil Rules; it "is in a position to ensure that all disclosure requirements it deems important become a part of the Rules." But if the Judicial Conference becomes responsible, a useful way to make litigants aware of Judicial Conference disclosure requirements would be to place them in the Civil Cover Sheet. (This will not help with Appellate Rule 26.1, however.)

00-CV-006, Federal Magistrate Judges Association Rules Committee (draft Report): Supports Rule 7.1. The disclosures will prove helpful. "This is consistent with the practice in many district courts currently which has been provided by General Order or Local Rule, but

certainly should be addressed on a nationwide basis through the federal rules."

00-CV-012, William J. Borah: (Mr. Borah reviewed the proposals for the Civil Practice and Procedure Section of the Illinois State Bar Association.) Rule 7.1(a)(1)(A) is a good idea, "and it would also give the opposing party information about the corporate structure of the opponent." The Rule 7.1(a)(1)(B) and 7.1(a)(2) requirements to disclose information required by the Judicial Conference cannot be the subject of comment yet, "when we don't even know what the Judicial Conference might recommend."

Comments on Appellate Rule 26(a)(1)

Some of the comments on Appellate Rule 26(a)(1) raise issues that apply to Rule 7.1 as well. The following summaries were prepared by Dean Patrick Schiltz, Reporter for the Appellate Rules Advisory Committee.

Jack E. Horsley, Esq. (00-AP-002) supports the amendment, which, he says, "will strip away a veil of concealment."

Judge Frank H. Easterbrook (7th Cir.)(00-AP-012) strongly supports two aspects of the proposal — extending the disclosure obligation to non-corporate parties and requiring supplementation — but is "appalled" by a third — giving authority to the Judicial Conference to modify the disclosure obligation without going through the Rules Enabling Act process. Judge Easterbrook's objections to the Judicial Conference provision are several: (1) The provision short-circuits the Rules Enabling Act. The judicial branch keeps telling Congress not to short-circuit the process; the judicial branch impairs its credibility when it short-circuits the process itself. (2) The provision would weaken the role of the Standing Committee. "Other

Committees of the Conference will see (and use) an opening into rules-related issues, and the ability of the Standing Committee to coordinate matters of practice and procedure will be undermined." (3) The provision would create a hardship for lawyers, as the Judicial Conference does not publish its standards in any central, readily accessible location. Judge Easterbrook recalls that some years ago the Advisory Committee on Appellate Rules proposed that the Judicial Conference be given authority to set technical standards for briefs, and that the proposal was rejected by the Standing Committee on the grounds described above. He urges that the Judicial Conference provision of proposed Rule 26.1 suffer a similar fate.

Judge Easterbrook also questions the assertion in the Committee Note that standards on disclosure issued by the Judicial Conference could preempt local rules. He points out that Rule 47(a)(1) provides that local rules "must be consistent with — but not duplicative of — Acts of Congress and rules adopted under 28 U.S.C. § 2072 and must conform to any uniform numbering system prescribed by the Judicial Conference of the United States." Judge Easterbrook interprets Rule 47(a)(1) to provide that "[o]nly statutes, rules, and one *particular* Judicial Conference action supersede local rules."

D.C. Circuit Advisory Committee on Procedures (No number; arrived too late to be summarized by Dean Schiltz). Opposes the proposed amendments to Appellate Rule 26.1. "[M]ore than enough information is already being disclosed pursuant to the current version of Rule 26 [sic] and the various local rules." The provision for Judicial Conference disclosure rules "means that each party's attorney will have to be checking on a regular basis to determine whether the Judicial Conference has revised its thinking." Delegation to the Judicial Conference also seems inconsistent with the public comment rules adopted under § 2073(a) and with the requirement that rules be transmitted to Congress no later than May 1; see section 2074.

Changes Made After Publication and Comment

The provisions that would require disclosure of additional information that may be required by the Judicial Conference have been deleted.

Rule 54. Judgments; Costs

* * * * *

(d) Costs; Attorneys' Fees.

* * * * *

(2) *Attorneys' Fees.*

(A) Claims for attorneys' fees and related nontaxable expenses shall be made by motion unless the substantive law governing the action provides for the recovery of such fees as an element of damages to be proved at trial.

(B) Unless otherwise provided by statute or order of the court, the motion must be filed ~~and served~~ no later than 14 days after entry of judgment; must specify the judgment and the statute, rule, or other

grounds entitling the moving party to the award; and must state the amount or provide a fair estimate of the amount sought. If directed by the court, the motion shall also disclose the terms of any agreement with respect to fees to be paid for the services for which claim is made.

(C) On request of a party or class member, the court shall afford an opportunity for adversary submissions with respect to the motion in accordance with Rule 43(e) or Rule 78. The court may determine issues of liability for fees before receiving submissions bearing on issues of evaluation of services for which liability is imposed by the court. The court shall find the facts and state its conclusions of law as provided in Rule 52(a)~~, and a judgment shall be set forth in a separate document as provided in Rule 58~~.

* * * * *

Committee Note

Subdivision (d)(2)(C) is amended to delete the requirement that judgment on a motion for attorney fees be set forth in a separate document. This change complements the amendment of Rule 58(a)(1), which deletes the separate document requirement for an order disposing of a motion for attorney fees under Rule 54. These changes are made to support amendment of Rule 4 of the Federal Rules of Appellate Procedure. It continues to be important that a district court make clear its meaning when it intends an order to be the final disposition of a motion for attorney fees.

The requirement in subdivision (d)(2)(B) that a motion for attorney fees be not only filed but also served no later than 14 days after entry of judgment is changed to require filing only, to establish a parallel with Rules 50, 52, and 59. Service continues to be required under Rule 5(a).

Rule 58. Entry of Judgment

~~Subject to the provisions of Rule 54(b): (1) upon a general verdict of a jury, or upon a decision by the court that a party shall recover only a sum certain or costs or that all relief shall be denied, the clerk, unless the court otherwise orders, shall forthwith prepare, sign, and enter the judgment without awaiting any direction by the court; (2) upon a~~

~~decision by the court granting other relief, or upon a special verdict or a general verdict accompanied by answers to interrogatories, the court shall promptly approve the form of the judgment, and the clerk shall thereupon enter it. Every judgment shall be set forth on a separate document. A judgment is effective only when so set forth and when entered as provided in Rule 79(a). Entry of the judgment shall not be delayed, nor the time for appeal extended, in order to tax costs or award fees, except that, when a timely motion for attorneys' fees is made under Rule 54(d)(2), the court, before a notice of appeal has been filed and has become effective, may order that the motion have the same effect under Rule 4(a)(4) of the Federal Rules of Appellate Procedure as a timely motion under Rule 59. Attorneys shall not submit forms of judgment except upon direction of the court, and these directions shall not be given as a matter of course.~~

(a) Separate Document.

(1) Every judgment and amended judgment must be set forth on a separate document, but a separate document is not required for an order disposing of a motion:

(A) for judgment under Rule 50(b);

(B) to amend or make additional findings of fact under Rule 52(b);

(C) for attorney fees under Rule 54;

(D) for a new trial, or to alter or amend the judgment, under Rule 59; or

(E) for relief under Rule 60.

(2) Subject to Rule 54(b):

(A) unless the court orders otherwise, the clerk must, without awaiting the court's direction, promptly prepare, sign, and enter the judgment when:

(i) the jury returns a general verdict,

(ii) the court awards only costs or a sum certain, or

(iii) the court denies all relief;

(B) the court must promptly approve the form of the judgment, which the clerk must promptly enter, when:

(i) the jury returns a special verdict or a general verdict accompanied by interrogatories, or

(ii) the court grants other relief not described in Rule 58(a)(2).

(b) **Time of Entry.** Judgment is entered for purposes of these rules:

(1) if Rule 58(a)(1) does not require a separate document, when it is entered in the civil docket under Rule 79(a), and

(2) if Rule 58(a)(1) requires a separate document, when it is entered in the civil docket under Rule 79(a) and when the earlier of these events occurs:

(A) when it is set forth on a separate document, or

(B) when 150 days have run from entry in the civil docket under Rule 79(a).

(c) Cost or Fee Awards.

(1) Entry of judgment may not be delayed, nor the time for appeal extended, in order to tax costs or award fees, except as provided in Rule 58(c)(2).

(2) When a timely motion for attorney fees is made under Rule 54(d)(2), the court may act before a notice of appeal has been filed and has become effective to order that the motion have the same effect under Federal Rule of Appellate Procedure 4(a)(4) as a timely motion under Rule 59.

(d) **Request for Entry.** A party may request that judgment be set forth on a separate document as required by Rule 58(a)(1).

Committee Note

Rule 58 has provided that a judgment is effective only when set forth on a separate document and entered as provided in Rule 79(a). This simple separate document requirement has been ignored in many cases. The result of failure to enter judgment on a separate document is that the time for making motions under Rules 50, 52, 54(d)(2)(B), 59, and some motions under Rule 60, never begins to run. The time to appeal under Appellate Rule 4(a) also does not begin to run. There have been few visible problems with respect to Rule 50, 52, 54(d)(2)(B), 59, or 60 motions, but there have been many and horridly confused problems under Appellate Rule 4(a). These amendments are designed to work in conjunction with Appellate Rule 4(a) to ensure that appeal time does not linger on indefinitely, and to maintain the integration of the time periods set for Rules 50, 52, 54(d)(2)(B), 59, and 60 with Appellate Rule 4(a).

Rule 58(a) preserves the core of the present separate document requirement, both for the initial judgment and for any amended judgment. No attempt is made to sort through the confusion that some courts have found in addressing the elements of a separate document. It is easy to prepare a separate document that recites the terms of the judgment without offering additional explanation or citation of authority. Forms 31 and 32 provide examples.

Rule 58 is amended, however, to address a problem that arises under Appellate Rule 4(a). Some courts treat such orders as those

that deny a motion for new trial as a "judgment," so that appeal time does not start to run until the order is entered on a separate document. Without attempting to address the question whether such orders are appealable, and thus judgments as defined by Rule 54(a), the amendment provides that entry on a separate document is not required for an order disposing of the motions listed in Appellate Rule 4(a). The enumeration of motions drawn from the Appellate Rule 4(a) list is generalized by omitting details that are important for appeal time purposes but that would unnecessarily complicate the separate document requirement. As one example, it is not required that any of the enumerated motions be timely. Many of the enumerated motions are frequently made before judgment is entered. The exemption of the order disposing of the motion does not excuse the obligation to set forth the judgment itself on a separate document. And if disposition of the motion results in an amended judgment, the amended judgment must be set forth on a separate document.

Rule 58(b) discards the attempt to define the time when a judgment becomes "effective." Taken in conjunction with the Rule 54(a) definition of a judgment to include "any order from which an appeal lies," the former Rule 58 definition of effectiveness could cause strange difficulties in implementing pretrial orders that are appealable under interlocutory appeal provisions or under expansive theories of finality. Rule 58(b) replaces the definition of effectiveness with a new provision that defines the time when judgment is entered. If judgment is promptly set forth on a separate document, as should be done when required by Rule 58(a)(1), the new provision will not change the effect of Rule 58. But in the cases in which court and clerk fail to comply with this simple requirement, the motion time periods set by Rules 50, 52, 54, 59, and 60 begin to run after expiration of 150 days from entry of the judgment in the civil docket as required by Rule 79(a).

A companion amendment of Appellate Rule 4(a)(7) integrates these changes with the time to appeal.

The new all-purpose definition of the entry of judgment must be applied with common sense to other questions that may turn on the time when judgment is entered. If the 150-day provision in Rule 58(b)(2)(B) — designed to integrate the time for post-judgment motions with appeal time — serves no purpose, or would defeat the purpose of another rule, it should be disregarded. In theory, for example, the separate document requirement continues to apply to an interlocutory order that is appealable as a final decision under collateral-order doctrine. Appealability under collateral-order doctrine should not be complicated by failure to enter the order as a judgment on a separate document — there is little reason to force trial judges to speculate about the potential appealability of every order, and there is no means to ensure that the trial judge will always reach the same conclusion as the court of appeals. Appeal time should start to run when the collateral order is entered without regard to creation of a separate document and without awaiting expiration of the 150 days provided by Rule 58(b)(2). Drastic surgery on Rules 54(a) and 58 would be required to address this and related issues, however, and it is better to leave this conundrum to the pragmatic disregard that seems its present fate. The present amendments do not seem to make matters worse, apart from one false appearance. If a pretrial order is set forth on a separate document that meets the requirements of Rule 58(b), the time to move for reconsideration seems to begin to run, perhaps years before final judgment. And even if there is no separate document, the time to move for reconsideration seems to begin 150 days after entry in the civil docket. This apparent problem is resolved by Rule 54(b), which expressly permits revision of all orders not made final under Rule 54(b) "at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties."

New Rule 58(d) replaces the provision that attorneys shall not submit forms of judgment except on direction of the court. This provision was added to Rule 58 to avoid the delays that were frequently encountered by the former practice of directing the attorneys for the prevailing party to prepare a form of judgment, and also to avoid the occasionally inept drafting that resulted from attorney-prepared judgments. See *11 Wright, Miller & Kane, Federal Practice & Procedure: Civil 2d, § 2786*. The express direction in Rule 58(a)(2) for prompt action by the clerk, and by the court if court action is required, addresses this concern. The new provision allowing any party to move for entry of judgment on a separate document will protect all needs for prompt commencement of the periods for motions, appeals, and execution or other enforcement.

Recommendation

The Advisory Committee recommends that Rules 54(a) and 58 be adopted as published, subject to minor style changes and two significant changes in Rule 58(b). The first change in Rule 58(b) opens up the definition of the time when judgment is entered. As published, Rule 58(b) defined the time of entry solely for purposes of the Civil Rules governing the post-judgment motions that suspend appeal time under Appellate Rule 4(a)(4), adding Civil Rule 62 (execution) as well. At the behest of the Appellate Rules Committee, the definition is changed to cover entry of judgment "for purposes of these rules." The second change expands from 60 days to 150 days the period that defines entry of judgment when a required separate document is not provided.

The comments on Rules 54(a) and 58 focus on Rule 58. Some parts of some of the comments seem to reflect misunderstanding of

Rule 58 as it now is. Other parts of some of the comments seem to reflect misunderstanding of the proposal published last August. It may be that the confusions are related. In any event, the comments suggesting drafting improvement all involve manifest shortcomings and have not provided inspiration for further clarification.

New Rule 58(a)(1) carries forward the requirement that every judgment be entered on a separate document, and adds an explicit requirement that every amended judgment be entered on a separate document. But it further provides that a separate document is not required for an order "disposing of" a motion under Rules 50, 52, 54, 59, or 60. The result is that if action on any of these motions leads to an amended judgment, a new separate document is required. A separate document also is required if the judgment, although unchanged, was not set out on a separate document before the motion was disposed of. But no separate document is required if the motion is denied, or is granted in terms that do not amend a judgment that is properly set out on a separate document. An order granting a motion to amend findings of fact, for example, may not lead to any change in the judgment.

Rule 58(a)(1) drew little comment. Public Citizen Litigation Group finds it a "close question," but believes that the separate document requirement should be retained for these orders. Compliance with the separate document requirement does not impose a great burden. And in complex cases the separate document will alert the parties that appeal time is running.

Rule 58(a)(1) was drawn in reliance on Dean Schiltz's exhaustive study of Rule 58 decisions. The courts of appeals are divided on application of the separate-document requirement to the orders listed in new Rule 58(a)(1). The list is geared to the list of motions in Appellate Rule 4(a)(4) that suspend appeal time until "entry of the

order disposing of the last such remaining motion." The list is somewhat broader than the Appellate Rule 4(a)(4) list because it omits distinctions drawn by Rule 4(a)(4) — for example, it does not require that the motion be timely, and it applies to all Rule 60 motions rather than those made no later than 10 days after judgment is entered. This expansion resulted from the conclusion that the separate document requirement should not be further complicated.

Rule 58(b)(2) is quite a different matter. Here, as with Rule 7.1, the history of this project is important. The beginning was a proposal by the Appellate Rules Committee to amend Appellate Rule 4(a)(7) to provide in essence that the time to appeal starts to run 150 days after an order was entered on the civil docket even though the order was not set forth on a separate document as required by Civil Rule 58. This proposal was advanced to address the "time bomb" problem — the separate document requirement was added to Rule 58 to provide a clear signal that appeal time has started to run, a purpose that led all circuits other than the First Circuit to conclude that appeal time does not start to run until the judgment is set forth on a separate document. The concern is that there are countless numbers of district-court judgments that can be appealed long after all parties understood the litigation had concluded, only because judgment was not set forth on a separate document. The difficulty of proceeding by way of Rule 4(a)(7) alone was that the result would be different times for appeal and for making post-judgment motions. Appeal time might have run, for example, although want of a separate document meant that the time to move for such relief as a new trial had not even begun to run. This difficulty led to the joint drafting process that yielded the published proposals. The Civil Rules Committee was responding to the urgent need felt by the Appellate Rules Committee, not to an independent sense that in fact there is a pressing problem arising from delayed explosion of Rule 58 time bombs.

The public comments include many comments hostile to the "60-day" provision in Rule 58(b)(2). The comments come from many organizations that have great collective experience with federal appeals, and that have provided thoughtful and helpful comments on many rules proposals over the years. There is a common theme. Rule 58 was amended nearly four decades ago to provide a clear signal that appeal time has started to run. The ambiguity and complexity of many orders makes the clear signal more important now than ever. It is easy for a district court to honor the separate-document requirement. Adherence to the requirement, moreover, may lead the district court to think more carefully about the intended finality of its actions. The proposed solution will reset the appeal-time traps that were decommissioned by the separate-document requirement. The traps will be less often fatal if the time period should be extended from 60 days to 180 days, but still will create problems. These problems will be created for little purpose — the abstract fear of long-delayed appeals does not correspond to any real problem. It is better to adhere to the present rule, remembering that any party who is anxious to ensure that appeal time begins to run upon final disposition of an action can request entry of judgment on a separate document.

These are powerful arguments that commanded serious attention. The responses made by the Appellate Rules Committee, however, were convincing. As "easy" as it may seem to comply with the separate document requirement, repeated efforts to achieve uniform compliance have been made without success. Extending the time of entry to 150 days after entry in the civil docket without a required separate document provides ample protection. A lawyer who hears nothing further about an action for 150 days after entry and notice of an order should inquire whether the order was meant to be the final act in the action. The 150-day period is nearly as long as the 180 day period set by Appellate Rule 4(a)(6)(B) that cuts off any opportunity to appeal when there is no notice at all that judgment has

been entered; if we are prepared to cut off any appeal opportunity without any notice, it is generous to set 150 days as the time that starts the appeal period after notice of entry on the docket of an order that ought to have been set forth on a separate document but was not. Expiration of the 150-day period only starts appeal time — there will be at least another 30 days to file the notice of appeal. And in fact many of the untold numbers of "time bombs" do explode into long-delayed appeals. Adherence to the published proposal is recommended, with the change that the period after entry in the civil docket without a required separate document be extended from 60 days to 150 days.

A closer question is presented by the change that extends Rule 58(b) to define entry of judgment for all Civil Rules purposes. The published proposal was designed solely to effect a workable integration of Rule 58 with the Appellate Rules. The need for integration relates directly to Civil Rules 50, 52, 54(d)(2)(b), 59, and 60. Coordination of the execution provisions of Rule 62 with these post-judgment motion rules seemed wise. No thought was given to the ways in which other rules might be affected if included in the definition. But there was much concern that the literal meaning of present Rule 58 could create serious mischief when applied to the Rule 54(a) definition of a judgment as "a decree and any order from which an appeal lies." The Committee Note speaks to this concern and urges a common-sense approach that in effect invites occasional disregard of the literal meaning of proposed Rule 58(b). One of the reasons for adopting this approach was the concern of the Appellate Rules Committee that Rule 58(b) should be simplified to reduce the burden faced by a lawyer directed by Appellate Rule 4(a)(7) to the definition in Rule 58(b). The Appellate Rules Committee has now suggested that it may prove better to adopt the Rule 58(b) language directly into Appellate Rule 4(a)(7). If that happens, Rule 58(b) is left as an all-purpose definition that is qualified in the Committee Note.

Nonetheless, the Advisory Committee determination at the April meeting is presented as a recommendation to approve the revised form of Rule 58(b) that defines entry of judgment for the purpose of all Civil Rules.

Summary of Comments: Rules 54, 58

00-CV-001, Committee on Federal Courts, Association of the Bar of the City of New York: The Rule 58 proposal may resurrect the trap for the unwary that Rule 58 was designed to eliminate [apparently the fear is that the 60-day period after entry on the docket is too brief]. The "time bomb" problem is better addressed in other ways. The ideal solution is to enforce Rule 58 as it is — district court clerks' offices should enforce an operating procedure that bars a case from being closed without entry of a final judgment embodied in a Rule 58 document. Failing that, the rule should provide that a prevailing party who believes that an order is appealable may serve notice of entry on every other party; the notice would start the running of appeal time. As a third choice, the published rule should provide a waiting period of "at least six months" before entry on the docket supersedes the need for entry of a separate judgment document. It is not unusual for 60 days to pass without any event in an action; it is considerably less frequent for an action to lie six months without anything happening.

00-CV-002, Public Citizen Litigation Group, Brian Wolfman: (1) The Rule 54(d)(2) and 58(a)(1) provisions that would eliminate the separate document requirement for specified post-judgment motions present "a close question," but should be rejected. To be sure, "these kinds of post-judgment rulings are generally discrete and imbued with finality," so a formal separate-document notice of appealability is not much needed. But in complex cases it may remain necessary to have a separate document that alerts the parties that appeal time is running. The burden on courts and clerks is not great — the separate judgment

is a short, formulaic document. The party seeking to ensure that appeal times run can request entry of judgment, see proposed Rule 58(d). And it makes sense to retain the separate-document requirement, as the proposal does, for all post-judgment orders not listed.

(2) "PCLG disagrees strenuously with" the proposal that would allow appeal time to begin 60 days after entry of the judgment on the docket, even though no separate document is filed. "[W]e do not understand why the Rules would retain the separate-document requirement and then allow it to evaporate at some point after an appealable order is entered." The very point of the separate document is to eliminate the ambiguities that surround the final-judgment rule. "[T]his signaling function is quite important because frequently an order is ambiguous as to whether it constitutes a 'judgment' * * *." The losing party, although aware that an order has entered, may not be aware that the order is appealable. The passage of 60 days from entry on the docket does not alleviate that ignorance. This is not a workable compromise between the present rule and the alternative of abolishing the separate-document requirement. The "time bomb" problem does not warrant this response. First, there is an easy remedy — district courts only need abide by the present rule; the prevailing party can help under proposed Rule 58(d) by requesting entry of judgment. Second, "we challenge the assumption that there are many 'problem' cases, despite the number of reported decisions on the topic. Third, the cases that involve any significant delay in taking an appeal "generally are cases of genuine ambiguity as to whether the underlying order is 'final' for purposes of appeal."

00-CV-003, Bradley Scott Shannon: Professor Shannon's comment is difficult to summarize because it is rich in detail. The conclusion picks up on the observation in the draft Committee Note that drastic surgery would be required to fully address the problems that arise

from present Rules 54(a) and 58. He agrees, but urges that the time has come for drastic surgery, including revision of Rule 54(a).

Rule 54(a) defines "judgment" for Civil Rules purposes as "a decree and any order from which an appeal lies." If there is no order, a case may move to final disposition without a "judgment" and thus without triggering the separate document requirement of Rule 58. More commonly, district courts have little occasion to think about appealability with respect to many orders that in fact are appealable — the consequence is that appeals are accepted despite failure to enter a separate document, and appeals are dismissed despite entry of a separate document. Rule 54(a) should be amended to refer only to "final" judgments. "Final" would be defined as an order that summarizes the claims disposed of in the action no matter how disposition is accomplished. The order would state whether the disposition is with prejudice, and also would state the precise relief granted.

Rule 58 should retain the separate document requirement, but limit it to the amended Rule 54(a) definition of a "final" judgment. And the present provisions that call for entry of judgment by the clerk in some circumstances, preserved in proposed Rule 58(a)(2), should be discarded. Entry of judgment should be required "very shortly (perhaps 10 days) after disposition of the last remaining claim or claims," and should not be deferred for post-final judgment motions. If a post-final judgment order alters or affects the final judgment in any way, the court should separately prepare and enter an amended final judgment.

00-CV-004, Ninth Circuit Conference of Chief Bankruptcy Judges, Hon. Louise De Carl Adler: "[W]holeheartedly supports the solution proposed. Failure to timely submit a final judgment is frequently a

problem faced by litigants in bankruptcy court and the proposed rules changes will solve it."

00-CV-006, Rules Committee, Federal Magistrate Judges Association (draft Report): Supports the Rule 54 and 58 proposals. The Rule 58 proposal "would help clarify requirements that have been ignored in many cases," and "establishes a basis for insuring that appeal time does not go on indefinitely."

00-CV-007, Advisory Committee on Rules of Practice, United States Court of Appeals for the Ninth Circuit: Expresses concern that "a lack of clarity" could cause "an inadvertent loss of appeal rights." The proposed rule could be read to mean that appeal time never starts to run until a separate document is entered, even in a case in which a separate document is not required. This confusion could lead to a deluge of requests that the court enter a separate document even though none is required. A revised draft is attached. It restates the separate document requirement to apply only to "[a] judgment that terminates a district court action." Time of entry is specified for the situation in which a separate document is entered even though none is required — judgment is entered on the later of the dates when it is entered or when a separate document is entered. (The purpose apparently is to protect against this event: a judgment that does not require a separate document is entered on day 1. On day 15 a separate document is entered. The intending appellant may be confused, believing that appeal time starts on day 16, not day 2.)

00-CV-008, Appellate Practice Section, State Bar of Michigan: The 60-day rule "would create a potential pitfall for litigants where the appealability of the order in question is ambiguous." "The primary rationale for the separate document rule is to create certainty as to when a judgment has been entered, which also provides a readily defined trigger for the 30-day appeal period." A victorious litigant

can avoid the time-bomb problem by submitting a proposed separate-document judgment. Adherence to the separate-document requirement is simple. "Finally, the question arises whether there are actually enough 'problem' cases to justify adoption of a 60-day rule that could give rise to a great many problems in its own right."

00-CV-009, Appellate Courts Committee, Los Angeles County Bar Association, James C. Martin: "Heartily endorses" the proposals. "[T]his was an area fraught with peril and confusion. The amendments provide greater certainty on the triggering events for this key jurisdictional issue."

00-CV-010, Michael Zachary: Writes from experience as a Second Circuit supervisory staff attorney and author of an article on Rules 58 and 79(a). Opposes the 60-day rule as one that "does more harm than good." It will return us to the pre-1963 days with "litigants unfairly losing their right to appeal when the order terminating the case is not clear or when certain types of motions which do not affect finality are still pending." Indeed, some may assume that the failure to enter a separate document "indicates the court's belief that the case is not yet concluded." Conversely, premature and protective appeals will be triggered in ambiguous circumstances "simply to insure against loss of the right to appeal." "Moreover, it has not been my experience that many delayed appeals are filed beyond a few months after the usual time for appeal or that prejudice resulted from the delay in those cases." Any remaining problems can be addressed by the prevailing party's opportunity to request entry of a separate document, or by the trial court acting to do so on its own; if belated appeals still slip through in long-closed cases, they can be dismissed "under the laches doctrine."

Drafting suggestions also are made. Both seem to be based on misreading the published proposals, but will be considered with care.

00-CV-011, Sidney Powell: Ms. Powell has been lead counsel in more than 450 federal appeals. She endorses in full the comments of Public Citizens Litigation Group, 002 above. The separate judgment requirement "serves not only the function of signaling the time to appeal, but it also serves as a single document for purposes of bonding or execution."

00-CV-012, William J. Borah: (Mr. Borah reviewed the proposals for the Civil Practice and Procedure Section of the Illinois State Bar Association.) The Rule 58 proposal "seems to make the whole issue even more confusing and complicated. While the commentary acknowledges the confusing state of this matter, I think that more thought should go into this before a proposal is made which adds to the problems. The commentary refers to the possibility that the 'separate document' rule should be abandoned altogether, and this would not be a bad idea."

00-CV-013, District of Columbia Bar, Litigation Section and Courts, Lawyers and the Administration of Justice Section: Accepts the restructuring of Rule 58, and the Rule 58(a)(1) list of orders that do not require a separate document. But urges that when a separate document is required by Rule 58(a)(1), only entry of a separate document should establish entry of judgment. Rule language is proposed for this purpose. The published proposal "will create more problems than it will cure." The proposal would impose on attorneys an obligation to inspect the docket at regular intervals, in part because "courts normally do not give attorneys notice of docket entries." The amendment could mean that an appeal is lost after 90 days even though there is no separate document. "The remedy is to clarify the requirement for entry of a separate document so that failures to follow the rule are less common." In addition, proposed Rule 58(d) should be revised to state that the court must comply with any legitimate request to enter a separate document.

Comments on Appellate Rule 4(a)(7)

Some of the comments on Appellate Rule 4(a)(7) addressed Civil Rule 58 problems but were not described as such. The following summaries were prepared by Dean Patrick Schiltz, Reporter for the Appellate Rules Advisory Committee.

Judge Frank H. Easterbrook (7th Cir.)(00-AP-012) seems to have two major concerns about the proposed revisions to Rule 4(a)(7)(B).
* * *

Second, Judge Easterbrook essentially opposes the 60-day provision and favors retaining the separate document requirement as it exists. He argues that, without the warning provided by a separate document, some litigants will fail to recognize that the time to appeal has begun to run and find themselves "hornswoggled out of their appeals." He argues that other litigants will "pepper courts of appeals with arguments that one or another decision marked the 'real' end of the case, so that the clock must be deemed to have started more than 30 days before the notice of appeal." Still other litigants will "bombard[] the court with notices of appeal from everything that might in retrospect be deemed a conclusive order."

The Appellate Practice Committee of the Commercial and Federal Litigation Section of the New York State Bar Association (00-AP-017) objects only to the 60-day provision. It has no objection to the remainder of the Rule 4(a)(7)/FRCP 58 proposal, including the provisions that would make clear that the appellant alone can waive the separate document requirement and that orders disposing of certain post-judgment motions need not be entered on separate documents. The Committee does note, though, that it would prefer that FRCP 58 instead provide that *all* orders disposing of post-judgment motions be entered on separate documents.

As to the 60-day provision, the Committee believes that it undermines the fundamental purpose of the separate document requirement, which is to provide litigants with a clear warning of when a judgment has been issued and the time to appeal has begun to run. The Committee concedes that the time bomb problem is "a real concern," but winning litigants can easily protect themselves from time bombs simply by asking the district court to enter judgment on a separate document.

D.C. Circuit Advisory Committee on Procedures: (This comment arrived too late to be summarized by Dean Schiltz.) The problem that appeal time never starts to run "should be addressed. However, some of our members found the new rule unnecessarily complicated." One possibility would be to state the number of days that a party has to appeal when no separate judgment is entered. [Note: this was the first approach of the Appellate Rules Committee; it was put aside because failure to make any other change would mean that the Civil Rules would permit motions for judgment as a matter of law, new trial, revised findings, and the like, after appeal time had expired.] The Rule 58(b)(2) proposal would be clearer if it said that when a separate document is required, judgment is entered when it is set forth on a separate document and entered on the docket under Rule 79(a).

Changes Made After Publication and Comment

Minor style changes were made. The definition of the time of entering judgment in Rule 58(b) was extended to reach all Civil Rules, not only the Rules described in the published version — Rules 50, 52, 54(d)(2)(B), 59, 60, and 62. And the time of entry was extended from 60 days to 150 days after entry in the civil docket without a required separate document.

Rule 81(a): Rules Governing Habeas Corpus

Rule 81. Applicability in General

(a) To What Proceedings Applicable.

* * * * *

(2) These rules are applicable to proceedings for admission to citizenship, habeas corpus, and quo warranto, to the extent that the practice in such proceedings is not set forth in statutes of the United States, the Rules Governing Section 2254 Cases, or the Rules Governing Section 2255 Proceedings, and has heretofore conformed to the practice in civil actions. ~~The writ of habeas corpus, or order to show cause, shall be directed to the person having custody of the person detained. It shall be returned within 3 days unless for good cause shown additional time is allowed which in cases brought under 28 U.S.C. § 2254 shall not exceed 40 days, and in all other cases shall not exceed 20 days.~~

16 * * * * *

Committee Note

This amendment brings Rule 81(a)(2) into accord with the Rules Governing § 2254 and § 2255 proceedings. In its present form, Rule 81(a)(2) includes return-time provisions that are inconsistent with the provisions in the Rules Governing §§ 2254 and 2255. The inconsistency should be eliminated, and it is better that the time provisions continue to be set out in the other rules without duplication in Rule 81. Rule 81 also directs that the writ be directed to the person having custody of the person detained. Similar directions exist in the § 2254 and § 2255 rules, providing additional detail for applicants subject to future custody. There is no need for partial duplication in Rule 81.

The provision that the civil rules apply to the extent that practice is not set forth in the § 2254 and § 2255 rules dovetails with the provisions in Rule 11 of the § 2254 rules and Rule 12 of the § 2255 rules.

Recommendation

The Advisory Committee recommends that the Rule 81(a)(2) amendment be submitted to the Judicial Conference for adoption as published. The Committee Note has been changed by deleting a reference to § 2241 proceedings that was marked for deletion before publication but slipped through.

The comment of the National Association of Criminal Defense Lawyers summarized below points out that the Criminal Rules

Committee plans further work on the Rules Governing Section 2254 Cases and the Rules Governing Section 2255 Proceedings. This work does not seem a reason to defer adoption of the Rule 81 amendments. The amendments eliminate inconsistencies between Rule 81 and some of the § 2254 and § 2255 rules. The second paragraph of § 2243 includes the provisions for addressing the writ and for return time that are deleted from Rule 81 — the amendments will not leave a gap that will be filled only later.

Summary of Comments: Rule 81

00-CV-006, Rules Committee, Federal Magistrate Judges Association (draft Report): Supports the proposal, which brings needed consistency to the rules and avoids unnecessary duplication of the § 2254 and § 2255 rules in Rule 81.

00-CV-014, National Association of Criminal Defense Lawyers: Begins with the suggestion that the published amendments of the Rules Governing § 2254 Cases and the Rules Governing § 2255 Proceedings "need more of an overhaul" than provided by the proposed amendments. On this premise, concludes that the related Rule 81(a)(2) amendment "is premature until the habeas rules are more fully reconsidered." And adds a statement that the Committee Note overstates the role of the § 2254 Rules when habeas corpus is sought under § 2241. Rule 1(b) states that in applications for habeas corpus not covered by Rule 1(a) — which describes various petitions under § 2254 — "these rules may be applied at the discretion of the United States district court." [This seems correct; all of the pre-publication correspondence about Rule 81(a)(2) noted the effect of Rule 1(b).]

Changes Made After Publication and Comment

The only change since publication is deletion of an inadvertent reference to § 2241 proceedings.

ADMIRALTY RULES PUBLISHED FOR COMMENT IN JANUARY 2001

Rule C. In Rem Actions: Special Provisions

* * * * *

(3) Judicial Authorization and Process.

(a) Arrest Warrant.

(i) When the United States files a complaint demanding a forfeiture for violation of a federal statute, the clerk must promptly issue a summons and a warrant for the arrest of the vessel or other property without requiring a certification of exigent circumstances, but if the property is real property the United States must proceed under applicable statutory procedures.

* * * * *

(6) Responsive Pleading; Interrogatories.

(a) Civil Forfeiture. In an in rem forfeiture action for violation of a federal statute:

(i) a person who asserts an interest in or right against the property that is the subject of the action must file a verified statement identifying the interest or right:

(A) within ~~20~~ 30 days after the earlier of (1) ~~receiving actual notice of execution of process~~ the date of service of the Government's complaint or (2) completed publication of notice under Rule C(4), or

(B) within the time that the court allows.

(ii) an agent, bailee, or attorney must state the authority to file a statement of interest in or right against the property on behalf of another; and

(iii) a person who files a statement of interest in or right against the property must serve and file an answer within 20 days after filing the statement.

(b) Maritime Arrests and Other Proceedings. In an in rem action not governed by Rule C(6)(a):

* * * * *

(iv) a person who asserts a right of possession or any ownership interest must ~~file~~ serve an answer within 20 days after filing the statement of interest or right.

* * * * *

Committee Note

Rule C(3) is amended to reflect the provisions of 18 U.S.C. § 985, enacted by the Civil Asset Forfeiture Reform Act of 2000, 114 Stat. 202, 214-215. Section 985 provides, subject to enumerated exceptions, that real property that is the subject of a civil forfeiture action is not to be seized until an order of forfeiture is entered. A civil forfeiture action is initiated by filing a complaint, posting notice, and serving notice on the property owner. The summons and arrest procedure is no longer appropriate.

Rule C(6)(a)(i)(A) is amended to adopt the provision enacted by 18 U.S.C. § 983(a)(4)(A), shortly before Rule C(6)(a)(i)(A) took effect, that sets the time for filing a verified statement as 30 days rather than 20 days, and that sets the first alternative event for measuring the 30 days as the date of service of the Government's complaint.

Rule C(6)(a)(iii) is amended to give notice of the provision enacted by 18 U.S.C. § 983(a)(4)(B) that requires that the answer in a forfeiture proceeding be filed within 20 days. Without this notice, unwary litigants might rely on the provision of Rule 5(d) that allows a reasonable time for filing after service.

Rule C(6)(b)(iv) is amended to change the requirement that an answer be filed within 20 days to a requirement that it be served within 20 days. Service is the ordinary requirement, as in Rule 12(a). Rule 5(d) requires filing within a reasonable time after service.

Recommendation

On January 16, 2001, proposals were published to amend the Admiralty Rules to conform to provisions of the Civil Asset Forfeiture Reform Act of 2000, 114 Stat. 202 ff. A short comment period was set, closing on April 2, 2001. The purpose of setting a short comment period reflected the unusual circumstances surrounding the amendments. Earlier amendments of the Admiralty Rules were transmitted to Congress by the Supreme Court on April 17, 2000, to take effect on December 1, 2000. One week later, Congress adopted the reform act. Several procedural provisions of the reform act were inconsistent with the amendments. The amendments, however, supersede the new statute because the amendments took effect after

the effective date of the statute. The amendments were framed without any information about the legislation that had not yet been clearly developed when the amendments were actually drafted, and there was no intent to supersede the statute. The proposals published in January 2001 seek to conform the Rules to the statute, with the hope that courts will follow the conforming Rules even before they can take effect upon completion of the remaining steps in the Enabling Act process.

No comments have been received on these proposals. The Department of Justice forfeiture experts believe that several more changes are required to adapt the Admiralty Rules to the needs of forfeiture practice, but those changes will require full consideration in the ordinary course of the Enabling Act process. Meanwhile, they believe that the January 2001 proposals should be adopted.

It is recommended that the January 2001 proposals be approved for transmission to the Judicial Conference for approval and submission to the Supreme Court.

Changes Made After Publication and Comment

No changes have been made since publication.

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EVIDENCE RULES

TO: **Hon. Anthony J. Scirica, Chair**
Standing Committee on Rules of Practice and Procedure

FROM: **W. Eugene Davis, Chair**
Advisory Committee on Federal Rules of Criminal Procedure

SUBJECT: **Report of the Advisory Committee on Criminal Rules**

DATE: **May 10, 2001**

I. Introduction

The Advisory Committee on the Rules of Criminal Procedure met on April 25-26 in Washington, D.C. and acted on the proposed restyling of the Rules of Criminal Procedure and on proposed substantive amendments to some of those rules. The Minutes of that meeting are included at Appendix E.

II. Action Items—Summary and Recommendations.

This report contains two action items:

- Approval and forwarding to the Judicial Conference of restyled Criminal Rules 1 through 60 (Appendix A); and

- Approval and forwarding to the Judicial Conference of substantive amendments to eight rules—Rules 5, 5.1, 10, 12.2, 26, 30, 35, and 43 (Appendix B).

III. ACTION ITEM—Approval and Forwarding to Judicial Conference of Restyled Criminal Rules 1-60 (Appendix A)

A. Restyling Project—An Overview

In 1998, the Committee was informed that following successful completion of the restyling of the Appellate Rules, the Style Subcommittee of the Standing Committee would prepare an initial draft of proposed style changes to the Criminal Rules, with the first installment being presented in late 1998. The Advisory Committee was formed into two separate subcommittees to review the rules as they were completed by the Style Subcommittee. In April, June, and October 1999, the Committee considered style revisions to Rules 1 through 31 and presented those rules to the Standing Committee at its January 2000 meeting in Miami. The Committee considered style changes to Rules 32 to 60 in the Spring of 2000, and presented those rules to the Standing Committee at its June 2000 meeting. Rules 1-60 were subsequently published for public comment, along with a separate package of "substantive" amendments to ten of those rules.

Following the public comment period, the two subcommittees met and considered the written comments submitted on the proposed amendments and offered a number of suggested additional style changes. In April 2001, the Advisory Committee considered those proposals and approved the style package—Rules 1-60 (Appendix A).

In conducting the restyling project, the Committee focused on several key points. First, the Committee has attempted to standardize key terms and phrases that appear throughout the rules.

Second, the Committee attempted to avoid any unforeseen substantive changes and attempted in the Committee Notes to clearly state when the Committee was making a change in practice.

Third, in several rules, the Committee deleted provisions that it believed were no longer necessary, usually because the caselaw has evolved since the rule was initially promulgated (or last amended).

Fourth, during the restyling effort, several rules were completely reorganized to make them easier to read and apply. *See, e.g.,* Rules 11, 16, 32, and 32.1. In several others, sections from one rule have been transferred to another rule. *See, e.g.*, Rules 4, 9, and 40.

Fifth, in some rules, significant substantive changes were made. Some of those changes had been under discussion but were deferred pending the restyling projects. Still others were identified and included during the project. As noted, below, those proposed amendments were published in a separate pamphlet for public comment.

B. Publication of Style and Substantive Packages for Public Comment

In June 2000, the Standing Committee authorized publication for public comment of two packages of amendments. The purpose of presenting the proposed amendments in two separate pamphlets was to highlight for the public that in addition to the "style" changes in Rules 1 to 60, a number of significant (perhaps controversial) amendments were also being proposed.

1. The "Style" Package

The first package (Appendix A)—referred to as the "style" package, included Rules 1 to 60. For those rules where the Committee was proposing significant substantive changes (Rules 5, 5.1, 10, 12.2, 26, 30, 35, 41, and 43), the language containing those changes was deleted from the "style" package. A "Reporter's Note" explained to the public that additional substantive changes for that particular rule were being published simultaneously in a separate package.

2. The "Substantive" Package

The second package (Appendix B)—referred to as the "substantive" package, consisted of Rules 5, 5.1, 10, 12.2, 26, 30, 32, 35, 41, and 43, which all provide for significant changes in practice. This version of the package included not only the restyled version of the rule but also the language that would effect the change in practice. The Committee Notes reflect those changes and again, a "Reporter's Note" explained that another version of each of these rules (which included only style changes) was being published simultaneously in a separate package.

C. Post-Publication Changes to the "Style" Package

1. Suggested Style Changes—Style Subcommittee

During the public comment period, Professor Kimble and Mr. Spaniol reviewed the style package several times and offered a number of suggestions. Those proposed changes were considered first by the two subcommittees and then by the full Advisory Committee.

2. Suggested Style Changes From the Public (Appendices C & D)

The Committee received approximately 80 comments from the public. Those comments, which focused on the substantive amendments to the rules, are summarized at Appendix C. In addition, the Administrative Office sorted out those public comments that appeared to focus only on the style package. Those are summarized at Appendix D. Finally, the Committee considered the testimony of five witnesses at the beginning of its meeting on April 25, 2001.

3. Changes Resulting from Intervening Legislation

In addition to the suggested changes from the Style Subcommittee and the public commentators, several changes were required because of intervening legislation, for example, the recently enacted Military Extraterritorial Jurisdiction Act (Pub. L. No. 106-523, 114 Stat. 2488).

4. Consideration of Possible Global Style Changes

During the public comment period, the Committee—at the suggestion of the Style Subcommittee—considered whether to make a number of post-publication global changes to the style package. The Committee adopted several of the proposed changes but rejected several others.

- *Numbering.* The Committee originally decided on a method for using Arabic numerals for any number less than 10 (ten) unless the number was "1." It seemed awkward to write the number 1 in those instances. The Style Subcommittee proposed a different system. The Advisory Committee adopted yet another system: Any number other than 1 or a number appearing at the beginning of a sentence or section, will be represented by the Arabic numerals—in order to make the rules more user-friendly.

- *Internal Cross-referencing.* The Committee addressed the issue whether to specifically identify any cross-references to other provisions within each rule, or whether simply to refer to "this rule." The Committee decided to address this issue on a rule-by-rule basis.

- *Titles of Rules and Subdivisions.* The Style Subcommittee recommended a number of additions and changes to the titles of subdivisions and paragraphs; in particular they note the preference for using the "ing" form of the word. The Committee adopted most of those recommended changes on a rule-by-rule basis.

- *Designating Deleted Rules.* A number of rules have been deleted over the years, and several were eliminated as a result of the current restyling effort. At one point during the project the Committee decided to keep the rule numbers in place and indicate in

brackets that the rule has been abrogated. The Committee decided to use the designation "[Reserved]" for those rules that were abrogated a number of years ago. The designations "[Transferred]" or "[Deleted]" are used to designate the Committee's actions in this round of amendments.

- *Use of the Terms "Unable" and "Cannot."* In a number of rules the Style Subcommittee has recommended that the word "cannot" be substituted for the word "unable." In the current rules both terms are used. The Committee decided to consider this proposal on a case-by-case basis.

- *"Law Enforcement Officer."* The current rules do not hyphenate this term and for the most part neither do the cases or commentators. Although the style subcommittee recommended that the term be hyphenated, the Committee decided otherwise.

5. Rule-by-Rule Summary of Changes Made to Style Package Following Publication

The following discussion identifies those rules where a change—other than a minor stylistic change—was made following publication. The changes are incorporated in the copy of the Rules, and the accompanying Committee Notes, at Appendix A.

a. Rule 1. Scope; Definitions

The Committee amended Rule 1(a)(5) by adding another subparagraph (F) that addresses proceedings against a witness in a foreign country under 28 U.S.C. § 1784. That provision had been inadvertently omitted from an early draft of the restyled Rule.

b. Rule 4. Arrest Warrant or Summons on a Complaint

Rule 4(c)(2) was changed to reflect the recently enacted Military Extraterritorial Jurisdiction Act (Pub. L. No. 106-523, 114 Stat. 2488). That act now recognizes that arrest warrants may be executed outside the United States.

c. Rule 5. Initial Appearance

The Committee added Rule 5(a)(1)(B) to reflect the recently enacted Military Extraterritorial Jurisdiction Act (Pub. L. No. 106-523, 114 Stat. 2488). The Committee was concerned that if the amendment is not made, an argument could be made that the restyle rule would supersede the Act.

In addition, the Committee adopted a redrafted and restructured Rule 5(c)(2) to expand the options for a case when the accused is arrested in a district other than the district where the offense was allegedly committed. New Rule 5(c)(2) provides that the initial appearance should occur in the district where the prosecution is pending if that district is adjacent to the district of arrest and the appearance will occur on the day of the arrest.

The Committee also changed Rule 5 to refer to "where the offense was allegedly committed" rather than "where the prosecution is pending" for clarity and consistency.

d. Rule 5.1. Preliminary Hearing

The Committee redrafted Rule 5.1(a) to fill a possible gap as to the right to preliminary hearings for persons who are charged with misdemeanors and consent to be tried by a magistrate judge.

e. Rule 6. The Grand Jury

The Committee amended Rule 6(e)(3)(A) by adding a new item (iii) that would provide an exception for disclosures authorized under 18 U.S.C. § 3322 (authorizing disclosures for civil forfeiture and civil banking laws, etc.). The Committee also redrafted Rule 6(a)(2) concerning the selection of alternate grand jurors—to parallel a similar provision for petit jurors in Rule 24.

f. Rule 7. The Indictment and the Information

The introductory language of Rule 7(a)(1) was changed by referencing an exception for criminal contempt proceedings.

g. Rule 11. Pleas

In Rule 11(e), the Committee changed the reference to "28 U.S.C. § 2255" to "collateral attack" to recognize that a plea may be set aside during some other form of collateral attack and not just under § 2255. *See, e.g., United States v. Jeffers*, 234 F.3d 277 (5th Cir. 2000) (noting that petition under § 2241 may be used where relief under § 2255 is inadequate).

The Committee also decided to change Rule 11(f). Rather than attempting to restyle language in Rule 11(f), which now tracks language in Federal Rule of Evidence 410—and risk possible inconsistencies—Rule 11(f) now simply cross-references Rule 410.

h. Rule 17. Subpoena

The Committee changed Rule 17(g) to reflect the authority of a magistrate judge to find a person in contempt.

i. Rule 26. Taking Testimony

Originally, the style version, but not the substantive version, of Rule 26 included the word "orally." The Committee decided, however, to delete the term "orally" from the restyled version as well as change the Committee Note to reflect the purpose of that amendment. The Committee was concerned that if the more substantive change to Rule 26, concerning the remote transmission of live testimony were to be rejected, the noncontroversial change in Rule 26 removing the restriction on oral testimony (as opposed to testimony from someone who communicates through signing) would not be approved.

j. Rule 32. Sentencing and Judgment

The Committee revised Rule 32(d) to clarify the provision dealing with the contents of the presentence report.

The Committee also adopted a revised version of Rule 32(h) and have now designated it as subdivision (h) and redesignated the remaining provisions as new subdivisions. Subdivision (h) is now

what had been Rule 32(h)(5) in the restyled version published for comment.

Rule 32(i) (formerly 32(h)) also includes a change in (i)(B) to reflect a recommendation that Rule 32(h)(1)(B) be amended to include a requirement that the judge provide the excluded information to the government as well as to the defendant.

Finally, Rule 32(i)(4)(C) (currently (h)(4)(C) in the published version, which addresses in camera hearings) now includes a "good cause" requirement.

k. Rule 32.1. Revoking or Modifying Probation or Supervised Release

The Committee decided to delete Rule 32.1(a)(3) that would have required the magistrate judge to give rights warnings to a person appearing before the magistrate judge for possible revocation of probation proceedings.

l. Rule 35. Correcting or Reducing a Sentence

The published version of Rule 35 uses the term "sentencing" to describe the triggering element for the two "time" requirements in the rule—the seven-day requirement and the one-year requirement. At the suggestion of the Standing Committee, the Advisory Committee discussed the issue of further defining or clarifying the term "sentencing." Although the initial decision was to use the term "oral announcement of sentence"—which reflects the majority view of the courts that have addressed the issue—upon further consideration, the Committee decided to define sentencing as the entry of the judgment. Even though that may result in the change in practice in some circuits,

it is more consistent with describing the triggering event, for example, of an appeal of a sentence.*

m. Rule 42. Criminal Contempt

Rule 42(b) has been modified to reflect the authority of magistrate judges to hold contempt proceedings—per the recent Federal Courts Improvement Act.

n. Rule 45. Computing and Extending Time

The term "President's Day" has been changed back to "Washington's Birthday," which is consistent with the recommendation of the Appellate Rules Committee to make the same change to its rules.

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* At the request of the Advisory Committee on Criminal Rules, the Committee on Rules of Practice and Procedure agreed at its June 7-8, 2001, meeting, to withdraw the proposal defining "sentencing" as the entry of the judgment. The Committee also agreed with the advisory committee's recommendation to publish the withdrawn proposal for public comment.

o. Rule 52. Harmless and Plain Error

In Rule 52(b), the Committee has deleted the words "or defect" to clarify an ambiguity in the wording "a plain error or defect...." The Supreme Court has concluded that that wording should be read more simply as meaning "error" and that the use of the disjunctive is misleading. *See United States v. Olano*, 507 U.S. 725, 732 (1993) (incorrect to read Rule 52(a) in the disjunctive); *United States v. Young*, 470 U.S. 1, 15 n.12 (1985) (use of disjunctive in Rule 52(a) is misleading). No changes were made to Rule 52(a).

p. Rule 58. Petty Offenses and Other Misdemeanors

Rule 58(b)(2)(E)(i) and (b)(3)(A) and (B) were changed to reflect recent statutory changes. The term "Class B misdemeanor motor vehicle offense, Class C misdemeanor, or an infraction" has been changed to read "petty offense."

q. Rule 60. Title

The Committee has restored Rule 60, which was originally deleted from the style package of the rules, as being unnecessary. After further discussion, the Committee believed that removing the official designation of the title of the Criminal Rules might create uncertainty or inconsistency in the designation or citation of the rules.

Recommendation: The Advisory Committee on the Criminal Rules recommends that the "style" package, consisting of Rules 1-60, be approved and transmitted to the Judicial Conference with a recommendation that it be sent to the Supreme Court for approval.

* * * * *

I. SCOPE, PURPOSE, AND CONSTRUCTION	TITLE I. APPLICABILITY
	Rule 1. Scope; Definitions
Rule 1. Scope These rules govern the procedure in all criminal proceedings in the courts of the United States, as provided in Rule 54(a); and, whenever specifically provided in one of the rules, to preliminary, supplementary, and special proceedings before United States magistrate judges and at proceedings before state and local judicial officers. **Rule 54. Application and Exception** (a) **Courts**. These rules apply to all criminal proceedings in the United States District Courts; in the District of Guam; in the District Court for the Northern Mariana Islands, except as otherwise provided in articles IV and V of the covenant provided by the Act of March 24, 1976 (90 Stat. 263); and in the District Court of the Virgin Islands; in the United States Courts of Appeals; and in the Supreme Court of the United States; except that the prosecution of offenses in the District Court of the Virgin Islands shall be by indictment or information as otherwise provided by law.	**(a) Scope.** (1) ***In General.*** These rules govern the procedure in all criminal proceedings in the United States district courts, the United States courts of appeals, and the Supreme Court of the United States. (2) ***State or Local Judicial Officer.*** When a rule so states, it applies to a proceeding before a state or local judicial officer. (3) ***Territorial Courts.*** These rules also govern the procedure in all criminal proceedings in the following courts: (A) the district court of Guam; (B) the district court for the Northern Mariana Islands, except as otherwise provided by law; and (C) the district court of the Virgin Islands, except that the prosecution of offenses in that court must be by indictment or information as otherwise provided by law.

(b) PROCEEDINGS (Rule 54 continued) **(1) Removed Proceedings.** These rules apply to criminal prosecutions removed to the United States district courts from state courts and govern all procedure after removal, except that dismissal by the attorney for the prosecution shall be governed by state law. **(2) Offenses Outside a District or State.** These rules apply to proceedings for offenses committed upon the high seas or elsewhere out of the jurisdiction of any particular state or district, except that such proceedings may be had in any district authorized by 18 U.S.C. § 3238. **(3) Peace Bonds.** These rules do not alter the power of judges of the United States or of United States magistrate judges to hold security of the peace and for good behavior under Revised Statutes, § 4069, 50 U.S.C. § 23, but in such cases the procedure shall conform to these rules so far as they are applicable. **(4) Proceedings Before United States Magistrate Judges.** Proceedings involving misdemeanors and other petty offenses are governed by Rule 58.	(4) ***Removed Proceedings.*** Although these rules govern all proceedings after removal from a state court, state law governs a dismissal by the prosecution.
(5) Other Proceedings. These rules are not applicable to extradition and rendition of fugitives; civil forfeiture of property for violation of a statute of the United States; or the collection of fines and penalties. Except as provided in Rule 20(d) they do not apply to proceedings under 18 U.S.C. Chapter 403 — Juvenile Delinquency — so far as they are inconsistent with that chapter. They do not apply to summary trials for offenses against the navigation laws under Revised Statutes §§ 4300-4305, 33 U.S.C. §§ 391-396, or to proceedings involving disputes between seamen under Revised Statutes §§ 4079-4081, as amended, 22 U.S.C. §§ 256-258, or to proceedings for fishery offenses under the Act of June 28, 1937, c. 392, 50 Stat. 325-327, 16 U.S.C. §§ 772-772i, or to proceedings against a witness in a foreign country under 28 U.S.C. § 1784.	(5) ***Excluded Proceedings.*** Proceedings not governed by these rules include: (A) the extradition and rendition of a fugitive; (B) a civil property forfeiture for violating a federal statute; (C) the collection of a fine or penalty; (D) a proceeding under a statute governing juvenile delinquency to the extent the procedure is inconsistent with the statute, unless Rule 20(d) provides otherwise; (E) a dispute between seamen under 22 U.S.C. §§ 256–258; and

(c) Application of Terms. (Rule 54 continued) As used in these rules the following terms have the designated meanings.

"Act of Congress" includes any act of Congress locally applicable to and in force in the District of Columbia, in Puerto Rico, in a territory or in any insular possession.

"Attorney for the government" means the Attorney General, an authorized assistant of the Attorney General, a United States Attorney, an authorized assistant of a United States Attorney, when applicable to cases arising under the laws of Guam the Attorney General of Guam or such other person or persons as may be authorized by the laws of Guam to act therein, and when applicable to cases arising under the laws of the Northern Mariana Islands the Attorney General of the Northern Mariana Islands or any other person or persons as may be authorized by the laws of the Northern Marianas to act therein.

"Civil action" refers to a civil action in a district court.

The words "demurrer," "motion to quash," "plea in abatement," "plea in bar" and "special plea in bar," or words to the same effect, in any act of Congress shall be construed to mean the motion raising a defense or objection provided in Rule 12.

"District court" includes all district courts named in subdivision (a) of this rule.

(F) a proceeding against a witness in a foreign country under 28 U.S.C. § 1784.

(b) Definitions. The following definitions apply to these rules:

(1) "Attorney for the government" means:

(A) the Attorney General or an authorized assistant;

(B) a United States attorney or an authorized assistant;

(C) when applicable to cases arising under Guam law, the Guam Attorney General or other person whom Guam law authorizes to act in the matter; and

(D) any other attorney authorized by law to conduct proceedings under these rules as a prosecutor.

"Federal magistrate judge" means a United States magistrate judge as defined in 28 U.S.C. §§ 631-639, a judge of the United States or another judge or judicial officer specifically empowered by statute in force in any territory or possession, the Commonwealth of Puerto Rico, or the District of Columbia, to perform a function to which a particular rule relates. "Judge of the United States" includes a judge of the district court, court of appeals, or the Supreme Court. "Law" includes statutes and judicial decisions. "Magistrate judge" includes a United States magistrate judge as defined in 28 U.S.C. §§ 631-639, a judge of the United States, another judge or judicial officer specifically empowered by statute in force in any territory or possession, the Commonwealth of Puerto Rico, or the District of Columbia, to perform a function to which a particular rule relates, and a state or local judicial officer, authorized by 18 U.S.C. § 3041 to perform the functions prescribed in Rules 3, 4, and 5.	**(2)** "Court" means a federal judge performing functions authorized by law. **(3)** "Federal judge" means: (A) a justice or judge of the United States as these terms are defined in 28 U.S.C. § 451; (B) a magistrate judge; and (C) a judge confirmed by the United States Senate and empowered by statute in any commonwealth, territory, or possession to perform a function to which a particular rule relates. **(4)** "Judge" means a federal judge or a state or local judicial officer. **(5)** "Magistrate judge" means a United States magistrate judge as defined in 28 U.S.C. §§ 631-639.
"Oath" includes affirmations. "Petty offense" is defined in 18 U.S.C. § 19. "State" includes District of Columbia, Puerto Rico, territory and insular possession. "United States magistrate judge" means the officer authorized by 28 U.S.C. §§ 631-639.	**(6)** "Oath" includes an affirmation. **(7)** "Organization" is defined in 18 U.S.C. § 18. **(8)** "Petty offense" is defined in 18 U.S.C. § 19. **(9)** "State" includes the District of Columbia, and any commonwealth, territory, or possession of the United States. **(10)** "State or local judicial officer" means: (A) a state or local officer authorized to act under 18 U.S.C. § 3041; and (B) a judicial officer empowered by statute in the District of Columbia or in any commonwealth, territory, or possession to perform a function to which a particular rule relates. **(c) Authority of a Justice or Judge of the United States.** When these rules authorize a magistrate judge to act, any other federal judge may also act.

COMMITTEE NOTE

Rule 1 is entirely revised and expanded to incorporate Rule 54, which deals with the application of the rules. Consistent with the title of the existing rule, the Committee believed that a statement of the scope of the rules should be placed at the beginning to show readers which proceedings are governed by these rules. The Committee also revised the rule to incorporate the definitions found in Rule 54(c) as a new Rule 1(b).

Rule 1(a) contains language from Rule 54(b). But language in current Rule 54(b)(2)-(4) has been deleted for several reasons: First, Rule 54(b)(2) refers to a venue statute that governs an offense committed on the high seas or somewhere outside the jurisdiction of a particular district; it is unnecessary and has been deleted because once venue has been established, the Rules of Criminal Procedure automatically apply. Second, Rule 54(b)(3) currently deals with peace bonds; that provision is inconsistent with the governing statute and has therefore been deleted. Finally, Rule 54(b)(4) references proceedings conducted before United States Magistrate Judges, a topic now covered in Rule 58.

Rule 1(a)(5) consists of material currently located in Rule 54(b)(5), with the exception of the references to the navigation laws and to fishery offenses. Those provisions were considered obsolete. But if those proceedings were to arise, they would be governed by the Rules of Criminal Procedure.

Rule 1(b) is composed of material currently located in Rule 54(c), with several exceptions. First, the reference to an "Act of Congress" has been deleted from the restyled rules; instead the rules use the self-explanatory term "federal statute." Second, the language concerning demurrers, pleas in abatement, etc., has been deleted as being anachronistic. Third, the definitions of "civil action" and "district court" have been deleted. Fourth, the term "attorney for the government" has been expanded to include reference to those attorneys who may serve as special or independent counsel under applicable federal statutes. The term "attorney for the government" contemplates an attorney of record in the case.

Fifth, the Committee added a definition for the term "court" in Rule 1(b)(2). Although that term originally was almost always synonymous with the term "district judge," the term might be misleading or unduly narrow because it may not cover the many functions performed by magistrate judges. *See generally* 28 U.S.C. §§ 132, 636. Additionally, the term does not cover circuit judges who may be authorized to hold a district court. *See* 28 U.S.C. § 291. The proposed definition continues the traditional view that "court" means district judge, but also reflects the current understanding that magistrate judges act as the "court" in many proceedings. Finally, the Committee intends that the term "court" be used principally to describe a judicial officer, except where a rule uses the term in a spatial sense, such as describing proceedings in "open court."

Sixth, the term "Judge of the United States" has been replaced with the term "Federal judge." That term includes Article III judges and magistrate judges and, as noted in Rule 1(b)(3)(C), federal judges other than Article III judges who may be authorized by statute to perform a particular act specified in the Rules of Criminal Procedure. The term does not include local judges in the District of Columbia. Seventh, the definition of "Law" has been deleted as being superfluous and possibly misleading because it suggests that administrative regulations are excluded.

Eighth, the current rules include three definitions of "magistrate judge." The term used in amended Rule 1(b)(5) is limited to United States magistrate judges. In the current rules the term magistrate judge includes not only United States magistrate judges, but also district court judges, court of appeals judges, Supreme Court justices, and where authorized, state and local officers. The Committee believed that the rules should reflect current practice, i.e., the wider and almost exclusive use of United States magistrate judges, especially in preliminary matters. The definition, however, is not intended to restrict the use of other federal judicial officers to perform those functions. Thus, Rule 1(c) has been added to make it clear that where the rules authorize a magistrate judge to act, any other federal judge or justice may act.

Finally, the term "organization" has been added to the list of definitions.

The remainder of the rule has been amended as part of the general restyling of the rules to make them more easily understood. In addition to changes made to improve the clarity, the Committee has changed language to make style and terminology consistent throughout the Criminal Rules. These changes are intended to be stylistic only.

Rule 2. Purpose and Construction	Rule 2. Interpretation
These rules are intended to provide for the just determination of every criminal proceeding. They shall be construed to secure simplicity in procedure, fairness in administration and the elimination of unjustifiable expense and delay.	These rules are to be interpreted to provide for the just determination of every criminal proceeding, to secure simplicity in procedure and fairness in administration, and to eliminate unjustifiable expense and delay.

COMMITTEE NOTE

The language of Rule 2 has been amended as part of the general restyling of the Criminal Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic. No substantive change is intended.

In particular, Rule 2 has been amended to clarify the purpose of the Rules of Criminal Procedure. The words "are intended" have been changed to read "are to be interpreted." The Committee believed that that was the original intent of the drafters and more accurately reflects the purpose of the rules.

II. PRELIMINARY PROCEEDINGS	TITLE II. PRELIMINARY PROCEEDINGS
Rule 3. The Complaint	**Rule 3. The Complaint**
The complaint is a written statement of the essential facts constituting the offense charged. It shall be made upon oath before a magistrate judge.	The complaint is a written statement of the essential facts constituting the offense charged. It must be made under oath before a magistrate judge or, if none is reasonably available, before a state or local judicial officer.

COMMITTEE NOTE

The language of Rule 3 is amended as part of the general restyling of the Criminal Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic and no substantive change is intended, except as described below.

The amendment makes one change in practice. Currently, Rule 3 requires the complaint to be sworn before a "magistrate judge," which under current Rule 54 could include a state or local judicial officer. Revised Rule 1 no longer includes state and local officers in the definition of magistrate judges for the purposes of these rules. Instead, the definition includes only United States magistrate judges. Rule 3 requires that the complaint be made before a United States magistrate judge or before a state or local officer. The revised rule does, however, make a change to reflect prevailing practice and the outcome desired by the Committee — that the procedure take place before a *federal* judicial officer if one is reasonably available. As noted in Rule 1(c), where the rules, such as Rule 3, authorize a magistrate judge to act, any other federal judge may act.

Rule 4. Arrest Warrant or Summons Upon Complaint	Rule 4. Arrest Warrant or Summons on a Complaint
(a) Issuance. If it appears from the complaint, or from an affidavit or affidavits filed with the complaint, that there is probable cause to believe that an offense has been committed and that the defendant has committed it, a warrant for the arrest of the defendant shall issue to any officer authorized by law to execute it. Upon the request of the attorney for the government a summons instead of a warrant shall issue. More than one warrant or summons may issue on the same complaint. If a defendant fails to appear in response to the summons, a warrant shall issue.	**(a) Issuance.** If the complaint or one or more affidavits filed with the complaint establish probable cause to believe that an offense has been committed and that the defendant committed it, the judge must issue an arrest warrant to an officer authorized to execute it. At the request of an attorney for the government, the judge must issue a summons, instead of a warrant, to a person authorized to serve it. A judge may issue more than one warrant or summons on the same complaint. If a defendant fails to appear in response to a summons, a judge may, and upon request of an attorney for the government must, issue a warrant.
(b) Probable Cause. The finding of probable cause may be based upon hearsay evidence in whole or in part.	
(c) Form. **(1) Warrant.** The warrant shall be signed by the magistrate judge and shall contain the name of the defendant or, if the defendant's name is unknown, any name or description by which the defendant can be identified with reasonable certainty. It shall describe the offense charged in the complaint. It shall command that the defendant be arrested and brought before the nearest available magistrate judge. **(2) Summons.** The summons shall be in the same form as the warrant except that it shall summon the defendant to appear before a magistrate at a stated time and place.	**(b) Form.** **(1)** ***Warrant.*** A warrant must: (A) contain the defendant's name or, if it is unknown, a name or description by which the defendant can be identified with reasonable certainty; (B) describe the offense charged in the complaint; (C) command that the defendant be arrested and brought without unnecessary delay before a magistrate judge or, if none is reasonably available, before a state or local judicial officer; and (D) be signed by a judge. **(2)** ***Summons.*** A summons must be in the same form as a warrant except that it must require the defendant to appear before a magistrate judge at a stated time and place.

(d) Execution or Service; and Return. **(1) By Whom.** The warrant shall be executed by a marshal or by some other officer authorized by law. The summons may be served by any person authorized to serve a summons in a civil action. **(2) Territorial Limits.** The warrant may be executed or the summons may be served at any place within the jurisdiction of the United States.	**(c) Execution or Service, and Return.** (1) ***By Whom.*** Only a marshal or other authorized officer may execute a warrant. Any person authorized to serve a summons in a federal civil action may serve a summons. (2) ***Location.*** A warrant may be executed, or a summons served, within the jurisdiction of the United States or anywhere else a federal statute authorizes an arrest.
(3) Manner. The warrant shall be executed by the arrest of the defendant. The officer need not have the warrant at the time of the arrest but upon request shall show the warrant to the defendant as soon as possible. If the officer does not have the warrant at the time of the arrest, the officer shall then inform the defendant of the offense charged and of the fact that a warrant has been issued. The summons shall be served upon a defendant by delivering a copy to the defendant personally, or by leaving it at the defendant's dwelling house or usual place of abode with some person of suitable age and discretion then residing therein and by mailing a copy of the summons to the defendant's last known address.	(3) ***Manner.*** (A) A warrant is executed by arresting the defendant. Upon arrest, an officer possessing the warrant must show it to the defendant. If the officer does not possess the warrant, the officer must inform the defendant of the warrant's existence and of the offense charged and, at the defendant's request, must show the warrant to the defendant as soon as possible. (B) A summons is served on an individual defendant: (i) by delivering a copy to the defendant personally; or (ii) by leaving a copy at the defendant's residence or usual place of abode with a person of suitable age and discretion residing at that location and by mailing a copy to the defendant's last known address. (C) A summons is served on an organization by delivering a copy to an officer, to a managing or general agent, or to another agent appointed or legally authorized to receive service of process. A copy must also be mailed to the organization's last known address within the district or to its principal place of business elsewhere in the United States.

(4) Return. The officer executing a warrant shall make return thereof to the magistrate judge or other officer before whom the defendant is brought pursuant to Rule 5. At the request of the attorney for the government any unexecuted warrant shall be returned to and canceled by the magistrate judge by whom it was issued. On or before the return day the person to whom a summons was delivered for service shall make return thereof to the magistrate judge before whom the summons is returnable. At the request of the attorney for the government made at any time while the complaint is pending, a warrant returned unexecuted and not canceled or summons returned unserved or a duplicate thereof may be delivered by the magistrate judge to the marshal or other authorized person for execution or service.	**(4)** ***Return.*** (A) After executing a warrant, the officer must return it to the judge before whom the defendant is brought in accordance with Rule 5. At the request of an attorney for the government, an unexecuted warrant must be brought back to and canceled by a magistrate judge or, if none is reasonably available, by a state or local judicial officer. (B) The person to whom a summons was delivered for service must return it on or before the return day. (C) At the request of an attorney for the government, a judge may deliver an unexecuted warrant, an unserved summons, or a copy of the warrant or summons to the marshal or other authorized person for execution or service.

COMMITTEE NOTE

The language of Rule 4 has been amended as part of the general restyling of the Criminal Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic, except as noted below.

The first non-stylistic change is in Rule 4(a), which has been amended to provide an element of discretion in those situations when the defendant fails to respond to a summons. Under the current rule, the judge must in all cases issue an arrest warrant. The revised rule provides discretion to the judge to issue an arrest warrant if the attorney for the government does not request that an arrest warrant be issued for a failure to appear.

Current Rule 4(b), which refers to the fact that hearsay evidence may be used to support probable cause, has been deleted. That language was added to the rule in 1974, apparently to reflect emerging federal case law. *See* Advisory Committee Note to 1974 Amendments to Rule 4 (citing cases). A similar amendment was made to Rule 41 in 1972. In the intervening years, however, the case law has become perfectly clear on that proposition. Thus, the Committee believed that the reference to hearsay was no longer necessary. Furthermore, the limited reference to hearsay evidence was misleading to the extent that it might have suggested that other forms of inadmissible evidence could not be considered. For example, the rule made no reference to considering a defendant's prior criminal record, which clearly may be considered in deciding whether probable cause exists. *See, e.g., Brinegar v. United States*, 338 U.S. 160 (1949) (officer's knowledge of defendant's prior criminal activity). Rather than address that issue, or any other similar issues, the Committee believed that the matter was best addressed in Rule 1101(d)(3), Federal Rules of Evidence. That rule explicitly provides that the Federal Rules of Evidence do not

apply to "preliminary examinations in criminal cases, . . . issuance of warrants for arrest, criminal summonses, and search warrants." The Advisory Committee Note accompanying that rule recognizes that: "The nature of the proceedings makes application of the formal rules of evidence inappropriate and impracticable." The Committee did not intend to make any substantive changes in practice by deleting the reference to hearsay evidence.

New Rule 4(b), which is currently Rule 4(c), addresses the form of an arrest warrant and a summons and includes two non-stylistic changes. First, Rule 4(b)(1)(C) mandates that the warrant require that the defendant be brought "without unnecessary delay" before a judge. The Committee believed that this was a more appropriate standard than the current requirement that the defendant be brought before the "nearest available" magistrate judge. This new language accurately reflects the thrust of the original rule, that time is of the essence and that the defendant should be brought with dispatch before a judicial officer in the district. Second, the revised rule states a preference that the defendant be brought before a federal judicial officer.

Rule 4(b)(2) has been amended to require that if a summons is issued, the defendant must appear before a magistrate judge. The current rule requires the appearance before a "magistrate," which could include a state or local judicial officer. This change is consistent with the preference for requiring defendants to appear before federal judicial officers stated in revised Rule 4(b)(1).

Rule 4(c) (currently Rule 4(d)) includes three changes. First, current Rule 4(d)(2) states the traditional rule recognizing the territorial limits for executing warrants. Rule 4(c)(2) includes new language that reflects the recent enactment of the Military Extraterritorial Jurisdiction Act (Pub. L. No. 106-523, 114 Stat. 2488) that permits arrests of certain military and Department of Defense personnel overseas. *See also* 14 U.S.C. § 89 (Coast Guard authority to effect arrests outside territorial limits of United States). Second, current Rule 4(d)(3) provides that the arresting officer is only required to inform the defendant of the offense charged and that a warrant exists if the officer does not have a copy of the warrant. As revised, Rule 4(c)(3)(A) explicitly requires the arresting officer in all instances to inform the defendant of the offense charged and of the fact that an arrest warrant exists. The new rule continues the current provision that the arresting officer need not have a copy of the warrant, but if the defendant requests to see it, the officer must show the warrant to the defendant as soon as possible. The rule does not attempt to define any particular time limits for showing the warrant to the defendant.

Third, Rule 4(c)(3)(C) is taken from former Rule 9(c)(1). That provision specifies the manner of serving a summons on an organization. The Committee believed that Rule 4 was the more appropriate location for general provisions addressing the mechanics of arrest warrants and summonses. Revised Rule 9 liberally cross-references the basic provisions appearing in Rule 4. Under the amended rule, in all cases in which a summons is being served on an organization, a copy of the summons must be mailed to the organization.

Fourth, a change is made in Rule 4(c)(4). Currently, Rule 4(d)(4) requires that an unexecuted warrant must be returned to the judicial officer or judge who issued it. As amended, Rule 4(c)(4)(A) provides that after a warrant is executed, the officer must return it to the judge before whom the defendant will appear under Rule 5. At the government's request, however, an unexecuted warrant must be canceled by a magistrate judge. The change recognizes the possibility that at the time the warrant is returned, the issuing judicial officer may not be available.

Rule 5. Initial Appearance Before the Magistrate Judge	Rule 5. Initial Appearance
(a) In General. Except as otherwise provided in this rule, an officer making an arrest under a warrant issued upon a complaint or any person making an arrest without a warrant shall take the arrested person without unnecessary delay before the nearest available federal magistrate judge or, if a federal magistrate judge is not reasonably available, before a state or local judicial officer authorized by 18 U.S.C. § 3041. If a person arrested without a warrant is brought before a magistrate judge, a complaint, satisfying the probable cause requirements of Rule 4(a), shall be promptly filed. When a person, arrested with or without a warrant or given a summons, appears initially before the magistrate judge, the magistrate judge shall proceed in accordance with the applicable subdivisions of this rule.	**(a) In General.** **(1)** ***Appearance Upon an Arrest.*** (A) A person making an arrest within the United States must take the defendant without unnecessary delay before a magistrate judge, or before a state or local judicial officer as Rule 5(c) authorizes, unless a statute provides otherwise. (B) A person making an arrest outside the United States must take the defendant without unnecessary delay before a magistrate judge unless a statute provides otherwise.

An officer making an arrest under a warrant issued upon a complaint charging solely a violation of 18 U.S.C. § 1073 need not comply with this rule if the person arrested is transferred without unnecessary delay to the custody of appropriate state or local authorities in the district of arrest and an attorney for the government moves promptly, in the district in which the warrant was issued, to dismiss the complaint.	(2) ***Exceptions.*** (A) An officer making an arrest under a warrant issued on a complaint charging solely a violation of 18 U.S.C. § 1073 need not comply with this rule if: (i) the person arrested is transferred without unnecessary delay to the custody of appropriate state or local authorities in the district of arrest; and (ii) an attorney for the government moves promptly, in the district where the warrant was issued, to dismiss the complaint. (B) If a defendant is arrested for violating probation or supervised release, Rule 32.1 applies. (C) If a defendant is arrested for failing to appear in another district, Rule 40 applies. (3) ***Appearance Upon a Summons.*** When a defendant appears in response to a summons under Rule 4, a magistrate judge must proceed under Rule 5(d) or (e), as applicable.
	(b) Arrest Without a Warrant. If a defendant is arrested without a warrant, a complaint meeting Rule 4(a)'s requirement of probable cause must be promptly filed in the district where the offense was allegedly committed.
	(c) Place of Initial Appearance; Transfer to Another District. (1) ***Arrest in the District Where the Offense Was Allegedly Committed.*** If the defendant is arrested in the district where the offense was allegedly committed: (A) the initial appearance must be in that district; and (B) if a magistrate judge is not reasonably available, the initial appearance may be before a state or local judicial officer.

(2) ***Arrest in a District Other Than Where the Offense Was Allegedly Committed.*** If the defendant was arrested in a district other than where the offense was allegedly committed, the initial appearance must be:

(A) in the district of arrest; or

(B) in an adjacent district if:

(i) the appearance can occur more promptly there; or

(ii) the offense was allegedly committed there and the initial appearance will occur on the day of arrest.

(3) ***Procedures in a District Other Than Where the Offense Was Allegedly Committed.*** If the initial appearance occurs in a district other than where the offense was allegedly committed, the following procedures apply:

(A) the magistrate judge must inform the defendant about the provisions of Rule 20;

(B) if the defendant was arrested without a warrant, the district court where the offense was allegedly committed must first issue a warrant before the magistrate judge transfers the defendant to that district;

(C) the magistrate judge must conduct a preliminary hearing if required by Rule 5.1 or Rule 58(b)(2)(G);

(D) the magistrate judge must transfer the defendant to the district where the offense was allegedly committed if:

(c) Offenses Not Triable by the United States Magistrate Judge. If the charge against the defendant is not triable by the United States magistrate judge, the defendant shall not be called upon to plead. The magistrate judge shall inform the defendant of the complaint against the defendant and of any affidavit filed therewith, of the defendant's right to retain counsel or to request the assignment of counsel if the defendant is unable to obtain counsel, and of the general circumstances under which the defendant may secure pretrial release. The magistrate judge shall inform the defendant that the defendant is not required to make a statement and that any statement made by the defendant may be used against the defendant. The magistrate judge shall also inform the defendant of the right to a preliminary examination. The magistrate judge shall allow the defendant reasonable time and opportunity to consult counsel and shall detain or conditionally release the defendant as provided by statute or in these rules.

* * * * *

(i) the government produces the warrant, a certified copy of the warrant, a facsimile of either, or other appropriate form of either; and

(ii) the judge finds that the defendant is the same person named in the indictment, information, or warrant; and

(E) when a defendant is transferred and discharged, the clerk must promptly transmit the papers and any bail to the clerk in the district where the offense was allegedly committed.

(d) Procedure in a Felony Case.

(1) ***Advice.*** If the defendant is charged with a felony, the judge must inform the defendant of the following:

(A) the complaint against the defendant, and any affidavit filed with it;

(B) the defendant's right to retain counsel or to request that counsel be appointed if the defendant cannot obtain counsel;

(C) the circumstances, if any, under which the defendant may secure pretrial release;

(D) any right to a preliminary hearing; and

(E) the defendant's right not to make a statement, and that any statement made may be used against the defendant.

(2) ***Consulting with Counsel.*** The judge must allow the defendant reasonable opportunity to consult with counsel.

(3) ***Detention or Release.*** The judge must detain or release the defendant as provided by statute or these rules.

(4) ***Plea.*** A defendant may be asked to plead only under Rule 10.

(b) Misdemeanors and Other Petty Offenses. If the charge against the defendant is a misdemeanor or other petty offense triable by a United States magistrate judge under 18 U.S.C. § 3401, the magistrate judge shall proceed in accordance with Rule 58.	**(e) Procedure in a Misdemeanor Case.** If the defendant is charged with a misdemeanor only, the judge must inform the defendant in accordance with Rule 58(b)(2).

COMMITTEE NOTE

The language of Rule 5 has been amended as part of the general restyling of the Criminal Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic, except as noted below.

Rule 5 has been completely revised to more clearly set out the procedures for initial appearances and to recognize that such appearances may be required at various stages of a criminal proceeding, for example, where a defendant has been arrested for violating the terms of probation.

Rule 5(a), which governs initial appearances by an arrested defendant before a magistrate judge, includes several changes. The first is a clarifying change; revised Rule 5(a)(1) provides that a person making the arrest must bring the defendant "without unnecessary delay" before a magistrate judge, instead of the current reference to "nearest available" magistrate. This language parallels changes in Rule 4 and reflects the view that time is of the essence. The Committee intends no change in practice. In using the term, the Committee recognizes that on occasion there may be necessary delay in presenting the defendant, for example due to weather conditions or other natural causes. A second change is non-stylistic, and reflects the stated preference (as in other provisions throughout the rules) that the defendant be brought before a federal judicial officer. Only if a magistrate judge is not available should the defendant be taken before a state or local officer.

The third sentence in current Rule 5(a), which states that a magistrate judge must proceed in accordance with the rule when a defendant is arrested without a warrant or given a summons, has been deleted as unnecessary.

Rule 5(a)(1)(B) codifies the case law reflecting that the right to an initial appearance applies not only when a person is arrested within the United States but also when an arrest occurs outside the United States. *See, e.g.*, *United States v. Purvis*, 768 F.2d 1237 (11th Cir. 1985); *United States v. Yunis*, 859 F.2d 953 (D.C. Cir. 1988). In these circumstances, the Committee believes — and the rule so provides — that the initial appearance should be before a federal magistrate judge rather than a state or local judicial officer. The rule has been amended by adding the words, "unless a statute provides otherwise," to reflect recent enactment of the Military Extraterritorial Jurisdiction Act (Pub. L. No. 106-523, 114 Stat. 2488) that permits certain persons overseas to appear before a magistrate judge by telephone communications.

Rule 5(a)(2)(A) consists of language currently located in Rule 5, that addresses the procedure to be followed when a defendant has been arrested under a warrant issued on a complaint charging solely a violation of 18 U.S.C. § 1073 (unlawful flight to avoid prosecution). Rule 5(a)(2)(B) and 5(a)(2)(C) are new provisions. They are intended to make it clear that when a defendant is arrested for violating probation or supervised release or for failing to appear in another district, Rules 32.1 and 40 apply. No change in practice is intended.

Rule 5(a)(3) is new and fills a perceived gap in the rules. It recognizes that a defendant may be subjected to an initial appearance under this rule if a summons was issued under Rule 4, instead of an arrest warrant. If the defendant is appearing pursuant to a summons in a felony case, Rule 5(d) applies and if the defendant is appearing in a misdemeanor case, Rule 5(e) applies.

Rule 5(b) carries forward the requirement in former Rule 5(a) that if the defendant is arrested without a warrant, a complaint must be promptly filed.

Rule 5(c) is a new provision setting out where an initial appearance is to take place. If the defendant is arrested in the district where the offense was allegedly committed, under Rule 5(c)(1), the defendant must be taken to a magistrate judge in that district. If no magistrate judge is reasonably available, a state or local judicial officer may conduct the initial appearance. On the other hand, if the defendant is arrested in a district other than the district where the offense was allegedly committed, Rule 5(c)(2) governs. In those instances, the defendant must be taken to a magistrate judge within the district of arrest, unless the appearance can take place more promptly in an adjacent district. And under Rule 5(c)(2)(B)(ii), the initial appearance must occur in the district where the offense was allegedly committed if that district is adjacent to the district of the arrest and the initial appearance will take place on the day of the arrest. The Committee recognized that in some cases, the nearest magistrate judge might actually be across a district's lines. Rule 5(c)(3) includes material formerly located in Rule 40.

Rule 5(d) is derived from current Rule 5(c) and has been retitled to more clearly reflect the subject of that subdivision — the procedure to be used if the defendant is charged with a felony. Rule 5(d)(4) has been added to make clear that a defendant may only be called upon to enter a plea under the provisions of Rule 10. That language is intended to reflect and reaffirm current practice.

The remaining portions of current Rule 5(c) have been moved to Rule 5.1, which deals with preliminary hearings in felony cases.

REPORTER'S NOTES

In publishing the "style" changes to the Federal Rules of Criminal Procedure, the Committee decided to publish separately any rule that includes what it considered at least one major substantive change. The purpose for this separate publication was to highlight for the bench and the bar any proposed amendments that the Committee believes will result in significant changes in current practice. Rule 5 was one of those rules. In restyling and reformatting Rule 5, the Committee decided to also propose a substantive change that would permit video teleconferencing of initial appearances. Another version of Rule 5, which includes a new subdivision (f) governing such procedures, is in what has been referred to as the "substantive" package.

	Rule 5.1. Preliminary Hearing
Rule 5(c). Offenses Not Triable by the United States Magistrate Judge. * * * * * A defendant is entitled to a preliminary examination, unless waived, when charged with any offense, other than a petty offense, which is to be tried by a judge of the district court. If the defendant waives preliminary examination, the magistrate judge shall forthwith hold the defendant to answer in the district court. If the defendant does not waive the preliminary examination, the magistrate judge shall schedule a preliminary examination.	**(a) In General.** If a defendant is charged with an offense other than a petty offense, a magistrate judge must conduct a preliminary hearing unless: **(1)** the defendant waives the hearing; **(2)** the defendant is indicted; **(3)** the government files an information under Rule 7(b) charging the defendant with a felony; **(4)** the government files an information charging the defendant with a misdemeanor; or **(5)** the defendant is charged with a misdemeanor and consents to trial before a magistrate judge.
	(b) Selecting a District. A defendant arrested in a district other than where the offense was allegedly committed may elect to have the preliminary hearing conducted in the district where the offense was allegedly committed.
Such examination shall be held within a reasonable time but in any event not later than 10 days following the initial appearance if the defendant is in custody and no later than 20 days if the defendant is not in custody, provided, however, that the preliminary examination shall not be held if the defendant is indicted or if an information against the defendant is filed in district court before the date set for the preliminary examination.	**(c) Scheduling.** The magistrate judge must hold the preliminary hearing within a reasonable time, but no later than 10 days after the initial appearance if the defendant is in custody and no later than 20 days if not in custody.
With the consent of the defendant and upon a showing of good cause, taking into account the public interest in the prompt disposition of criminal cases, time limits specified in this subdivision may be extended one or more times by a federal magistrate judge. In the absence of such consent by the defendant, time limits may be extended by a judge of the United States only upon a showing that extraordinary circumstances exist and that delay is indispensable to the interests of justice.	**(d) Extending the Time.** With the defendant's consent and upon a showing of good cause — taking into account the public interest in the prompt disposition of criminal cases — a magistrate judge may extend the time limits in Rule 5.1(c) one or more times. If the defendant does not consent, a justice or judge of the United States (as these terms are defined in 28 U.S.C. § 451) may extend the time limits only on a showing that extraordinary circumstances exist and justice requires the delay.

Rule 5.1. Preliminary Examination **(a) Probable Cause Finding.** If from the evidence it appears that there is probable cause to believe that an offense has been committed and that the defendant committed it, the federal magistrate judge shall forthwith hold the defendant to answer in district court. The finding of probable cause may be based upon hearsay evidence in whole or in part. The defendant may cross-examine adverse witnesses and may introduce evidence. Objections to evidence on the ground that it was acquired by unlawful means are not properly made at the preliminary examination. Motions to suppress must be made to the trial court as provided in Rule 12.	(e) **Hearing and Finding.** At the preliminary hearing, the defendant may cross-examine adverse witnesses and may introduce evidence but may not object to evidence on the ground that it was unlawfully acquired. If the magistrate judge finds probable cause to believe an offense has been committed and the defendant committed it, the magistrate judge must promptly require the defendant to appear for further proceedings.
(b) Discharge of Defendant. If from the evidence it appears that there is no probable cause to believe that an offense has been committed or that the defendant committed it, the federal magistrate judge shall dismiss the complaint and discharge the defendant. The discharge of the defendant shall not preclude the government from instituting a subsequent prosecution for the same offense.	(f) **Discharging the Defendant.** If the magistrate judge finds no probable cause to believe an offense has been committed or the defendant committed it, the magistrate judge must dismiss the complaint and discharge the defendant. A discharge does not preclude the government from later prosecuting the defendant for the same offense.
(c) Records. After concluding the proceeding the federal magistrate judge shall transmit forthwith to the clerk of the district court all papers in the proceeding. The magistrate judge shall promptly make or cause to be made a record or summary of such proceeding. (1) On timely application to a federal magistrate judge, the attorney for a defendant in a criminal case may be given the opportunity to have the recording of the hearing on preliminary examination made available to that attorney in connection with any further hearing or preparation for trial. The court may, by local rule, appoint the place for and define the conditions under which such opportunity may be afforded counsel.	(g) **Recording the Proceedings.** The preliminary hearing must be recorded by a court reporter or by a suitable recording device. A recording of the proceeding may be made available to any party upon request. A copy of the recording and a transcript may be provided to any party upon request and upon any payment required by applicable Judicial Conference regulations.

(2) On application of a defendant addressed to the court or any judge thereof, an order may issue that the federal magistrate judge make available a copy of the transcript, or of a portion thereof, to defense counsel. Such order shall provide for prepayment of costs of such transcript by the defendant unless the defendant makes a sufficient affidavit that the defendant is unable to pay or to give security therefor, in which case the expense shall be paid by the Director of the Administrative Office of the United States Courts from available appropriated funds. Counsel for the government may move also that a copy of the transcript, in whole or in part, be made available to it, for good cause shown, and an order may be entered granting such motion in whole or in part, on appropriate terms, except that the government need not prepay costs nor furnish security therefor.	
(d) Production of Statements. (1) In General. Rule 26.2(a)-(d) and (f) applies at any hearing under this rule, unless the court, for good cause shown, rules otherwise in a particular case. (2) Sanctions for Failure to Produce Statement. If a party elects not to comply with an order under Rule 26.2(a) to deliver a statement to the moving party, the court may not consider the testimony of a witness whose statement is withheld.	**(h) Producing a Statement.** (1) ***In General.*** Rule 26.2(a)-(d) and (f) applies at any hearing under this rule, unless the magistrate judge for good cause rules otherwise in a particular case. (2) ***Sanctions for Not Producing a Statement.*** If a party disobeys a Rule 26.2 order to deliver a statement to the moving party, the magistrate judge must not consider the testimony of a witness whose statement is withheld.

COMMITTEE NOTE

The language of Rule 5.1 has been amended as part of the general restyling of the Criminal Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic, except as noted below.

First, the title of the rule has been changed. Although the underlying statute, 18 U.S.C. § 3060, uses the phrase *preliminary examination*, the Committee believes that the phrase *preliminary hearing* is more accurate. What happens at this proceeding is more than just an examination; it includes an evidentiary hearing, argument, and a judicial ruling. Further, the phrase *preliminary hearing* predominates in actual usage.

Rule 5.1(a) is composed of the first sentence of the second paragraph of current Rule 5(c). Rule 5.1(b) addresses the ability of a defendant to elect where a preliminary hearing will be held. That provision is taken from current Rule 40(a).

Rules 5.1(c) and (d) include material currently located in Rule 5(c): scheduling and extending the time limits for the hearing. The Committee is aware that in most districts, magistrate judges perform these functions. That point is also reflected in the definition of "court" in Rule 1(b), which in turn recognizes that magistrate judges may be authorized to act.

Rule 5.1(e), addressing the issue of probable cause, contains the language currently located in Rule 5.1(a), with the exception of the sentence, "The finding of probable cause may be based upon hearsay evidence in whole or in part." That language was included in the original promulgation of the rule in 1972. Similar language was added to Rule 41 in 1972 and to Rule 4 in 1974. In the original Committee Note, the Advisory Committee explained that the language was included to make it clear that a finding of probable cause may be based upon hearsay, noting that there had been some uncertainty in the federal system about the propriety of relying upon hearsay at the preliminary examination. *See* Advisory Committee Note to Rule 5.1 (citing cases and commentary). Federal law is now clear on that proposition. Thus, the Committee believed that the reference to hearsay was no longer necessary. Further, the Committee believed that the matter was best addressed in Rule 1101(d)(3), Federal Rules of Evidence. That rule explicitly states that the Federal Rules of Evidence do not apply to "preliminary examinations in criminal cases,...issuance of warrants for arrest, criminal summonses, and search warrants." The Advisory Committee Note accompanying that rule recognizes that: "The nature of the proceedings makes application of the formal rules of evidence inappropriate and impracticable." The Committee did not intend to make any substantive changes in practice by deleting the reference to hearsay evidence.

Rule 5.1(f), which deals with the discharge of a defendant, consists of former Rule 5.1(b).

Rule 5.1(g) is a revised version of the material in current Rule 5.1(c). Instead of including detailed information in the rule itself concerning records of preliminary hearings, the Committee opted simply to direct the reader to the applicable Judicial Conference regulations governing records. The Committee did not intend to make any substantive changes in the way in which those records are currently made available.

Finally, although the rule speaks in terms of initial appearances being conducted before a magistrate judge, Rule 1(c) makes clear that a district judge may perform any function in these rules that a magistrate judge may perform.

REPORTER'S NOTES

In publishing the "style" changes to the Federal Rules of Criminal Procedure, the Committee decided to publish separately any rule that includes what it considered at least one major substantive change. The purpose for this separate publication is to highlight for the bench and the bar any proposed amendments that the Committee believes will result in significant changes in current practice. Rule 5.1 was one of those rules. In revising Rule 5.1, the Committee decided to also propose a significant substantive change that would permit a United States Magistrate Judge to grant a continuance for a preliminary hearing conducted under the rule even if the defendant has not consented to such a continuance. That version is presented in what has been referred to as the "substantive" package.

III. INDICTMENT AND INFORMATION	TITLE III. THE GRAND JURY, THE INDICTMENT, AND THE INFORMATION
Rule 6. The Grand Jury	**Rule 6. The Grand Jury**
(a) Summoning Grand Juries. **(1) Generally.** The court shall order one or more grand juries to be summoned at such time as the public interest requires. The grand jury shall consist of not less than 16 nor more than 23 members. The court shall direct that a sufficient number of legally qualified persons be summoned to meet this requirement. **(2) Alternate Jurors.** The court may direct that alternate jurors may be designated at the time a grand jury is selected. Alternate jurors in the order in which they were designated may thereafter be impanelled as provided in subdivision (g) of this rule. Alternate jurors shall be drawn in the same manner and shall have the same qualifications as the regular jurors, and if impanelled shall be subject to the same challenges, shall take the same oath and shall have the same functions, powers, facilities and privileges as the regular jurors.	**(a) Summoning a Grand Jury.** (1) ***In General.*** When the public interest so requires, the court must order that one or more grand juries be summoned. A grand jury must have 16 to 23 members, and the court must order that enough legally qualified persons be summoned to meet this requirement. (2) ***Alternate Jurors.*** When a grand jury is selected, the court may also select alternate jurors. Alternate jurors must have the same qualifications and be selected in the same manner as any other juror. Alternate jurors replace jurors in the same sequence in which the alternates were selected. An alternate juror who replaces a juror is subject to the same challenges, takes the same oath, and has the same authority as the other jurors.
(b) Objections to Grand Jury and to Grand Jurors. **(1) Challenges.** The attorney for the government or a defendant who has been held to answer in the district court may challenge the array of jurors on the ground that the grand jury was not selected, drawn or summoned in accordance with law, and may challenge an individual juror on the ground that the juror is not legally qualified. Challenges shall be made before the administration of the oath to the jurors and shall be tried by the court. **(2) Motion to Dismiss.** A motion to dismiss the indictment may be based on objections to the array or on the lack of legal qualification of an individual juror, if not previously determined upon challenge. It shall be made in the manner prescribed in 28 U.S.C. § 1867(e) and shall be granted under the conditions prescribed in that statute. An indictment shall not be dismissed on the ground that one or more members of the grand jury were not legally qualified if it appears from the record kept pursuant to subdivision (c) of this rule that 12 or more jurors, after deducting the number not legally qualified, concurred in finding the indictment.	**(b) Objection to the Grand Jury or to a Grand Juror.** (1) ***Challenges.*** Either the government or a defendant may challenge the grand jury on the ground that it was not lawfully drawn, summoned, or selected, and may challenge an individual juror on the ground that the juror is not legally qualified. (2) ***Motion to Dismiss an Indictment.*** A party may move to dismiss the indictment based on an objection to the grand jury or on an individual juror's lack of legal qualification, unless the court has previously ruled on the same objection under Rule 6(b)(1). The motion to dismiss is governed by 28 U.S.C. § 1867(e). The court must not dismiss the indictment on the ground that a grand juror was not legally qualified if the record shows that at least 12 qualified jurors concurred in the indictment.

(c) Foreperson and Deputy Foreperson. The court shall appoint one of the jurors to be foreperson and another to be deputy foreperson. The foreperson shall have power to administer oaths and affirmations and shall sign all indictments. The foreperson or another juror designated by the foreperson shall keep record of the number of jurors concurring in the finding of every indictment and shall file the record with the clerk of the court, but the record shall not be made public except on order of the court. During the absence of the foreperson, the deputy foreperson shall act as foreperson.	**(c) Foreperson and Deputy Foreperson.** The court will appoint one juror as the foreperson and another as the deputy foreperson. In the foreperson's absence, the deputy foreperson will act as the foreperson. The foreperson may administer oaths and affirmations and will sign all indictments. The foreperson — or another juror designated by the foreperson — will record the number of jurors concurring in every indictment and will file the record with the clerk, but the record may not be made public unless the court so orders.
(d) Who May Be Present. **(1) While Grand Jury is in Session.** Attorneys for the government, the witness under examination, interpreters when needed and, for the purpose of taking the evidence, a stenographer or operator of a recording device may be present while the grand jury is in session. **(2) During Deliberations and Voting.** No person other than the jurors, and any interpreter necessary to assist a juror who is hearing or speech impaired, may be present while the grand jury is deliberating or voting.	**(d) Who May Be Present.** **(1)** ***While the Grand Jury Is in Session.*** The following persons may be present while the grand jury is in session: attorneys for the government, the witness being questioned, interpreters when needed, and a court reporter or an operator of a recording device. **(2)** ***During Deliberations and Voting.*** No person other than the jurors, and any interpreter needed to assist a hearing-impaired or speech-impaired juror, may be present while the grand jury is deliberating or voting.

(e) Recording and Disclosure of Proceedings.

(1) Recording of Proceedings. All proceedings, except when the grand jury is deliberating or voting, shall be recorded stenographically or by an electronic recording device. An unintentional failure of any recording to reproduce all or any portion of a proceeding shall not affect the validity of the prosecution. The recording or reporter's notes or any transcript prepared therefrom shall remain in the custody or control of the attorney for the government unless otherwise ordered by the court in a particular case.

(2) General Rule of Secrecy. A grand juror, an interpreter, a stenographer, an operator of a recording device, a typist who transcribes recorded testimony, an attorney for the government, or any person to whom disclosure is made under paragraph (3)(A)(ii) of this subdivision shall not disclose matters occurring before the grand jury, except as otherwise provided for in these rules. No obligation of secrecy may be imposed on any person except in accordance with this rule. A knowing violation of Rule 6 may be punished as a contempt of court.

(e) Recording and Disclosing the Proceedings.

(1) ***Recording the Proceedings.*** Except while the grand jury is deliberating or voting, all proceedings must be recorded by a court reporter or by a suitable recording device. But the validity of a prosecution is not affected by the unintentional failure to make a recording. Unless the court orders otherwise, an attorney for the government will retain control of the recording, the reporter's notes, and any transcript prepared from those notes.

(2) ***Secrecy.***

(A) No obligation of secrecy may be imposed on any person except in accordance with Rule 6(e)(2)(B).

(B) Unless these rules provide otherwise, the following persons must not disclose a matter occurring before the grand jury:

(i) a grand juror;

(ii) an interpreter;

(iii) a court reporter;

(iv) an operator of a recording device;

(v) a person who transcribes recorded testimony;

(vi) an attorney for the government; or

(vii) a person to whom disclosure is made under Rule 6(e)(3)(A)(ii) or (iii).

(3) Exceptions. (A) Disclosure otherwise prohibited by this rule of matters occurring before the grand jury, other than its deliberations and the vote of any grand juror, may be made to— (i) an attorney for the government for use in the performance of such attorney's duty; and (ii) such government personnel (including personnel of a state or subdivision of a state) as are deemed necessary by an attorney for the government to assist an attorney for the government in the performance of such attorney's duty to enforce federal criminal law. (B) Any person to whom matters are disclosed under subparagraph (A)(ii) of this paragraph shall not utilize that grand jury material for any purpose other than assisting the attorney for the government in the performance of such attorney's duty to enforce federal criminal law. An attorney for the government shall promptly provide the district court, before which was impaneled the grand jury whose material has been so disclosed, with the names of the persons to whom such disclosure has been made, and shall certify that the attorney has advised such persons of their obligation of secrecy under this rule.	**(3)** ***Exceptions.*** (A) Disclosure of a grand-jury matter — other than the grand jury's deliberations or any grand juror's vote — may be made to: (i) an attorney for the government for use in performing that attorney's duty; (ii) any government personnel — including those of a state or state subdivision or of an Indian tribe — that an attorney for the government considers necessary to assist in performing that attorney's duty to enforce federal criminal law; or (iii) a person authorized by 18 U.S.C. § 3322. (B) A person to whom information is disclosed under Rule 6(e)(3)(A)(ii) may use that information only to assist an attorney for the government in performing that attorney's duty to enforce federal criminal law. An attorney for the government must promptly provide the court that impaneled the grand jury with the names of all persons to whom a disclosure has been made, and must certify that the attorney has advised those persons of their obligation of secrecy under this rule.

(C) Disclosure otherwise prohibited by this rule of matters occurring before the grand jury may also be made— (i) when so directed by a court preliminarily to or in connection with a judicial proceeding; (ii) when permitted by a court at the request of the defendant, upon a showing that grounds may exist for a motion to dismiss the indictment because of matters occurring before the grand jury; (iii) when the disclosure is made by an attorney for the government to another federal grand jury; or (iv) when permitted by a court at the request of an attorney for the government, upon a showing that such matters may disclose a violation of state criminal law, to an appropriate official of a state or subdivision of a state for the purpose of enforcing such law. If the court orders disclosure of matters occurring before the grand jury, the disclosure shall be made in such manner, at such time, and under such conditions as the court may direct.	(C) An attorney for the government may disclose any grand-jury matter to another federal grand jury. (D) The court may authorize disclosure — at a time, in a manner, and subject to any other conditions that it directs — of a grand-jury matter: (i) preliminarily to or in connection with a judicial proceeding; (ii) at the request of a defendant who shows that a ground may exist to dismiss the indictment because of a matter that occurred before the grand jury; (iii) at the request of the government if it shows that the matter may disclose a violation of state or Indian tribal criminal law, as long as the disclosure is to an appropriate state, state-subdivision, or Indian tribal official for the purpose of enforcing that law; or (iv) at the request of the government if it shows that the matter may disclose a violation of military criminal law under the Uniform Code of Military Justice, as long as the disclosure is to an appropriate military official for the purpose of enforcing that law.

(D) A petition for disclosure pursuant to subdivision (e)(3)(C)(i) shall be filed in the district where the grand jury convened. Unless the hearing is ex parte, which it may be when the petitioner is the government, the petitioner shall serve written notice of the petition upon (i) the attorney for the government, (ii) the parties to the judicial proceeding if disclosure is sought in connection with such a proceeding, and (iii) such other persons as the court may direct. The court shall afford those persons a reasonable opportunity to appear and be heard.	(E) A petition to disclose a grand-jury matter under Rule 6(e)(3)(D)(i) must be filed in the district where the grand jury convened. Unless the hearing is ex parte — as it may be when the government is the petitioner — the petitioner must serve the petition on, and the court must afford a reasonable opportunity to appear and be heard to: (i) an attorney for the government; (ii) the parties to the judicial proceeding; and (iii) any other person whom the court may designate.
(E) If the judicial proceeding giving rise to the petition is in a federal district court in another district, the court shall transfer the matter to that court unless it can reasonably obtain sufficient knowledge of the proceeding to determine whether disclosure is proper. The court shall order transmitted to the court to which the matter is transferred the material sought to be disclosed, if feasible, and a written evaluation of the need for continued grand jury secrecy. The court to which the matter is transferred shall afford the aforementioned persons a reasonable opportunity to appear and be heard.	(F) If the petition to disclose arises out of a judicial proceeding in another district, the petitioned court must transfer the petition to the other court unless the petitioned court can reasonably determine whether disclosure is proper. If the petitioned court decides to transfer, it must send to the transferee court the material sought to be disclosed, if feasible, and a written evaluation of the need for continued grand-jury secrecy. The transferee court must afford those persons identified in Rule 6(e)(3)(E) a reasonable opportunity to appear and be heard.

(4) Sealed Indictments. The federal magistrate judge to whom an indictment is returned may direct that the indictment be kept secret until the defendant is in custody or has been released pending trial. Thereupon the clerk shall seal the indictment and no person shall disclose the return of the indictment except when necessary for the issuance and execution of a warrant or summons.	(4) ***Sealed Indictment.*** The magistrate judge to whom an indictment is returned may direct that the indictment be kept secret until the defendant is in custody or has been released pending trial. The clerk must then seal the indictment, and no person may disclose the indictment's existence except as necessary to issue or execute a warrant or summons.
(5) Closed Hearing. Subject to any right to an open hearing in contempt proceedings, the court shall order a hearing on matters affecting a grand jury proceeding to be closed to the extent necessary to prevent disclosure of matters occurring before a grand jury.	(5) ***Closed Hearing.*** Subject to any right to an open hearing in a contempt proceeding, the court must close any hearing to the extent necessary to prevent disclosure of a matter occurring before a grand jury.
(6) Sealed Records. Records, orders and subpoenas relating to grand jury proceedings shall be kept under seal to the extent and for such time as is necessary to prevent disclosure of matters occurring before a grand jury.	(6) ***Sealed Records.*** Records, orders, and subpoenas relating to grand-jury proceedings must be kept under seal to the extent and as long as necessary to prevent the unauthorized disclosure of a matter occurring before a grand jury.
	(7) ***Contempt.*** A knowing violation of Rule 6 may be punished as a contempt of court.

(f) Finding and Return of Indictment. A grand jury may indict only upon the concurrence of 12 or more jurors. The indictment shall be returned by the grand jury, or through the foreperson or deputy foreperson on its behalf, to a federal magistrate judge in open court. If a complaint or information is pending against the defendant and 12 persons do not vote to indict, the foreperson shall so report to a federal magistrate judge in writing as soon as possible.	(f) **Indictment and Return.** A grand jury may indict only if at least 12 jurors concur. The grand jury — or its foreperson or deputy foreperson — must return the indictment to a magistrate judge in open court. If a complaint or information is pending against the defendant and 12 jurors do not concur in the indictment, the foreperson must promptly and in writing report the lack of concurrence to the magistrate judge.
(g) Discharge and Excuse. A grand jury shall serve until discharged by the court, but no grand jury may serve more than 18 months unless the court extends the service of the grand jury for a period of six months or less upon a determination that such extension is in the public interest. At any time for cause shown the court may excuse a juror either temporarily or permanently, and in the latter event the court may impanel another person in place of the juror excused.	(g) **Discharging the Grand Jury.** A grand jury must serve until the court discharges it, but it may serve more than 18 months only if the court, having determined that an extension is in the public interest, extends the grand jury's service. An extension may be granted for no more than 6 months, except as otherwise provided by statute. (h) **Excusing a Juror.** At any time, for good cause, the court may excuse a juror either temporarily or permanently, and if permanently, the court may impanel an alternate juror in place of the excused juror. (i) **"Indian Tribe" Defined.** "Indian tribe" means an Indian tribe recognized by the Secretary of the Interior on a list published in the Federal Register under 25 U.S.C. § 479a-1.

COMMITTEE NOTE

The language of Rule 6 has been amended as part of the general restyling of the Criminal Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic, except as noted below.

The first change is in Rule 6(b)(1). The last sentence of current Rule 6(b)(1) provides that "Challenges shall be made before the administration of the oath to the jurors and shall be tried by the court." That language has been deleted from the amended rule. The remainder of this subdivision rests on the assumption that formal proceedings have begun against a person, i.e., an indictment has been returned. The Committee believed that although the first sentence reflects current practice of a defendant being able to challenge the composition or qualifications of the grand jurors after the indictment is returned, the second sentence does not comport with modern practice. That is, a defendant will normally not know the composition of the grand jury or identity of the grand jurors before they are administered their oath. Thus, there is no opportunity to challenge them and have the court decide the issue before the oath is given.

In Rule 6(d)(1), the term "court stenographer" has been changed to "court reporter." Similar changes have been made in Rule 6(e)(1) and (2).

Rule 6(e) continues to spell out the general rule of secrecy of grand-jury proceedings and the exceptions to that general rule. The last sentence in current Rule 6(e)(2), concerning contempt for violating Rule 6, now appears in Rule 6(e)(7). No change in substance is intended.

Rule 6(e)(3)(A)(ii) includes a new provision recognizing the sovereignty of Indian Tribes and the possibility that it would be necessary to disclose grand-jury information to appropriate tribal officials in order to enforce federal law. Similar language has been added to Rule 6(e)(3)(D)(iii).

Rule 6(e)(3)(A)(iii) is a new provision that recognizes that disclosure may be made to a person under 18 U.S.C. § 3322 (authorizing disclosures to an attorney for the government and banking regulators for enforcing civil forfeiture and civil banking laws). This reference was added to avoid the possibility of the amendments to Rule 6 superseding that particular statute.

Rule 6(e)(3)(C) consists of language located in current Rule 6(e)(3)(C)(iii). The Committee believed that this provision, which recognizes that prior court approval is not required for disclosure of a grand-jury matter to another grand jury, should be treated as a separate subdivision in revised Rule 6(e)(3). No change in practice is intended.

Rule 6(e)(3)(D)(iv) is a new provision that addresses disclosure of grand-jury information to armed forces personnel where the disclosure is for the purpose of enforcing military criminal law under the Uniform Code of Military Justice, 10 U.S.C. §§ 801-946. *See, e.g.,* Department of Defense Directive 5525.7 (January 22, 1985); 1984 Memorandum of Understanding Between Department of Justice and the Department of Defense Relating to the Investigation and Prosecution of Certain Crimes; Memorandum of Understanding Between the Departments of Justice and Transportation (Coast Guard) Relating to the Investigations and Prosecution of Crimes Over Which the Two Departments Have Concurrent Jurisdiction (October 9, 1967).

In Rule 6(e)(3)(E)(ii), the Committee considered whether to amend the language relating to "parties to the judicial proceeding" and determined that in the context of the rule it is understood that the parties referred to are the parties in the same judicial proceeding identified in Rule 6(e)(3)(D)(i).

The Committee decided to leave in subdivision (e) the provision stating that a "knowing violation of Rule 6" may be punished by contempt notwithstanding that, due to its apparent application to the entirety of the Rule, the provision seemingly is misplaced in subdivision (e). Research shows that Congress added the provision in 1977 and that it was crafted solely to deal with violations of the secrecy prohibitions in subdivision (e). *See* S. Rep. No. 95-354, p. 8 (1977). Supporting this narrow construction, the Committee found no reported decision involving an application or attempted use of the contempt sanction to a violation other than of the disclosure restrictions in subdivision (e). On the other hand, the Supreme Court in dicta did indicate on one occasion its arguable understanding that the contempt sanction would be available also for a violation of Rule 6(d) relating to who may be present during the grand jury's deliberations. *Bank of Nova Scotia v. United States*, 487 U.S. 250, 263 (1988).

In sum, it appears that the scope of the contempt sanction in Rule 6 is unsettled. Because the provision creates an offense, altering its scope may be beyond the authority bestowed by the Rules Enabling Act, 28 U.S.C. §§ 2071 et seq. *See* 28 U.S.C. § 2072(b) (Rules must not "abridge, enlarge, or modify any substantive right"). The Committee decided to leave the contempt provision in its present location in subdivision (e), because breaking it out into a separate subdivision could be construed to support the interpretation that the sanction may be applied to a knowing violation of any of the Rule's provisions rather than just those in subdivision (e). Whether or not that is a correct interpretation of the provision — a matter on which the Committee takes no position — must be determined by case law, or resolved by Congress.

Current Rule 6(g) has been divided into two new subdivisions, Rule 6(g), Discharge, and Rule 6(h), Excuse. The Committee added the phrase in Rule 6(g) "except as otherwise provided by statute," to recognize the provisions of 18 U.S.C. § 3331 relating to special grand juries.

Rule 6(i) is a new provision defining the term "Indian Tribe," a term used only in this rule.

Rule 7. The Indictment and the Information	Rule 7. The Indictment and the Information
(a) Use of Indictment or Information. An offense which may be punished by death shall be prosecuted by indictment. An offense which may be punished by imprisonment for a term exceeding one year or at hard labor shall be prosecuted by indictment or, if indictment is waived, it may be prosecuted by information. Any other offense may be prosecuted by indictment or by information. An information may be filed without leave of court.	**(a) When Used.** **(1)** ***Felony.*** An offense (other than criminal contempt) must be prosecuted by an indictment if it is punishable: (A) by death; or (B) by imprisonment for more than one year. **(2)** ***Misdemeanor.*** An offense punishable by imprisonment for one year or less may be prosecuted in accordance with Rule 58(b)(1).
(b) Waiver of Indictment. An offense which may be punished by imprisonment for a term exceeding one year or at hard labor may be prosecuted by information if the defendant, after having been advised of the nature of the charge and of the rights of the defendant, waives in open court prosecution by indictment.	**(b) Waiving Indictment.** An offense punishable by imprisonment for more than one year may be prosecuted by information if the defendant — in open court and after being advised of the nature of the charge and of the defendant's rights — waives prosecution by indictment.

(c) Nature and Contents. **(1) In General.** The indictment or the information shall be a plain, concise and definite written statement of the essential facts constituting the offense charged. It shall be signed by the attorney for the government. It need not contain a formal commencement, a formal conclusion or any other matter not necessary to such statement. Allegations made in one count may be incorporated by reference in another count. It may be alleged in a single count that the means by which the defendant committed the offense are unknown or that the defendant committed it by one or more specified means. The indictment or information shall state for each count the official or customary citation of the statute, rule, regulation or other provision of law which the defendant is alleged therein to have violated. **(2) Criminal Forfeiture.** No judgment of forfeiture may be entered in a criminal proceeding unless the indictment or the information provides notice that the defendant has an interest in property that is subject to forfeiture in accordance with the applicable statute. **(3) Harmless Error.** Error in the citation or its omission shall not be ground for dismissal of the indictment or information or for reversal of a conviction if the error or omission did not mislead the defendant to the defendant's prejudice.	**(c) Nature and Contents.** (1) ***In General.*** The indictment or information must be a plain, concise, and definite written statement of the essential facts constituting the offense charged and must be signed by an attorney for the government. It need not contain a formal introduction or conclusion. A count may incorporate by reference an allegation made in another count. A count may allege that the means by which the defendant committed the offense are unknown or that the defendant committed it by one or more specified means. For each count, the indictment or information must give the official or customary citation of the statute, rule, regulation, or other provision of law that the defendant is alleged to have violated. (2) ***Criminal Forfeiture.*** No judgment of forfeiture may be entered in a criminal proceeding unless the indictment or the information provides notice that the defendant has an interest in property that is subject to forfeiture in accordance with the applicable statute. (3) ***Citation Error.*** Unless the defendant was misled and thereby prejudiced, neither an error in a citation nor a citation's omission is a ground to dismiss the indictment or information or to reverse a conviction.
(d) Surplusage. The court on motion of the defendant may strike surplusage from the indictment or information.	**(d) Surplusage.** Upon the defendant's motion, the court may strike surplusage from the indictment or information.
(e) Amendment of Information. The court may permit an information to be amended at any time before verdict or finding if no additional or different offense is charged and if substantial rights of the defendant are not prejudiced.	**(e) Amending an Information.** Unless an additional or different offense is charged or a substantial right of the defendant is prejudiced, the court may permit an information to be amended at any time before the verdict or finding.
(f) Bill of Particulars. The court may direct the filing of a bill of particulars. A motion for a bill of particulars may be made before arraignment or within ten days after arraignment or at such later time as the court may permit. A bill of particulars may be amended at any time subject to such conditions as justice requires.	**(f) Bill of Particulars.** The court may direct the government to file a bill of particulars. The defendant may move for a bill of particulars before or within 10 days after arraignment or at a later time if the court permits. The government may amend a bill of particulars subject to such conditions as justice requires.

COMMITTEE NOTE

The language of Rule 7 has been amended as part of the general restyling of the Criminal Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic.

The Committee has deleted the references to "hard labor" in the rule. This punishment is not found in current federal statutes.

The Committee added an exception for criminal contempt to the requirement in Rule 7(a)(1) that a prosecution for felony must be initiated by indictment. This is consistent with case law, *e.g., United States v. Eichhorst*, 544 F.2d 1383 (7th Cir. 1976), which has sustained the use of the special procedures for instituting criminal contempt proceedings found in Rule 42. While indictment is not a required method of bringing felony criminal contempt charges, however, it is a permissible one. *See United States v. Williams*, 622 F.2d 830 (5th Cir. 1980). No change in practice is intended.

The title of Rule 7(c)(3) has been amended. The Committee believed that potential confusion could arise with the use of the term "harmless error." Rule 52, which deals with the issues of harmless error and plain error, is sufficient to address the topic. Potentially, the topic of harmless error could arise with regard to any of the other rules and there is insufficient need to highlight the term in Rule 7. Rule 7(c)(3), on the other hand, focuses specifically on the effect of an error in the citation of authority in the indictment. That material remains but without any reference to harmless error.

Rule 8. Joinder of Offenses and of Defendants	Rule 8. Joinder of Offenses or Defendants
(a) Joinder of Offenses. Two or more offenses may be charged in the same indictment or information in a separate count for each offense if the offenses charged, whether felonies or misdemeanors or both, are of the same or similar character or are based on the same act or transaction or on two or more acts or transactions connected together or constituting parts of a common scheme or plan.	**(a) Joinder of Offenses.** The indictment or information may charge a defendant in separate counts with 2 or more offenses if the offenses charged — whether felonies or misdemeanors or both — are of the same or similar character, or are based on the same act or transaction, or are connected with or constitute parts of a common scheme or plan.
(b) Joinder of Defendants. Two or more defendants may be charged in the same indictment or information if they are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses. Such defendants may be charged in one or more counts together or separately and all of the defendants need not be charged in each count.	**(b) Joinder of Defendants.** The indictment or information may charge 2 or more defendants if they are alleged to have participated in the same act or transaction, or in the same series of acts or transactions, constituting an offense or offenses. The defendants may be charged in one or more counts together or separately. All defendants need not be charged in each count.

COMMITTEE NOTE

The language of Rule 8 has been amended as part of the general restyling of the Criminal Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

Rule 9. Warrant or Summons Upon Indictment or Information	Rule 9. Arrest Warrant or Summons on an Indictment or Information
(a) Issuance. Upon the request of the attorney for government the court shall issue a warrant for each defendant named in an information supported by a showing of probable cause under oath as is required by Rule 4(a), or in an indictment. Upon the request of the attorney for the government a summons instead of a warrant shall issue. If no request is made, the court may issue either a warrant or a summons in its discretion. More than one warrant or summons may issue for the same defendant. The clerk shall deliver the warrant or summons to the marshal or other person authorized by law to execute or serve it. If a defendant fails to appear in response to the summons, a warrant shall issue. When a defendant arrested with a warrant or given a summons appears initially before a magistrate judge, the magistrate judge shall proceed in accordance with the applicable subdivisions of Rule 5.	**(a) Issuance.** The court must issue a warrant — or at the government's request, a summons — for each defendant named in an indictment or named in an information if one or more affidavits accompanying the information establish probable cause to believe that an offense has been committed and that the defendant committed it. The court may issue more than one warrant or summons for the same defendant. If a defendant fails to appear in response to a summons, the court may, and upon request of an attorney for the government must, issue a warrant. The court must issue the arrest warrant to an officer authorized to execute it or the summons to a person authorized to serve it.
(b) Form. **(1) Warrant.** The form of the warrant shall be as provided in Rule 4(c)(1) except that it shall be signed by the clerk, it shall describe the offense charged in the indictment or information and it shall command that the defendant be arrested and brought before the nearest available magistrate judge. The amount of bail may be fixed by the court and endorsed on the warrant. **(2) Summons.** The summons shall be in the same form as the warrant except that it shall summon the defendant to appear before a magistrate judge at a stated time and place.	**(b) Form.** **(1)** ***Warrant.*** The warrant must conform to Rule 4(b)(1) except that it must be signed by the clerk and must describe the offense charged in the indictment or information. **(2)** ***Summons.*** The summons must be in the same form as a warrant except that it must require the defendant to appear before the court at a stated time and place.
(c) Execution or Service; and Return. **(1) Execution or Service.** The warrant shall be executed or the summons served as provided in Rule 4(d)(1), (2) and (3). A summons to a corporation shall be served by delivering a copy to an officer or to a managing or general agent or to any other agent authorized by appointment or by law to receive service of process and, if the agent is one authorized by statute to receive service and the statute so requires, by also mailing a copy to the corporation's last known address within the district or at its principal place of business elsewhere in the United States. The officer executing the warrant shall bring the arrested person without unnecessary delay before the nearest available federal magistrate judge or, in the event that a federal magistrate judge is not reasonably available, before a state or local judicial officer authorized by 18 U.S.C. § 3041.	**(c) Execution or Service; Return; Initial Appearance.** **(1)** ***Execution or Service.*** (A) The warrant must be executed or the summons served as provided in Rule 4(c)(1), (2), and (3). (B) The officer executing the warrant must proceed in accordance with Rule 5(a)(1).

(2) Return. The officer executing a warrant shall make return thereof to the magistrate judge or other officer before whom the defendant is brought. At the request of the attorney for the government any unexecuted warrant shall be returned and cancelled. On or before the return day the person to whom a summons was delivered for service shall make return thereof. At the request of the attorney for the government made at any time while the indictment or information is pending, a warrant returned unexecuted and not cancelled or a summons returned unserved or a duplicate thereof may be delivered by the clerk to the marshal or other authorized person for execution or service.	(2) ***Return.*** A warrant or summons must be returned in accordance with Rule 4(c)(4). (3) ***Initial Appearance.*** When an arrested or summoned defendant first appears before the court, the judge must proceed under Rule 5.
[(d) Remand to United States Magistrate for Trial of Minor Offenses] (Abrogated Apr. 28, 1982, eff. Aug. 1, 1982).	

COMMITTEE NOTE

The language of Rule 9 has been amended as part of the general restyling of the Criminal Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only, except as noted below.

Rule 9 has been changed to reflect its relationship to Rule 4 procedures for obtaining an arrest warrant or summons. Thus, rather than simply repeating material that is already located in Rule 4, the Committee determined that where appropriate, Rule 9 should simply direct the reader to the procedures specified in Rule 4.

Rule 9(a) has been amended to permit a judge discretion whether to issue an arrest warrant when a defendant fails to respond to a summons on a complaint. Under the current language of the rule, if the defendant fails to appear, the judge must issue a warrant. Under the amended version, if the defendant fails to appear and the government requests that a warrant be issued, the judge must issue one. In the absence of such a request, the judge has the discretion to do so. This change mirrors language in amended Rule 4(a).

A second amendment has been made in Rule 9(b)(1). The rule has been amended to delete language permitting the court to set the amount of bail on the warrant. The Committee believes that this language is inconsistent with the 1984 Bail Reform Act. *See United States v. Thomas*, 992 F. Supp. 782 (D.V.I. 1998) (bail amount endorsed on warrant that has not been determined in proceedings conducted under Bail Reform Act has no bearing on decision by judge conducting Rule 40 hearing).

The language in current Rule 9(c)(1), concerning service of a summons on an organization, has been moved to Rule 4.

IV. ARRAIGNMENT, AND PREPARATION FOR TRIAL	TITLE IV. ARRAIGNMENT AND PREPARATION FOR TRIAL
Rule 10. Arraignment	**Rule 10. Arraignment**
Arraignment shall be conducted in open court and shall consist of reading the indictment or information to the defendant or stating to the defendant the substance of the charge and calling on the defendant to plead thereto. The defendant shall be given a copy of the indictment or information before being called upon to plead.	An arraignment must be conducted in open court and must consist of: **(a)** ensuring that the defendant has a copy of the indictment or information; **(b)** reading the indictment or information to the defendant or stating to the defendant the substance of the charge; and then **(c)** asking the defendant to plead to the indictment or information.

COMMITTEE NOTE

The language of Rule 10 has been amended as part of the general restyling of the Criminal Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

REPORTER'S NOTES

In publishing the "style" changes to the Federal Rules of Criminal Procedure, the Committee decided to publish separately any rule that includes what it considered at least one major substantive change. The purpose for this separate publication was to highlight for the bench and the bar any proposed amendments that the Committee believes will result in significant changes in current practice. Rule 10 was one of those rules. Another version of Rule 10, which includes several significant changes, was published simultaneously in a separate pamphlet. That version includes a proposed amendment that would permit a defendant to waive altogether an appearance at the arraignment and another amendment that would permit use of video teleconferencing for arraignments.

Rule 11. Pleas	Rule 11. Pleas
(a) Alternatives. **(1) In General.** A defendant may plead guilty, not guilty, or nolo contendere. If a defendant refuses to plead, or if a defendant organization, as defined in 18 U.S.C. § 18, fails to appear, the court shall enter a plea of not guilty. **(2) Conditional Pleas.** With the approval of the court and the consent of the government, a defendant may enter a conditional plea of guilty or nolo contendere, reserving in writing the right, on appeal from the judgment, to review of the adverse determination of any specified pretrial motion. A defendant who prevails on appeal shall be allowed to withdraw the plea.	**(a) Entering a Plea.** (1) ***In General.*** A defendant may plead not guilty, guilty, or (with the court's consent) nolo contendere. (2) ***Conditional Plea.*** With the consent of the court and the government, a defendant may enter a conditional plea of guilty or nolo contendere, reserving in writing the right to have an appellate court review an adverse determination of a specified pretrial motion. A defendant who prevails on appeal may then withdraw the plea.
(b) Nolo Contendere. A defendant may plead nolo contendere only with the consent of the court. Such a plea shall be accepted by the court only after due consideration of the views of the parties and the interest of the public in the effective administration of justice.	(3) ***Nolo Contendere Plea.*** Before accepting a plea of nolo contendere, the court must consider the parties' views and the public interest in the effective administration of justice. (4) ***Failure to Enter a Plea.*** If a defendant refuses to enter a plea or if a defendant organization fails to appear, the court must enter a plea of not guilty.

(c) Advice to Defendant. Before accepting a plea of guilty or nolo contendere, the court must address the defendant personally in open court and inform the defendant of, and determine that the defendant understands, the following:

(1) the nature of the charge to which the plea is offered, the mandatory minimum penalty provided by law, if any, and the maximum possible penalty provided by law, including the effect of any special parole or supervised release term, the fact that the court is required to consider any applicable sentencing guidelines but may depart from those guidelines under some circumstances, and, when applicable, that the court may also order the defendant to make restitution to any victim of the offense; and

(2) if the defendant is not represented by an attorney, that the defendant has the right to be represented by an attorney at every stage of the proceeding, and, if necessary, one will be appointed to represent the defendant; and

(3) that the defendant has the right to plead not guilty or to persist in that plea if it has already been made, the right to be tried by a jury and at that trial the right to the assistance of counsel, the right to confront and cross-examine adverse witnesses, and the right against compelled self-incrimination; and

(4) that if a plea of guilty or nolo contendere is accepted by the court there will not be a further trial of any kind, so that by pleading guilty or nolo contendere the defendant waives the right to a trial; and

(5) if the court intends to question the defendant under oath, on the record, and in the presence of counsel about the offense to which the defendant has pleaded, that the defendant's answers may later be used against the defendant in a prosecution for perjury or false statement; and

(b) Considering and Accepting a Guilty or Nolo Contendere Plea.

(1) ***Advising and Questioning the Defendant.*** Before the court accepts a plea of guilty or nolo contendere, the defendant may be placed under oath, and the court must address the defendant personally in open court. During this address, the court must inform the defendant of, and determine that the defendant understands, the following:

(A) the government's right, in a prosecution for perjury or false statement, to use against the defendant any statement that the defendant gives under oath;

(B) the right to plead not guilty, or having already so pleaded, to persist in that plea;

(C) the right to a jury trial;

(D) the right to be represented by counsel — and if necessary have the court appoint counsel — at trial and at every other stage of the proceeding;

(E) the right at trial to confront and cross-examine adverse witnesses, to be protected from compelled self-incrimination, to testify and present evidence, and to compel the attendance of witnesses;

(F) the defendant's waiver of these trial rights if the court accepts a plea of guilty or nolo contendere;

(G) the nature of each charge to which the defendant is pleading;

(6) the terms of any provision in a plea agreement waiving the right to appeal or to collaterally attack the sentence.	(H) any maximum possible penalty, including imprisonment, fine, and term of supervised release; (I) any mandatory minimum penalty; (J) any applicable forfeiture; (K) the court's authority to order restitution; (L) the court's obligation to impose a special assessment; (M) the court's obligation to apply the Sentencing Guidelines, and the court's discretion to depart from those guidelines under some circumstances; and (N) the terms of any plea-agreement provision waiving the right to appeal or to collaterally attack the sentence.
(d) Insuring That the Plea is Voluntary. The court shall not accept a plea of guilty or nolo contendere without first, by addressing the defendant personally in open court, determining that the plea is voluntary and not the result of force or threats or of promises apart from a plea agreement. The court shall also inquire as to whether the defendant's willingness to plead guilty or nolo contendere results from prior discussions between the attorney for the government and the defendant or the defendant's attorney.	**(2)** ***Ensuring That a Plea Is Voluntary.*** Before accepting a plea of guilty or nolo contendere, the court must address the defendant personally in open court and determine that the plea is voluntary and did not result from force, threats, or promises (other than promises in a plea agreement). **(3)** ***Determining the Factual Basis for a Plea.*** Before entering judgment on a guilty plea, the court must determine that there is a factual basis for the plea.

(e) Plea Agreement Procedure. (1) **In General.** The attorney for the government and the attorney for the defendant — or the defendant when acting pro se — may agree that, upon the defendant's entering a plea of guilty or nolo contendere to a charged offense, or to a lesser or related offense, the attorney for the government will: (A) move to dismiss other charges; or (B) recommend, or agree not to oppose the defendant's request for a particular sentence or sentencing range, or that a particular provision of the Sentencing Guidelines, or policy statement, or sentencing factor is or is not applicable to the case. Any such recommendation or request is not binding on the court; or (C) agree that a specific sentence or sentencing range is the appropriate disposition of the case, or that a particular provision of the Sentencing Guidelines, or policy statement, or sentencing factor is or is not applicable to the case. Such a plea agreement is binding on the court once it is accepted by the court. The court shall not participate in any discussions between the parties concerning any such plea agreement.	**(c) Plea Agreement Procedure.** **(1)** ***In General.*** An attorney for the government and the defendant's attorney, or the defendant when proceeding pro se, may discuss and reach a plea agreement. The court must not participate in these discussions. If the defendant pleads guilty or nolo contendere to either a charged offense or a lesser or related offense, the plea agreement may specify that an attorney for the government will: (A) not bring, or will move to dismiss, other charges; (B) recommend, or agree not to oppose the defendant's request, that a particular sentence or sentencing range is appropriate or that a particular provision of the Sentencing Guidelines, or policy statement, or sentencing factor does or does not apply (such a recommendation or request does not bind the court); or (C) agree that a specific sentence or sentencing range is the appropriate disposition of the case, or that a particular provision of the Sentencing Guidelines, or policy statement, or sentencing factor does or does not apply (such a recommendation or request binds the court once the court accepts the plea agreement).
(2) Notice of Such Agreement. If a plea agreement has been reached by the parties, the court shall, on the record, require the disclosure of the agreement in open court or, upon a showing of good cause, in camera, at the time the plea is offered. If the agreement is of the type specified in subdivision (e)(1)(A) or (C), the court may accept or reject the agreement, or may defer its decision as to the acceptance or rejection until there has been an opportunity to consider the presentence report. If the agreement is of the type specified in subdivision (e)(1)(B), the court shall advise the defendant that if the court does not accept the recommendation or request the defendant nevertheless has no right to withdraw the plea.	**(2)** ***Disclosing a Plea Agreement.*** The parties must disclose the plea agreement in open court when the plea is offered, unless the court for good cause allows the parties to disclose the plea agreement in camera.

(3) Acceptance of a Plea Agreement. If the court accepts the plea agreement, the court shall inform the defendant that it will embody in the judgment and sentence the disposition provided for in the plea agreement.	(3) ***Judicial Consideration of a Plea Agreement.*** (A) To the extent the plea agreement is of the type specified in Rule 11(c)(1)(A) or (C), the court may accept the agreement, reject it, or defer a decision until the court has reviewed the presentence report. (B) To the extent the plea agreement is of the type specified in Rule 11(c)(1)(B), the court must advise the defendant that the defendant has no right to withdraw the plea if the court does not follow the recommendation or request. (4) ***Accepting a Plea Agreement.*** If the court accepts the plea agreement, it must inform the defendant that to the extent the plea agreement is of the type specified in Rule 11(c)(1)(A) or (C), the agreed disposition will be included in the judgment.
(4) Rejection of a Plea Agreement. If the court rejects the plea agreement, the court shall, on the record, inform the parties of this fact, advise the defendant personally in open court or, on a showing of good cause, in camera, that the court is not bound by the plea agreement, afford the defendant the opportunity to then withdraw the plea, and advise the defendant that if the defendant persists in a guilty plea or plea of nolo contendere the disposition of the case may be less favorable to the defendant than that contemplated by the plea agreement.	(5) ***Rejecting a Plea Agreement.*** If the court rejects a plea agreement containing provisions of the type specified in Rule 11(c)(1)(A) or (C), the court must do the following on the record and in open court (or, for good cause, in camera): (A) inform the parties that the court rejects the plea agreement; (B) advise the defendant personally that the court is not required to follow the plea agreement and give the defendant an opportunity to withdraw the plea; and (C) advise the defendant personally that if the plea is not withdrawn, the court may dispose of the case less favorably toward the defendant than the plea agreement contemplated.

(5) Time of Plea Agreement Procedure. Except for good cause shown, notification to the court of the existence of a plea agreement shall be given at the arraignment or at such other time, prior to trial, as may be fixed by the court.

(d) Withdrawing a Guilty or Nolo Contendere Plea. A defendant may withdraw a plea of guilty or nolo contendere:

(1) before the court accepts the plea, for any reason or no reason; or

(2) after the court accepts the plea, but before it imposes sentence if:

(A) the court rejects a plea agreement under Rule 11(c)(5); or

(B) the defendant can show a fair and just reason for requesting the withdrawal.

(e) Finality of a Guilty or Nolo Contendere Plea. After the court imposes sentence, the defendant may not withdraw a plea of guilty or nolo contendere, and the plea may be set aside only on direct appeal or collateral attack.

(6) Inadmissibility of Pleas, Plea Discussions, and Related Statements. Except as otherwise provided in this paragraph, evidence of the following is not, in any civil or criminal proceeding, admissible against the defendant who made the plea or was a participant in the plea discussions:

(A) a plea of guilty which was later withdrawn;

(B) a plea of nolo contendere;

(C) any statement made in the course of any proceedings under this rule regarding either of the foregoing pleas; or

(D) any statement made in the course of plea discussions with an attorney for the government which do not result in a plea of guilty or which result in a plea of guilty later withdrawn.

However, such a statement is admissible (i) in any proceeding wherein another statement made in the course of the same plea or plea discussions has been introduced and the statement ought in fairness be considered contemporaneously with it, or (ii) in a criminal proceeding for perjury or false statement if the statement was made by the defendant under oath, on the record, and in the presence of counsel.

(f) Admissibility or Inadmissibility of a Plea, Plea Discussions, and Related Statements. The admissibility or inadmissibility of a plea, a plea discussion, and any related statement is governed by Federal Rule of Evidence 410.

(f) Determining Accuracy of Plea. Notwithstanding the acceptance of a plea of guilty, the court should not enter a judgment upon such plea without making such inquiry as shall satisfy it that there is a factual basis for the plea.	
(g) Record of Proceedings. A verbatim record of the proceedings at which the defendant enters a plea shall be made and, if there is a plea of guilty or nolo contendere, the record shall include, without limitation, the court's advice to the defendant, the inquiry into the voluntariness of the plea including any plea agreement, and the inquiry into the accuracy of a guilty plea.	**(g) Recording the Proceedings.** The proceedings during which the defendant enters a plea must be recorded by a court reporter or by a suitable recording device. If there is a guilty plea or a nolo contendere plea, the record must include the inquiries and advice to the defendant required under Rule 11(b) and (c).
(h) Harmless Error. Any variance from the procedures required by this rule which does not affect substantial rights shall be disregarded.	**(h) Harmless Error.** A variance from the requirements of this rule is harmless error if it does not affect substantial rights.

COMMITTEE NOTE

The language of Rule 11 has been amended and reorganized as part of the general restyling of the Criminal Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only, except as noted below.

Amended Rule 11(b)(1) requires the court to apprise the defendant of his or her rights before accepting a plea of guilty or nolo contendere. The Committee determined to expand upon the incomplete listing in the current rule of the elements of the "maximum possible penalty" and any "mandatory minimum" penalty to include advice as to the maximum or minimum term of imprisonment, forfeiture, fine, and special assessment, in addition to the two types of maximum and minimum penalties presently enumerated: restitution and supervised release. The outmoded reference to a term of "special parole" has been eliminated.

Amended Rule 11(b)(2), formerly Rule 11(d), covers the issue of determining that the plea is voluntary, and not the result of force, threats, or promises (other than those in a plea agreement). The reference to an inquiry in current Rule 11(d) whether the plea has resulted from plea discussions with the government has been deleted. That reference, which was often a source of confusion to defendants who were clearly pleading guilty as part of a plea agreement with the government, was considered unnecessary.

Rule 11(c)(1)(A) includes a change, which recognizes a common type of plea agreement — that the government will "not bring" other charges.

The Committee considered whether to address the practice in some courts of using judges to facilitate plea agreements. The current rule states that "the court shall not participate in any discussions between the parties concerning such plea agreement." Some courts apparently believe that that language acts as a limitation only upon the judge taking the defendant's plea and thus permits other judges to serve as facilitators for reaching a plea agreement between the government and the defendant. *See, e.g., United States v. Torres*, 999 F.2d 376, 378 (9th Cir. 1993) (noting practice and concluding that presiding judge had not participated in a plea agreement that had resulted from discussions involving another judge). The Committee decided to leave the Rule as it is with the understanding that doing so was in no way intended either to approve or disapprove the existing law interpreting that provision.

Amended Rules 11(c)(3) to (5) address the topics of consideration, acceptance, and rejection of a plea agreement. The amendments are not intended to make any change in practice. The topics are discussed separately because in the past there has been some question about the possible interplay between the court's consideration of the guilty plea in conjunction with a plea agreement and sentencing and the ability of the defendant to withdraw a plea. *See United States v. Hyde*, 520 U.S. 670 (1997) (holding that plea and plea agreement need not be accepted or rejected as a single unit; "guilty pleas can be accepted while plea agreements are deferred, and the acceptance of the two can be separated in time."). Similarly, the Committee decided to more clearly spell out in Rule 11(d) and 11(e) the ability of the defendant to withdraw a plea. *See United States v. Hyde, supra.*

Amended Rule 11(e) is a new provision, taken from current Rule 32(e), that addresses the finality of a guilty or nolo contendere plea after the court imposes sentence. The provision makes it clear that it is not possible for a defendant to withdraw a plea after sentence is imposed.

The reference to a "motion under 28 U.S.C. § 2255" has been changed to the broader term "collateral attack" to recognize that in some instances a court may grant collateral relief under provisions other than § 2255. *See United States v. Jeffers*, 234 F.3d 277 (5th Cir. 2000) (petition under § 2241 may be appropriate where remedy under § 2255 is ineffective or inadequate).

Currently, Rule 11(e)(5) requires that unless good cause is shown, the parties are to give pretrial notice to the court that a plea agreement exists. That provision has been deleted. First, the Committee believed that although the provision was originally drafted to assist judges, under current practice few counsel would risk the consequences in the ordinary case of not informing the court that an agreement exists. Secondly, the Committee was concerned that there might be rare cases where the parties might agree that informing the court of the existence of an agreement might endanger a defendant or compromise an ongoing investigation in a related case. In the end, the Committee believed that, on balance, it would be preferable to remove the provision and reduce the risk of pretrial disclosure.

Finally, revised Rule 11(f), which addresses the issue of admissibility or inadmissibility of pleas and statements made during the plea inquiry, cross references Federal Rule of Evidence 410.

Rule 12. Pleadings and Motions Before Trial; Defenses and Objections.	Rule 12. Pleadings and Pretrial Motions
(a) Pleadings and Motions. Pleadings in criminal proceedings shall be the indictment and the information, and the pleas of not guilty, guilty and nolo contendere. All other pleas, and demurrers and motions to quash are abolished, and defenses and objections raised before trial which heretofore could have been raised by one or more of them shall be raised only by motion to dismiss or to grant appropriate relief, as provided in these rules.	**(a) Pleadings.** The pleadings in a criminal proceeding are the indictment, the information, and the pleas of not guilty, guilty, and nolo contendere.
(b) Pretrial Motions. Any defense, objection, or request which is capable of determination without the trial of the general issue may be raised before trial by motion. Motions may be written or oral at the discretion of the judge. The following must be raised prior to trial: **(1)** Defenses and objections based on defects in the institution of the prosecution; or **(2)** Defenses and objections based on defects in the indictment or information (other than that it fails to show jurisdiction in the court or to charge an offense which objections shall be noticed by the court at any time during the pendency of the proceedings); or **(3)** Motions to suppress evidence; or **(4)** Requests for discovery under Rule 16; or **(5)** Requests for a severance of charges or defendants under Rule 14.	**(b) Pretrial Motions.** **(1)** ***In General.*** Rule 47 applies to a pretrial motion. **(2)** ***Motions That May Be Made Before Trial.*** A party may raise by pretrial motion any defense, objection, or request that the court can determine without a trial of the general issue. **(3)** ***Motions That Must Be Made Before Trial.*** The following must be raised before trial: (A) a motion alleging a defect in instituting the prosecution; (B) a motion alleging a defect in the indictment or information — but at any time while the case is pending, the court may hear a claim that the indictment or information fails to invoke the court's jurisdiction or to state an offense; (C) a motion to suppress evidence; (D) a Rule 14 motion to sever charges or defendants; and (E) a Rule 16 motion for discovery.

	(4) ***Notice of the Government's Intent to Use Evidence.*** (A) *At the Government's Discretion.* At the arraignment or as soon afterward as practicable, the government may notify the defendant of its intent to use specified evidence at trial in order to afford the defendant an opportunity to object before trial under Rule 12(b)(3)(C). (B) *At the Defendant's Request.* At the arraignment or as soon afterward as practicable, the defendant may, in order to have an opportunity to move to suppress evidence under Rule 12(b)(3)(C), request notice of the government's intent to use (in its evidence-in-chief at trial) any evidence that the defendant may be entitled to discover under Rule 16.
(c) Motion Date. Unless otherwise provided by local rule, the court may, at the time of the arraignment or as soon thereafter as practicable, set a time for the making of pretrial motions or requests and, if required, a later date of hearing.	**(c) Motion Deadline.** The court may, at the arraignment or as soon afterward as practicable, set a deadline for the parties to make pretrial motions and may also schedule a motion hearing.
(d) Notice by the Government of the Intention to Use Evidence. **(1) At the Discretion of the Government.** At the arraignment or as soon thereafter as is practicable, the government may give notice to the defendant of its intention to use specified evidence at trial in order to afford the defendant an opportunity to raise objections to such evidence prior to trial under subdivision (b)(3) of this rule. **(2) At the Request of the Defendant.** At the arraignment or as soon thereafter as is practicable the defendant may, in order to afford an opportunity to move to suppress evidence under subdivision (b)(3) of this rule, request notice of the government's intention to use (in its evidence in chief at trial) any evidence which the defendant may be entitled to discover under Rule 16 subject to any relevant limitations prescribed in Rule 16.	

(e) Ruling on Motion. A motion made before trial shall be determined before trial unless the court, for good cause, orders that it be deferred for determination at the trial of the general issue or until after verdict, but no such determination shall be deferred if a party's right to appeal is adversely affected. Where factual issues are involved in determining a motion, the court shall state its essential findings on the record.	(d) **Ruling on a Motion.** The court must decide every pretrial motion before trial unless it finds good cause to defer a ruling. The court must not defer ruling on a pretrial motion if the deferral will adversely affect a party's right to appeal. When factual issues are involved in deciding a motion, the court must state its essential findings on the record.
(f) Effect of Failure To Raise Defenses or Objections. Failure by a party to raise defenses or objections or to make requests which must be made prior to trial, at the time set by the court pursuant to subdivision (c), or prior to any extension thereof made by the court, shall constitute waiver thereof, but the court for cause shown may grant relief from the waiver.	(e) **Waiver of a Defense, Objection, or Request.** A party waives any Rule12(b)(3) defense, objection, or request not raised by the deadline the court sets under Rule 12(c) or by any extension the court provides. For good cause, the court may grant relief from the waiver.
(g) Records. A verbatim record shall be made of all proceedings at the hearing, including such findings of fact and conclusions of law as are made orally.	(f) **Recording the Proceedings.** All proceedings at a motion hearing, including any findings of fact and conclusions of law made orally by the court, must be recorded by a court reporter or a suitable recording device.
(h) Effect of Determination. If the court grants a motion based on a defect in the institution of the prosecution or in the indictment or information, it may also order that the defendant be continued in custody or that bail be continued for a specified time pending the filing of a new indictment or information. Nothing in this rule shall be deemed to affect the provisions of any Act of Congress relating to periods of limitations.	(g) **Defendant's Continued Custody or Release Status.** If the court grants a motion to dismiss based on a defect in instituting the prosecution, in the indictment, or in the information, it may order the defendant to be released or detained under 18 U.S.C. § 3142 for a specified time until a new indictment or information is filed. This rule does not affect any federal statutory period of limitations.
(i) Production of Statements at Suppression Hearing. Rule 26.2 applies at a hearing on a motion to suppress evidence under subdivision (b)(3) of this rule. For purposes of this subdivision, a law enforcement officer is deemed a government witness.	(h) **Producing Statements at a Suppression Hearing.** Rule 26.2 applies at a suppression hearing under Rule 12(b)(3)(C). At a suppression hearing, a law enforcement officer is considered a government witness.

COMMITTEE NOTE

The language of Rule 12 has been amended as part of the general restyling of the Criminal Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only, except as noted below.

The last sentence of current Rule 12(a), referring to the elimination of "all other pleas, and demurrers and motions to quash" has been deleted as unnecessary.

Rule 12(b) is modified to more clearly indicate that Rule 47 governs any pretrial motions filed under Rule 12, including form and content. The new provision also more clearly delineates those motions that *must* be filed pretrial and those that *may* be filed pretrial. No change in practice is intended.

Rule 12(b)(4) is composed of what is currently Rule 12(d). The Committee believed that that provision, which addresses the government's requirement to disclose discoverable information for the purpose of facilitating timely defense objections and motions, was more appropriately associated with the pretrial motions specified in Rule 12(b)(3).

Rule 12(c) includes a non-stylistic change. The reference to the "local rule" exception has been deleted to make it clear that judges should be encouraged to set deadlines for motions. The Committee believed that doing so promotes more efficient case management, especially when there is a heavy docket of pending cases. Although the rule permits some discretion in setting a date for motion hearings, the Committee believed that doing so at an early point in the proceedings would also promote judicial economy.

Moving the language in current Rule 12(d) caused the relettering of the subdivisions following Rule 12(c).

Although amended Rule 12(e) is a revised version of current Rule 12(f), the Committee intends to make no change in the current law regarding waivers of motions or defenses.

Rule 12.1. Notice of Alibi	Rule 12.1. Notice of an Alibi Defense
(a) Notice by Defendant. Upon written demand of the attorney for the government stating the time, date, and place at which the alleged offense was committed, the defendant shall serve within ten days, or at such different time as the court may direct, upon the attorney for the government a written notice of the defendant's intention to offer a defense of alibi. Such notice by the defendant shall state the specific place or places at which the defendant claims to have been at the time of the alleged offense and the names and addresses of the witnesses upon whom the defendant intends to rely to establish such alibi.	**(a) Government's Request for Notice and Defendant's Response.** **(1)** ***Government's Request.*** An attorney for the government may request in writing that the defendant notify an attorney for the government of any intended alibi defense. The request must state the time, date, and place of the alleged offense. **(2)** ***Defendant's Response.*** Within 10 days after the request, or at some other time the court sets, the defendant must serve written notice on an attorney for the government of any intended alibi defense. The defendant's notice must state: (A) each specific place where the defendant claims to have been at the time of the alleged offense; and (B) the name, address, and telephone number of each alibi witness on whom the defendant intends to rely.
(b) Disclosure of Information and Witness. Within ten days thereafter, but in no event less than ten days before trial, unless the court otherwise directs, the attorney for the government shall serve upon the defendant or the defendant's attorney a written notice stating the names and addresses of the witnesses upon whom the government intends to rely to establish the defendant's presence at the scene of the alleged offense and any other witnesses to be relied upon to rebut testimony of any of the defendant's alibi witnesses.	**(b) Disclosing Government Witnesses.** **(1)** ***Disclosure.*** If the defendant serves a Rule 12.1(a)(2) notice, an attorney for the government must disclose in writing to the defendant or the defendant's attorney: (A) the name, address, and telephone number of each witness the government intends to rely on to establish the defendant's presence at the scene of the alleged offense; and (B) each government rebuttal witness to the defendant's alibi defense. **(2)** ***Time to Disclose.*** Unless the court directs otherwise, an attorney for the government must give its Rule 12.1(b)(1) disclosure within 10 days after the defendant serves notice of an intended alibi defense under Rule 12.1(a)(2), but no later than 10 days before trial.

(c) Continuing Duty to Disclose. If prior to or during trial, a party learns of an additional witness whose identity, if known, should have been included in the information furnished under subdivision (a) or (b), the party shall promptly notify the other party or the other party's attorney of the existence and identity of such additional witness.	**(c) Continuing Duty to Disclose.** Both an attorney for the government and the defendant must promptly disclose in writing to the other party the name, address, and telephone number of each additional witness if: **(1)** the disclosing party learns of the witness before or during trial; and **(2)** the witness should have been disclosed under Rule 12.1(a) or (b) if the disclosing party had known of the witness earlier.
(d) Failure to Comply. Upon failure of either party to comply with the requirements of this rule, the court may exclude the testimony of any undisclosed witness offered by such party as to the defendant's absence from or presence at, the scene of the alleged offense. This rule shall not limit the right of the defendant to testify.	**(d) Exceptions.** For good cause, the court may grant an exception to any requirement of Rule 12.1(a)-(c).
(e) Exceptions. For good cause shown, the court may grant an exception to any of the requirements of subdivisions (a) through (d) of this rule.	**(e) Failure to Comply.** If a party fails to comply with this rule, the court may exclude the testimony of any undisclosed witness regarding the defendant's alibi. This rule does not limit the defendant's right to testify.
(f) Inadmissibility of Withdrawn Alibi. Evidence of an intention to rely upon an alibi defense, later withdrawn, or of statements made in connections with such intention, is not, in any civil or criminal proceeding, admissible against the person who gave notice of the intention.	**(f) Inadmissibility of Withdrawn Intention.** Evidence of an intention to rely on an alibi defense, later withdrawn, or of a statement made in connection with that intention, is not, in any civil or criminal proceeding, admissible against the person who gave notice of the intention.

COMMITTEE NOTE

The language of Rule 12.1 has been amended as part of the general restyling of the Criminal Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only, except as noted below.

Current Rules12.1(d) and 12.1(e) have been switched in the amended rule to improve the organization of the rule.

Finally, the amended rule includes a new requirement that in providing the names and addresses of alibi and any rebuttal witnesses, the parties must also provide the phone numbers of those witnesses. *See* Rule 12.1(a)(2), Rule 12.1(b)(1), and Rule 12.1(c). The Committee believed that requiring such information would facilitate locating and interviewing those witnesses.

Rule 12.2. Notice of Insanity Defense or Expert Testimony of Defendant's Mental Condition	Rule 12.2. Notice of an Insanity Defense; Mental Examination
(a) Defense of Insanity. If a defendant intends to rely upon the defense of insanity at the time of the alleged offense, the defendant shall, within the time provided for the filing of pretrial motions or at such later time as the court may direct, notify the attorney for the government in writing of such intention and file a copy of such notice with the clerk. If there is a failure to comply with the requirements of this subdivision, insanity may not be raised as a defense. The court may for cause shown allow late filing of the notice or grant additional time to the parties to prepare for trial or make such other order as may be appropriate.	(a) **Notice of an Insanity Defense.** A defendant who intends to assert a defense of insanity at the time of the alleged offense must so notify an attorney for the government in writing within the time provided for filing a pretrial motion, or at any later time the court sets. A defendant who fails to do so cannot rely on an insanity defense. The court may, for good cause, allow the defendant to file the notice late, grant additional trial-preparation time, or make other appropriate orders.
(b) Expert Testimony of Defendant's Mental Condition. If a defendant intends to introduce expert testimony relating to a mental disease or defect or any other mental condition of the defendant bearing upon the issue of guilt, the defendant shall, within the time provided for the filing of pretrial motions or at such later time as the court may direct, notify the attorney for the government in writing of such intention and file a copy of such notice with the clerk. The court may for cause shown allow late filing of the notice or grant additional time to the parties to prepare for trial or make such other order as may be appropriate.	(b) **Notice of Expert Evidence of a Mental Condition.** If a defendant intends to introduce expert evidence relating to a mental disease or defect or any other mental condition of the defendant bearing on the issue of guilt, the defendant must — within the time provided for filing a pretrial motion or at any later time the court sets — notify an attorney for the government in writing of this intention and file a copy of the notice with the clerk. The court may, for good cause, allow the defendant to file the notice late, grant the parties additional trial-preparation time, or make other appropriate orders.
(c) Mental Examination of Defendant. In an appropriate case the court may, upon motion of the attorney for the government, order the defendant to submit to an examination pursuant to 18 U.S.C. 4241 or 4242. No statement made by the defendant in the course of any examination provided for by this rule, whether the examination be with or without the consent of the defendant, no testimony by the expert based upon such statement, and no other fruits of the statement shall be admitted in evidence against the defendant in any criminal proceeding except on an issue respecting mental condition on which the defendant has introduced testimony.	(c) **Mental Examination.** (1) ***Authority to Order an Examination; Procedures.*** In an appropriate case the court may, upon motion of an attorney for the government, order the defendant to submit to an examination in accordance with 18 U.S.C. § 4241 or § 4242. (2) ***Inadmissibility of a Defendant's Statements.*** No statement made by a defendant in the course of any examination conducted under this rule (whether conducted with or without the defendant's consent), no testimony by the expert based on the statement, and no other fruits of the statement may be admitted into evidence against the defendant in any criminal proceeding except on an issue regarding mental condition on which the defendant has introduced evidence.

(d) Failure to Comply. If there is a failure to give notice when required by subdivision (b) of this rule or to submit to an examination when ordered under subdivision (c) of this rule, the court may exclude the testimony of any expert witness offered by the defendant on the issue of the defendant's guilt.	(d) **Failure to Comply.** If the defendant fails to give notice under Rule 12.2(b) or does not submit to an examination when ordered under Rule 12.2(c), the court may exclude any expert evidence from the defendant on the issue of the defendant's mental disease, mental defect, or any other mental condition bearing on the defendant's guilt.
(e) Inadmissibility of Withdrawn Intention. Evidence of an intention as to which notice was given under subdivision (a) or (b), later withdrawn, is not, in any civil or criminal proceeding, admissible against the person who gave notice of the intention.	(e) **Inadmissibility of Withdrawn Intention.** Evidence of an intention as to which notice was given under Rule 12.2(a) or (b), later withdrawn, is not, in any civil or criminal proceeding, admissible against the person who gave notice of the intention.

COMMITTEE NOTE

The language of Rule 12.2 has been amended as part of the general restyling of the Criminal Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

REPORTER'S NOTES

In publishing the "style" changes to the Federal Rules of Criminal Procedure, the Committee decided to publish separately any rule that includes what it considered at least one major substantive change. The purpose for this separate publication was to highlight for the bench and the bar any proposed amendments that the Committee believes will result in significant changes in current practice. Rule 12.2 was one of those rules. Although this version of Rule 12.2 contains only "style" changes, another version of the rule is included in the "substantive" package. That version of Rule 12.2 includes five significant amendments.

Rule 12.3. Notice of Defense Based upon Public Authority	Rule 12.3. Notice of a Public-Authority Defense
(a) Notice by Defendant; Government Response; Disclosure of Witnesses. **(1) Defendant's Notice and Government's Response.** A defendant intending to claim a defense of actual or believed exercise of public authority on behalf of a law enforcement or Federal intelligence agency at the time of the alleged offense shall, within the time provided for the filing of pretrial motions or at such later time as the court may direct, serve upon the attorney for the Government a written notice of such intention and file a copy of such notice with the clerk. Such notice shall identify the law enforcement or Federal intelligence agency and any member of such agency on behalf of which and the period of time in which the defendant claims the actual or believed exercise of public authority occurred. If the notice identifies a Federal intelligence agency, the copy filed with the clerk shall be under seal. Within ten days after receiving the defendant's notice, but in no event less than twenty days before the trial, the attorney for the Government shall serve upon the defendant or the defendant's attorney a written response which shall admit or deny that the defendant exercised the public authority identified in the defendant's notice.	**(a) Notice of the Defense and Disclosure of Witnesses.** (1) ***Notice in General.*** If a defendant intends to assert a defense of actual or believed exercise of public authority on behalf of a law enforcement agency or federal intelligence agency at the time of the alleged offense, the defendant must so notify an attorney for the government in writing and must file a copy of the notice with the clerk within the time provided for filing a pretrial motion, or at any later time the court sets. The notice filed with the clerk must be under seal if the notice identifies a federal intelligence agency as the source of public authority. (2) ***Contents of Notice.*** The notice must contain the following information: (A) the law enforcement agency or federal intelligence agency involved; (B) the agency member on whose behalf the defendant claims to have acted; and (C) the time during which the defendant claims to have acted with public authority. (3) ***Response to the Notice.*** An attorney for the government must serve a written response on the defendant or the defendant's attorney within 10 days after receiving the defendant's notice, but no later than 20 days before trial. The response must admit or deny that the defendant exercised the public authority identified in the defendant's notice.

(2) Disclosure of Witnesses. At the time that the Government serves its response to the notice or thereafter, but in no event less than twenty days before trial, the attorney for the Government may serve upon the defendant or the defendant's attorney a written demand for the names and addresses of the witnesses, if any, upon whom the defendant intends to rely in establishing the defense identified in the notice. Within seven days after receiving the Government's demand, the defendant shall serve upon the attorney for the Government a written statement of the names and addresses of any such witnesses. Within seven days after receiving the defendant's written statement, the attorney for the Government shall serve upon the defendant or the defendant's attorney a written statement of the names and addresses of the witnesses, if any, upon whom the Government intends to rely in opposing the defense identified in the notice.	**(4)** ***Disclosing Witnesses.*** (A) *Government's Request.* An attorney for the government may request in writing that the defendant disclose the name, address, and telephone number of each witness the defendant intends to rely on to establish a public-authority defense. An attorney for the government may serve the request when the government serves its response to the defendant's notice under Rule 12.3(a)(3), or later, but must serve the request no later than 20 days before trial. (B) *Defendant's Response.* Within 7 days after receiving the government's request, the defendant must serve on an attorney for the government a written statement of the name, address, and telephone number of each witness. (C) *Government's Reply.* Within 7 days after receiving the defendant's statement, an attorney for the government must serve on the defendant or the defendant's attorney a written statement of the name, address, and telephone number of each witness the government intends to rely on to oppose the defendant's public-authority defense.
(3) Additional Time. If good cause is shown, the court may allow a party additional time to comply with any obligation imposed by this rule.	**(5)** ***Additional Time.*** The court may, for good cause, allow a party additional time to comply with this rule.
(b) Continuing Duty to Disclose. If, prior to or during trial, a party learns of any additional witness whose identity, if known, should have been included in the written statement furnished under subdivision (a)(2) of this rule, that party shall promptly notify in writing the other party or the other party's attorney of the name and address of any such witness.	**(b)** **Continuing Duty to Disclose.** Both an attorney for the government and the defendant must promptly disclose in writing to the other party the name, address, and telephone number of any additional witness if: **(1)** the disclosing party learns of the witness before or during trial; and **(2)** the witness should have been disclosed under Rule 12.3(a)(4) if the disclosing party had known of the witness earlier.

(c) Failure to Comply. If a party fails to comply with the requirements of this rule, the court may exclude the testimony of any undisclosed witness offered in support of or in opposition to the defense, or enter such other order as it deems just under the circumstances. This rule shall not limit the right of the defendant to testify.	**(c) Failure to Comply.** If a party fails to comply with this rule, the court may exclude the testimony of any undisclosed witness regarding the public-authority defense. This rule does not limit the defendant's right to testify.
(d) Protective Procedures Unaffected. This rule shall be in addition to and shall not supersede the authority of the court to issue appropriate protective orders, or the authority of the court to order that any pleading be filed under seal.	**(d) Protective Procedures Unaffected.** This rule does not limit the court's authority to issue appropriate protective orders or to order that any filings be under seal.
(e) Inadmissibility of Withdrawn Defense Based upon Public Authority. Evidence of an intention as to which notice was given under subdivision (a), later withdrawn, is not, in any civil or criminal proceeding, admissible against the person who gave notice of the intention.	**(e) Inadmissibility of Withdrawn Intention.** Evidence of an intention as to which notice was given under Rule 12.3(a), later withdrawn, is not, in any civil or criminal proceeding, admissible against the person who gave notice of the intention.

COMMITTEE NOTE

The language of Rule 12.3 has been amended as part of the general restyling of the Criminal Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only, except as noted below.

Substantive changes have been made in Rule 12.3(a)(4) and 12.3(b). As in Rule 12.1, the Committee decided to include in the restyled rule the requirement that the parties provide the telephone numbers of any witnesses disclosed under the rule.

Rule 13. Trial Together of Indictments or Informations	Rule 13. Joint Trial of Separate Cases
The court may order two or more indictments or informations or both to be tried together if the offenses, and the defendants if there is more than one, could have been joined in a single indictment or information. The procedure shall be the same as if the prosecution were under such single indictment or information.	The court may order that separate cases be tried together as though brought in a single indictment or information if all offenses and all defendants could have been joined in a single indictment or information.

COMMITTEE NOTE

The language of Rule 13 has been amended as part of the general restyling of the Criminal Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

Rule 14. Relief from Prejudicial Joinder	Rule 14. Relief from Prejudicial Joinder
If it appears that a defendant or the government is prejudiced by a joinder of offenses or of defendants in an indictment or information or by such joinder for trial together, the court may order an election or separate trials of counts, grant a severance of defendants or provide whatever other relief justice requires. In ruling on a motion by a defendant for severance the court may order the attorney for the government to deliver to the court for inspection *in camera* any statements or confessions made by the defendants which the government intends to introduce in evidence at the trial.	**(a) Relief.** If the joinder of offenses or defendants in an indictment, an information, or a consolidation for trial appears to prejudice a defendant or the government, the court may order separate trials of counts, sever the defendants' trials, or provide any other relief that justice requires. **(b) Defendant's Statements.** Before ruling on a defendant's motion to sever, the court may order an attorney for the government to deliver to the court for in camera inspection any defendant's statement that the government intends to use as evidence.

COMMITTEE NOTE

The language of Rule 14 has been amended as part of the general restyling of the Criminal Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

The reference to a defendant's "confession" in the last sentence of the current rule has been deleted. The Committee believed that the reference to the "defendant's statements" in the amended rule would fairly embrace any confessions or admissions by a defendant.

Rule 15. Depositions	Rule 15. Depositions
(a) When Taken. Whenever due to exceptional circumstances of the case it is in the interest of justice that the testimony of a prospective witness of a party be taken and preserved for use at trial, the court may upon motion of such party and notice to the parties order that testimony of such witness be taken by deposition and that any designated book, paper, document, record, recording, or other material not privileged, be produced at the same time and place. If a witness is detained pursuant to section 3144 of title 18, United States Code, the court on written motion of the witness and upon notice to the parties may direct that the witness' deposition be taken. After the deposition has been subscribed the court may discharge the witness.	**(a) When Taken.** **(1)** ***In General.*** A party may move that a prospective witness be deposed in order to preserve testimony for trial. The court may grant the motion because of exceptional circumstances and in the interest of justice. If the court orders the deposition to be taken, it may also require the deponent to produce at the deposition any designated material that is not privileged, including any book, paper, document, record, recording, or data. **(2)** ***Detained Material Witness.*** A witness who is detained under 18 U.S.C. § 3144 may request to be deposed by filing a written motion and giving notice to the parties. The court may then order that the deposition be taken and may discharge the witness after the witness has signed under oath the deposition transcript.
(b) Notice of Taking. The party at whose instance a deposition is to be taken shall give to every party reasonable written notice of the time and place for taking the deposition. The notice shall state the name and address of each person to be examined. On motion of a party upon whom the notice is served, the court for cause shown may extend or shorten the time or change the place for taking the deposition.	**(b) Notice.** **(1)** ***In General.*** A party seeking to take a deposition must give every other party reasonable written notice of the deposition's date and location. The notice must state the name and address of each deponent. If requested by a party receiving the notice, the court may, for good cause, change the deposition's date or location. **(2)** ***To the Custodial Officer.*** A party seeking to take the deposition must also notify the officer who has custody of the defendant of the scheduled date and location.

The officer having custody of a defendant shall be notified of the time and place set for the examination and shall, unless the defendant waives in writing the right to be present, produce the defendant at the examination and keep the defendant in the presence of the witness during the examination, unless, after being warned by the court that disruptive conduct will cause the defendant's removal from the place of the taking of the deposition, the defendant persists in conduct which is such as to justify exclusion from that place. A defendant not in custody shall have the right to be present at the examination upon request subject to such terms as may be fixed by the court, but a failure, absent good cause shown, to appear after notice and tender of expenses in accordance with subdivision (c) of this rule shall constitute a waiver of that right and of any objection to the taking and use of the deposition based upon that right.	**(c) Defendant's Presence.** **(1)** ***Defendant in Custody.*** The officer who has custody of the defendant must produce the defendant at the deposition and keep the defendant in the witness's presence during the examination, unless the defendant: (A) waives in writing the right to be present; or (B) persists in disruptive conduct justifying exclusion after being warned by the court that disruptive conduct will result in the defendant's exclusion. **(2)** ***Defendant Not in Custody.*** A defendant who is not in custody has the right upon request to be present at the deposition, subject to any conditions imposed by the court. If the government tenders the defendant's expenses as provided in Rule 15(d) but the defendant still fails to appear, the defendant — absent good cause — waives both the right to appear and any objection to the taking and use of the deposition based on that right.
(c) Payment of Expenses. Whenever a deposition is taken at the instance of the government, or whenever a deposition is taken at the instance of a defendant who is unable to bear the expenses of the taking of the deposition, the court may direct that the expense of travel and subsistence of the defendant and the defendant's attorney for attendance at the examination and the cost of the transcript of the deposition shall be paid by the government.	**(d) Expenses.** If the deposition was requested by the government, the court may — or if the defendant is unable to bear the deposition expenses, the court must — order the government to pay: **(1)** any reasonable travel and subsistence expenses of the defendant and the defendant's attorney to attend the deposition; and **(2)** the costs of the deposition transcript.

(d) How Taken. Subject to such additional conditions as the court shall provide, a deposition shall be taken and filed in the manner provided in civil actions except as otherwise provided in these rules, provided that (1) in no event shall a deposition be taken of a party defendant without that defendant's consent, and (2) the scope and manner of examination and cross-examination shall be such as would be allowed in the trial itself. The government shall make available to the defendant or the defendant's counsel for examination and use at the taking of the deposition any statement of the witness being deposed which is in the possession of the government and to which the defendant would be entitled at the trial.	**(e) Manner of Taking.** Unless these rules or a court order provides otherwise, a deposition must be taken and filed in the same manner as a deposition in a civil action, except that: **(1)** A defendant may not be deposed without that defendant's consent. **(2)** The scope and manner of the deposition examination and cross-examination must be the same as would be allowed during trial. **(3)** The government must provide to the defendant or the defendant's attorney, for use at the deposition, any statement of the deponent in the government's possession to which the defendant would be entitled at trial.
(e) Use. At the trial or upon any hearing, a part or all of a deposition, so far as otherwise admissible under the rules of evidence, may be used as substantive evidence if the witness is unavailable, as unavailability is defined in Rule 804(a) of the Federal Rules of Evidence, or the witness gives testimony at the trial or hearing inconsistent with that witness' deposition. Any deposition may also be used by any party for the purpose of contradicting or impeaching the testimony of the deponent as a witness. If only a part of a deposition is offered in evidence by a party, an adverse party may require the offering of all of it which is relevant to the part offered and any party may offer other parts.	**(f) Use as Evidence.** A party may use all or part of a deposition as provided by the Federal Rules of Evidence.
(f) Objections to Deposition Testimony. Objections to deposition testimony or evidence or parts thereof and the grounds for the objection shall be stated at the time of the taking of the deposition.	**(g) Objections.** A party objecting to deposition testimony or evidence must state the grounds for the objection during the deposition.
(g) Deposition by Agreement Not Precluded. Nothing in this rule shall preclude the taking of a deposition, orally or upon written questions, or the use of a deposition, by agreement of the parties with the consent of the court.	**(h) Depositions by Agreement Permitted.** The parties may by agreement take and use a deposition with the court's consent.

COMMITTEE NOTE

The language of Rule 15 has been amended as part of the general restyling of the Criminal Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only, except as noted below.

In Rule 15(a), the list of materials to be produced has been amended to include the expansive term "data" to reflect the fact that in an increasingly technological culture, the information may exist in a format not already covered by the more conventional list, such as a book or document.

The last portion of current Rule 15(b), dealing with the defendant's presence at a deposition, has been moved to amended Rule 15(c).

Revised Rule 15(d) addresses the payment of expenses incurred by the defendant and the defendant's attorney. Under the current rule, if the government requests the deposition, or if the defendant requests the deposition and is unable to pay for it, the court *may* direct the government to pay for travel and subsistence expenses for both the defendant and the defendant's attorney. In either case, the current rule requires the government to pay for the transcript. Under the amended rule, if the government requested the deposition, the court *must* require the government to pay reasonable subsistence and travel expenses and the cost of the deposition transcript. If the defendant is unable to pay the deposition expenses, the court *must* order the government to pay reasonable subsistence and travel expenses and the deposition transcript costs — regardless of who requested the deposition. Although the current rule places no apparent limits on the amount of funds that should be reimbursed, the Committee believed that insertion of the word "reasonable" was consistent with current practice.

Rule 15(f) is intended to more clearly reflect that the admissibility of any deposition taken under the rule is governed not by the rule itself, but instead by the Federal Rules of Evidence.

Rule 16. Discovery and Inspection	Rule 16. Discovery and Inspection
(a) Governmental Disclosure of Evidence. **(1) Information Subject to Disclosure.** **(A) Statement of Defendant.** Upon request of a defendant the government must 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 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 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 who the government contends (1) was, at the time of making the statement, so situated as a director, officer, employee or agent as to have been able legally to bind the defendant in respect to the subject of the statement, or (2) was, at the time of the offense, personally involved in the alleged conduct constituting the offense and so situated as a director, officer, employee, or agent as to have been able legally to bind the defendant in respect to that alleged conduct in which the person was involved.	**(a) Government's Disclosure.** **(1) *Information Subject to Disclosure.*** (A) *Defendant's Oral Statement.* Upon a defendant's request, the government must disclose to the defendant the substance of any relevant oral statement made by the defendant, before or after arrest, in response to interrogation by a person the defendant knew was a government agent if the government intends to use the statement at trial. (B) *Defendant's Written or Recorded Statement.* Upon a defendant's request, the government must disclose to the defendant, and make available for inspection, copying, or photographing, all of the following: (i) any relevant written or recorded statement by the defendant if: (a) the statement is within the government's possession, custody, or control; and (b) the attorney for the government knows — or through due diligence could know — that the statement exists; (ii) the portion of any written record containing the substance of any relevant oral statement made before or after arrest if the defendant made the statement in response to interrogation by a person the defendant knew was a government agent; and (iii) the defendant's recorded testimony before a grand jury relating to the charged offense.

	(C) *Organizational Defendant.* Upon a defendant's request, if the defendant is an organization, the government must disclose to the defendant any statement described in Rule 16(a)(1)(A) and (B) if the government contends that the person making the statement:
	(i) was legally able to bind the defendant regarding the subject of the statement because of that person's position as the defendant's director, officer, employee, or agent; or (ii) was personally involved in the alleged conduct constituting the offense and was legally able to bind the defendant regarding that conduct because of that person's position as the defendant's director, officer, employee, or agent.
(B) Defendant's Prior Record. Upon request of the defendant, the government shall furnish to the defendant such copy of the defendant's prior criminal record, if any, as is 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.	(D) *Defendant's Prior Record.* Upon a defendant's request, the government must furnish the defendant with a copy of the defendant's prior criminal record that is within the government's possession, custody, or control if the attorney for the government knows — or through due diligence could know — that the record exists.
(C) Documents and Tangible Objects. Upon request of the defendant the government shall permit the defendant to inspect and copy or photograph books, papers, documents, photographs, tangible objects, buildings or places, or copies or portions thereof, which are within the possession, custody or control of the government, and which are material to the preparation of the defendant's defense or are intended for use by the government as evidence in chief at the trial, or were obtained from or belong to the defendant.	(E) *Documents and Objects.* Upon a defendant's request, the government must permit the defendant to inspect and to copy or photograph books, papers, documents, data, photographs, tangible objects, buildings or places, or copies or portions of any of these items, if the item is within the government's possession, custody, or control and: (i) the item is material to preparing the defense; (ii) the government intends to use the item in its case-in-chief at trial; or (iii) the item was obtained from or belongs to the defendant.

(D) Reports of Examinations and Tests. Upon request of a defendant the government shall permit the defendant to inspect and copy or photograph any results or reports of physical or mental examinations, and of scientific tests or experiments, or copies thereof, which are 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, and which are material to the preparation of the defense or are intended for use by the government as evidence in chief at the trial.	(F) *Reports of Examinations and Tests.* Upon a defendant's request, the government must permit a defendant to inspect and to copy or photograph the results or reports of any physical or mental examination and of any scientific test or experiment if: (i) the item is within the government's possession, custody, or control; (ii) the attorney for the government knows — or through due diligence could know — that the item exists; and (iii) the item is material to preparing the defense or the government intends to use the item in its case-in-chief at trial.
(E) Expert Witnesses. At the defendant's request, the government shall disclose to the defendant a written summary of testimony that the government intends to use under Rules 702, 703, or 705 of the Federal Rules of Evidence during its case in chief at trial. If the government requests discovery under subdivision (b)(1)(C)(ii) of this rule and the defendant complies, the government shall, at the defendant's request, disclose to the defendant a written summary of testimony the government intends to use under Rules 702, 703, or 705 as evidence at trial on the issue of the defendant's mental condition. The summary provided under this subdivision shall describe the witnesses' opinions, the bases and the reasons for those opinions, and the witnesses' qualifications.	(G) *Expert Testimony.* Upon a defendant's request, the government must give the defendant a written summary of any testimony the government intends to use in its case-in-chief at trial under Federal Rules of Evidence 702, 703, or 705. The summary must describe the witness's opinions, the bases and reasons for those opinions, and the witness's qualifications.
(2) Information Not Subject to Disclosure. Except as provided in paragraphs (A), (B), (D), and (E) of subdivision (a)(1), this rule does not authorize the discovery or inspection of reports, memoranda, or other internal government documents made by the attorney for the government or any other government agent investigating or prosecuting the case. Nor does the rule authorize the discovery or inspection of statements made by government witnesses or prospective government witnesses except as provided in 18 U.S.C. § 3500.	(2) ***Information Not Subject to Disclosure.*** Except as Rule 16(a)(1) provides otherwise, this rule does not authorize the discovery or inspection of reports, memoranda, or other internal government documents made by an attorney for the government or other government agent in connection with investigating or prosecuting the case. Nor does this rule authorize the discovery or inspection of statements made by prospective government witnesses except as provided in 18 U.S.C. § 3500.

(3) Grand Jury Transcripts. Except as provided in Rules 6, 12(i) and 26.2, and subdivision (a)(1)(A) of this rule, these rules do not relate to discovery or inspection of recorded proceedings of a grand jury.	(3) ***Grand Jury Transcripts.*** This rule does not apply to the discovery or inspection of a grand jury's recorded proceedings, except as provided in Rules 6, 12(h), 16(a)(1), and 26.2.
[(4) Failure to Call Witness.] (Deleted Dec. 12, 1975)	
(b) The Defendant's Disclosure of Evidence. **(1) Information Subject to Disclosure.** **(A) Documents and Tangible Objects.** If the defendant requests disclosure under subdivision (a)(1)(C) or (D) of this rule, upon compliance with such request by the government, the defendant, on request of the government, shall permit the government to inspect and copy or photograph books, papers, documents, photographs, tangible objects, or copies or portions thereof, which are within the possession, custody, or control of the defendant and which the defendant intends to introduce as evidence in chief at the trial.	**(b) Defendant's Disclosure.** (1) ***Information Subject to Disclosure.*** (A) *Documents and Objects*. If a defendant requests disclosure under Rule 16(a)(1)(E) and the government complies, then the defendant must permit the government, upon request, to inspect and to copy or photograph books, papers, documents, data, photographs, tangible objects, buildings or places, or copies or portions of any of these items if: (i) the item is within the defendant's possession, custody, or control; and (ii) the defendant intends to use the item in the defendant's case-in-chief at trial.
(B) Reports of Examinations and Tests. If the defendant requests disclosure under subdivision (a)(1)(C) or (D) of this rule, upon compliance with such request by the government, the defendant, on request of the government, shall permit the government to inspect and copy or photograph any results or reports of physical or mental examinations and of scientific tests or experiments made in connection with the particular case, or copies thereof, within the possession or control of the defendant, which the defendant intends to introduce as evidence in chief at the trial or which were prepared by a witness whom the defendant intends to call at the trial when the results or reports relate to that witness' testimony.	(B) *Reports of Examinations and Tests*. If a defendant requests disclosure under Rule 16(a)(1)(F) and the government complies, the defendant must permit the government, upon request, to inspect and to copy or photograph the results or reports of any physical or mental examination and of any scientific test or experiment if: (i) the item is within the defendant's possession, custody, or control; and (ii) the defendant intends to use the item in the defendant's case-in-chief at trial, or intends to call the witness who prepared the report and the report relates to the witness's testimony.

(C) Expert Witnesses. Under the following circumstances, the defendant shall, at the government's request, disclose to the government a written summary of testimony that the defendant intends to use under Rules 702, 703, or 705 of the Federal Rules of Evidence as evidence at trial: (i) if the defendant requests disclosure under subdivision (a)(1)(E) of this rule and the government complies, or (ii) if the defendant has given notice under Rule 12.2(b) of an intent to present expert testimony on the defendant's mental condition. This summary shall describe the witnesses' opinions, the bases and reasons for those opinions, and the witnesses' qualifications.	(C) *Expert Testimony.* If a defendant requests disclosure under Rule 16(a)(1)(G) and the government complies, the defendant must give the government, upon request, a written summary of any testimony the defendant intends to use as evidence at trial under Federal Rules of Evidence 702, 703, or 705. The summary must describe the witness's opinions, the bases and reasons for these opinions, and the witness's qualifications.
(2) Information Not Subject To Disclosure. Except as to scientific or medical reports, this subdivision does not authorize the discovery or inspection of reports, memoranda, or other internal defense documents made by the defendant, or the defendant's attorneys or agents in connection with the investigation or defense of the case, or of statements made by the defendant, or by government or defense witnesses, or by prospective government or defense witnesses, to the defendant, the defendant's agents or attorneys.	(2) ***Information Not Subject to Disclosure.*** Except for scientific or medical reports, Rule 16(b)(1) does not authorize discovery or inspection of: (A) reports, memoranda, or other documents made by the defendant, or the defendant's attorney or agent, during the case's investigation or defense; or (B) a statement made to the defendant, or the defendant's attorney or agent, by: (i) the defendant; (ii) a government or defense witness; or (iii) a prospective government or defense witness.
[(3) Failure to Call Witness.] (Deleted Dec. 12, 1975)	
(c) Continuing Duty to Disclose. If, prior to or during trial, a party discovers additional evidence or material previously requested or ordered, which is subject to discovery or inspection under this rule, such party shall promptly notify the other party or that other party's attorney or the court of the existence of the additional evidence or material.	**(c) Continuing Duty to Disclose.** A party who discovers additional evidence or material before or during trial must promptly disclose its existence to the other party or the court if: **(1)** the evidence or material is subject to discovery or inspection under this rule; and **(2)** the other party previously requested, or the court ordered, its production.

(d) Regulation of Discovery. **(1) Protective and Modifying Orders.** Upon a sufficient showing the court may at any time order that the discovery or inspection be denied, restricted, or deferred, or make such other order as is appropriate. Upon motion by a party, the court may permit the party to make such showing, in whole or in part, in the form of a written statement to be inspected by the judge alone. If the court enters an order granting relief following such an ex parte showing, the entire text of the party's statement shall be sealed and preserved in the records of the court to be made available to the appellate court in the event of an appeal.	**(d) Regulating Discovery.** (1) ***Protective and Modifying Orders.*** At any time the court may, for good cause, deny, restrict, or defer discovery or inspection, or grant other appropriate relief. The court may permit a party to show good cause by a written statement that the court will inspect ex parte. If relief is granted, the court must preserve the entire text of the party's statement under seal.
(2) Failure To Comply With a Request. If at any time during the course of proceedings it is brought to the attention of the court that a party has failed to comply with this rule, the court may order such party to permit the discovery or inspection, grant a continuance, or prohibit the party from introducing evidence not disclosed, or it may enter such other order as it deems just under the circumstances. The court may specify the time, place and manner of making the discovery and inspection and may prescribe such terms and conditions as are just.	(2) ***Failure to Comply.*** If a party fails to comply with this rule, the court may: (A) order that party to permit the discovery or inspection; specify its time, place, and manner; and prescribe other just terms and conditions; (B) grant a continuance; (C) prohibit that party from introducing the undisclosed evidence; or (D) enter any other order that is just under the circumstances.
(e) Alibi Witnesses. Discovery of alibi witnesses is governed by Rule 12.1.	

COMMITTEE NOTE

The language of Rule 16 has been amended as part of the general restyling of the Criminal Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only, except as noted below.

Current Rule 16(a)(1)(A) is now located in Rule 16(a)(1)(A), (B), and (C). Current Rule 16(a)(1)(B), (C), (D), and (E) have been relettered.

Amended Rule 16(b)(1)(B) includes a change that may be substantive in nature. Rule 16(a)(1)(E) and 16(a)(1)(F) require production of specified information if the government intends to "use" the information "in its case-in-chief at trial." The Committee believed that the language in revised Rule 16(b)(1)(B), which deals with a defendant's disclosure of information to the government, should track the similar language in revised Rule 16(a)(1). In Rule 16(b)(1)(B)(ii), the Committee changed the current provision which reads: "the defendant intends to *introduce* as evidence" to the "defendant intends to *use* the item . . ." The Committee recognized that this might constitute a substantive change in the rule but believed that it was a necessary conforming change with the provisions in Rule16(a)(1)(E) and (F), noted *supra*, regarding use of evidence by the government.

In amended Rule 16(d)(1), the last phrase in the current subdivision — which refers to a possible appeal of the court's discovery order — has been deleted. In the Committee's view, no substantive change results from that deletion. The language is unnecessary because the court, regardless of whether there is an appeal, will have maintained the record.

Finally, current Rule 16(e), which addresses the topic of notice of alibi witnesses, has been deleted as being unnecessarily duplicative of Rule 12.1.

Rule 17. Subpoena	Rule 17. Subpoena
(a) For Attendance of Witnesses; Form; Issuance. A subpoena shall be issued by the clerk under the seal of the court. It shall state the name of the court and the title, if any, of the proceeding, and shall command each person to whom it is directed to attend and give testimony at the time and place specified therein. The clerk shall issue a subpoena, signed and sealed but otherwise in blank to a party requesting it, who shall fill in the blanks before it is served. A subpoena shall be issued by a United States magistrate judge in a proceeding before that magistrate judge, but it need not be under the seal of the court.	(a) **Content.** A subpoena must state the court's name and the title of the proceeding, include the seal of the court, and command the witness to attend and testify at the time and place the subpoena specifies. The clerk must issue a blank subpoena — signed and sealed — to the party requesting it, and that party must fill in the blanks before the subpoena is served.
(b) Defendants Unable to Pay. The court shall order at any time that a subpoena be issued for service on a named witness upon an ex parte application of a defendant upon a satisfactory showing that the defendant is financially unable to pay the fees of the witness and that the presence of the witness is necessary to an adequate defense. If the court orders the subpoena to be issued, the costs incurred by the process and the fees of the witness so subpoenaed shall be paid in the same manner in which similar costs and fees are paid in case of a witness subpoenaed in behalf of the government.	(b) **Defendant Unable to Pay.** Upon a defendant's ex parte application, the court must order that a subpoena be issued for a named witness if the defendant shows an inability to pay the witness's fees and the necessity of the witness's presence for an adequate defense. If the court orders a subpoena to be issued, the process costs and witness fees will be paid in the same manner as those paid for witnesses the government subpoenas.
(c) For Production of Documentary Evidence and of Objects. A subpoena may also command the person to whom it is directed to produce the books, papers, documents or other objects designated therein. The court on motion made promptly may quash or modify the subpoena if compliance would be unreasonable or oppressive. The court may direct that books, papers, documents or objects designated in the subpoena be produced before the court at a time prior to the trial or prior to the time when they are to be offered in evidence and may upon their production permit the books, papers, documents or objects or portions thereof to be inspected by the parties and their attorneys.	(c) **Producing Documents and Objects.** (1) ***In General.*** A subpoena may order the witness to produce any books, papers, documents, data, or other objects the subpoena designates. The court may direct the witness to produce the designated items in court before trial or before they are to be offered in evidence. When the items arrive, the court may permit the parties and their attorneys to inspect all or part of them. (2) ***Quashing or Modifying the Subpoena.*** On motion made promptly, the court may quash or modify the subpoena if compliance would be unreasonable or oppressive.

(d) Service. A subpoena may be served by the marshal, by a deputy marshal or by any other person who is not a party and who is not less than 18 years of age. Service of a subpoena shall be made by delivering a copy thereof to the person named and by tendering to that person the fee for 1 day's attendance and the mileage allowed by law. Fees and mileage need not be tendered to the witness upon service of a subpoena issued in behalf of the United States or an officer or agency thereof.	**(d) Service.** A marshal, a deputy marshal, or any nonparty who is at least 18 years old may serve a subpoena. The server must deliver a copy of the subpoena to the witness and must tender to the witness one day's witness-attendance fee and the legal mileage allowance. The server need not tender the attendance fee or mileage allowance when the United States, a federal officer, or a federal agency has requested the subpoena.
(e) Place of Service. **(1) In United States.** A subpoena requiring the attendance of a witness at a hearing or trial may be served at any place within the United States. **(2) Abroad.** A subpoena directed to a witness in a foreign country shall issue under the circumstances and in the manner and be served as provided in Title 28, U.S.C., § 1783.	**(e) Place of Service.** (1) ***In the United States.*** A subpoena requiring a witness to attend a hearing or trial may be served at any place within the United States. (2) ***In a Foreign Country.*** If the witness is in a foreign country, 28 U.S.C. § 1783 governs the subpoena's service.
(f) For Taking Depositions; Place of Examination. **(1) Issuance.** An order to take a deposition authorizes the issuance by the clerk of the court for the district in which the deposition is to be taken of subpoenas for the persons named or described therein. **(2) Place.** The witness whose deposition is to be taken may be required by subpoena to attend at any place designated by the trial court, taking into account the convenience of the witness and the parties.	**(f) Issuing a Deposition Subpoena.** (1) ***Issuance.*** A court order to take a deposition authorizes the clerk in the district where the deposition is to be taken to issue a subpoena for any witness named or described in the order. (2) ***Place.*** After considering the convenience of the witness and the parties, the court may order — and the subpoena may require — the witness to appear anywhere the court designates.
(g) Contempt. Failure by any person without adequate excuse to obey a subpoena served upon that person may be deemed a contempt of the court from which the subpoena issued or of the court for the district in which it issued if it was issued by a United States magistrate judge.	**(g) Contempt.** The court (other than a magistrate judge) may hold in contempt a witness who, without adequate excuse, disobeys a subpoena issued by a federal court in that district. A magistrate judge may hold in contempt a witness who, without adequate excuse, disobeys a subpoena issued by that magistrate judge as provided in 28 U.S.C. § 636(e).
(h) Information Not Subject to Subpoena. Statements made by witnesses or prospective witnesses may not be subpoenaed from the government or the defendant under this rule, but shall be subject to production only in accordance with the provisions of Rule 26.2.	**(h) Information Not Subject to a Subpoena.** No party may subpoena a statement of a witness or of a prospective witness under this rule. Rule 26.2 governs the production of the statement.

COMMITTEE NOTE

The language of Rule 17 has been amended as part of the general restyling of the Criminal Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only, except as noted below.

A potential substantive change has been made in Rule 17(c)(1); the word "data" has been added to the list of matters that may be subpoenaed. The Committee believed that inserting that term will reflect the fact that in an increasingly technological culture, the information may exist in a format not already covered by the more conventional list, such as a book or document.

Rule 17(g) has been amended to recognize the contempt powers of a court (other than a magistrate judge) and a magistrate judge.

Rule 17.1. Pretrial Conference	Rule 17.1. Pretrial Conference
At any time after the filing of the indictment or information the court upon motion of any party or upon its own motion may order one or more conferences to consider such matters as will promote a fair and expeditious trial. At the conclusion of a conference the court shall prepare and file a memorandum of the matters agreed upon. No admissions made by the defendant or the defendant's attorney at the conference shall be used against the defendant unless the admissions are reduced to writing and signed by the defendant and the defendant's attorney. This rule shall not be invoked in the case of a defendant who is not represented by counsel.	On its own, or on a party's motion, the court may hold one or more pretrial conferences to promote a fair and expeditious trial. When a conference ends, the court must prepare and file a memorandum of any matters agreed to during the conference. The government may not use any statement made during the conference by the defendant or the defendant's attorney unless it is in writing and is signed by the defendant and the defendant's attorney.

COMMITTEE NOTE

The language of Rule 17.1 has been amended as part of the general restyling of the Criminal Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only, except as noted below.

Current Rule 17.1 prohibits the court from holding a pretrial conference where the defendant is not represented by counsel. It is unclear whether this would bar such a conference when the defendant invokes the constitutional right to self-representation. *See Faretta v. California*, 422 U.S. 806 (1975). The amended version makes clear that a pretrial conference may be held in these circumstances. Moreover, the Committee believed that pretrial conferences might be particularly useful in those cases where the defendant is proceeding pro se.

V. VENUE	TITLE V. VENUE
Rule 18. Place of Prosecution and Trial	**Rule 18. Place of Prosecution and Trial**
Except as otherwise permitted by statute or by these rules, the prosecution shall be had in a district in which the offense was committed. The court shall fix the place of trial within the district with due regard to the convenience of the defendant and the witnesses and the prompt administration of justice.	Unless a statute or these rules permit otherwise, the government must prosecute an offense in a district where the offense was committed. The court must set the place of trial within the district with due regard for the convenience of the defendant and the witnesses, and the prompt administration of justice.

COMMITTEE NOTE

The language of Rule 18 has been amended as part of the general restyling of the Criminal Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

Rule 19. Rescinded.	**Rule 19. [Reserved.]**

Rule 20. Transfer From the District for Plea and Sentence	Rule 20. Transfer for Plea and Sentence
(a) Indictment or Information Pending. A defendant arrested, held, or present in a district other than that in which an indictment or information is pending against that defendant may state in writing a wish to plead guilty or nolo contendere, to waive trial in the district in which the indictment or information is pending, and to consent to disposition of the case in the district in which that defendant was arrested, held, or present, subject to the approval of the United States attorney for each district. Upon receipt of the defendant's statement and of the written approval of the United States attorneys, the clerk of the court in which the indictment or information is pending shall transmit the papers in the proceeding or certified copies thereof to the clerk of the court for the district in which the defendant is arrested, held, or present, and the prosecution shall continue in that district.	**(a) Consent to Transfer.** A prosecution may be transferred from the district where the indictment or information is pending, or from which a warrant on a complaint has been issued, to the district where the defendant is arrested, held, or present if: **(1)** the defendant states in writing a wish to plead guilty or nolo contendere and to waive trial in the district where the indictment, information, or complaint is pending, consents in writing to the court's disposing of the case in the transferee district, and files the statement in the transferee district; and **(2)** the United States attorneys in both districts approve the transfer in writing. **(b) Clerk's Duties.** After receiving the defendant's statement and the required approvals, the clerk where the indictment, information, or complaint is pending must send the file, or a certified copy, to the clerk in the transferee district.
(b) Indictment or Information Not Pending. A defendant arrested, held, or present, in a district other than the district in which a complaint is pending against that defendant may state in writing a wish to plead guilty or nolo contendere, to waive venue and trial in the district in which the warrant was issued, and to consent to disposition of the case in the district in which that defendant was arrested, held, or present, subject to the approval of the United States attorney for each district. Upon filing the written waiver of venue in the district in which the defendant is present, the prosecution may proceed as if venue were in such district.	
(c) Effect of Not Guilty Plea. If after the proceeding has been transferred pursuant to subdivision (a) or (b) of this rule the defendant pleads not guilty, the clerk shall return the papers to the court in which the prosecution was commenced, and the proceeding shall be restored to the docket of that court. The defendant's statement that the defendant wishes to plead guilty or nolo contendere shall not be used against that defendant.	**(c) Effect of a Not Guilty Plea.** If the defendant pleads not guilty after the case has been transferred under Rule 20(a), the clerk must return the papers to the court where the prosecution began, and that court must restore the proceeding to its docket. The defendant's statement that the defendant wished to plead guilty or nolo contendere is not, in any civil or criminal proceeding, admissible against the defendant.

(d) Juveniles. A juvenile (as defined in 18 U.S.C. § 5031) who is arrested, held, or present in a district other than that in which the juvenile is alleged to have committed an act in violation of a law of the United States not punishable by death or life imprisonment may, after having been advised by counsel and with the approval of the court and the United States attorney for each district, consent to be proceeded against as a juvenile delinquent in the district in which the juvenile is arrested, held, or present. The consent shall be given in writing before the court but only after the court has apprised the juvenile of the juvenile's rights, including the right to be returned to the district in which the juvenile is alleged to have committed the act, and of the consequences of such consent.	**(d) Juveniles.** **(1)** ***Consent to Transfer.*** A juvenile, as defined in 18 U.S.C. § 5031, may be proceeded against as a juvenile delinquent in the district where the juvenile is arrested, held, or present if: (A) the alleged offense that occurred in the other district is not punishable by death or life imprisonment; (B) an attorney has advised the juvenile; (C) the court has informed the juvenile of the juvenile's rights — including the right to be returned to the district where the offense allegedly occurred — and the consequences of waiving those rights; (D) the juvenile, after receiving the court's information about rights, consents in writing to be proceeded against in the transferee district, and files the consent in the transferee district; (E) the United States attorneys for both districts approve the transfer in writing; and (F) the transferee court approves the transfer. **(2)** ***Clerk's Duties.*** After receiving the juvenile's written consent and the required approvals, the clerk where the indictment, information, or complaint is pending or where the alleged offense occurred must send the file, or a certified copy, to the clerk in the transferee district.

COMMITTEE NOTE

The language of Rule 20 has been amended as part of the general restyling of the Criminal Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only, except as noted below.

New Rule 20(d)(2) applies to juvenile cases and has been added to parallel a similar provision in new Rule 20(b). The new provision provides that after the court has determined that the provisions in Rule 20(d)(1) have been completed and the transfer is approved, the file (or certified copy) must be transmitted from the original court to the transferee court.

Rule 21. Transfer From the District for Trial	Rule 21. Transfer for Trial
(a) For Prejudice in the District. The court upon motion of the defendant shall transfer the proceeding as to that defendant to another district whether or not such district is specified in the defendant's motion if the court is satisfied that there exists in the district where the prosecution is pending so great a prejudice against the defendant that the defendant cannot obtain a fair and impartial trial at any place fixed by law for holding court in that district.	**(a) For Prejudice.** Upon the defendant's motion, the court must transfer the proceeding against that defendant to another district if the court is satisfied that so great a prejudice against the defendant exists in the transferring district that the defendant cannot obtain a fair and impartial trial there.
(b) Transfer in Other Cases. For the convenience of parties and witnesses, and in the interest of justice, the court upon motion of the defendant may transfer the proceeding as to that defendant or any one or more of the counts thereof to another district.	**(b) For Convenience.** Upon the defendant's motion, the court may transfer the proceeding, or one or more counts, against that defendant to another district for the convenience of the parties and witnesses and in the interest of justice.
(c) Proceedings on Transfer. When a transfer is ordered the clerk shall transmit to the clerk of the court to which the proceeding is transferred all papers in the proceeding or duplicates thereof and any bail taken, and the prosecution shall continue in that district.	**(c) Proceedings on Transfer.** When the court orders a transfer, the clerk must send to the transferee district the file, or a certified copy, and any bail taken. The prosecution will then continue in the transferee district.
	(d) Time to File a Motion to Transfer. A motion to transfer may be made at or before arraignment or at any other time the court or these rules prescribe.

COMMITTEE NOTE

The language of Rule 21 has been amended as part of the general restyling of the Criminal Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

Amended Rule 21(d) consists of what was formerly Rule 22. The Committee believed that the substance of Rule 22, which addressed the issue of the timing of motions to transfer, was more appropriate for inclusion in Rule 21.

Rule 22. Time of Motion to Transfer	Rule 22. [Transferred.]
A motion to transfer under these rules may be made at or before arraignment or at such other time as the court or these rules may prescribe.	

COMMITTEE NOTE

Rule 22 has been abrogated. The substance of the rule is now located in Rule 21(d).

VI. TRIAL	TITLE VI. TRIAL
Rule 23. Trial by Jury or by the Court	**Rule 23. Jury or Nonjury Trial**
(a) Trial by Jury. Cases required to be tried by jury shall be so tried unless the defendant waives a jury trial in writing with the approval of the court and the consent of the government.	**(a) Jury Trial.** If the defendant is entitled to a jury trial, the trial must be by jury unless: **(1)** the defendant waives a jury trial in writing; **(2)** the government consents; and **(3)** the court approves.
(b) Jury of Less Than Twelve. Juries shall be of 12 but at any time before verdict the parties may stipulate in writing with the approval of the court that the jury shall consist of any number less than 12 or that a valid verdict may be returned by a jury of less than 12 should the court find it necessary to excuse one or more jurors for any just cause after trial commences. Even absent such stipulation, if the court finds it necessary to excuse a juror for just cause after the jury has retired to consider its verdict, in the discretion of the court a valid verdict may be returned by the remaining 11 jurors.	**(b) Jury Size.** **(1)** ***In General.*** A jury consists of 12 persons unless this rule provides otherwise. **(2)** ***Stipulation for a Smaller Jury.*** At any time before the verdict, the parties may, with the court's approval, stipulate in writing that: (A) the jury may consist of fewer than 12 persons; or (B) a jury of fewer than 12 persons may return a verdict if the court finds it necessary to excuse a juror for good cause after the trial begins. **(3)** ***Court Order for a Jury of 11.*** After the jury has retired to deliberate, the court may permit a jury of 11 persons to return a verdict, even without a stipulation by the parties, if the court finds good cause to excuse a juror.
(c) Trial Without a Jury. In a case tried without a jury the court shall make a general finding and shall in addition, on request made before the general finding, find the facts specially. Such findings may be oral. If an opinion or memorandum of decision is filed, it will be sufficient if the findings of fact appear therein.	**(c) Nonjury Trial.** In a case tried without a jury, the court must find the defendant guilty or not guilty. If a party requests before the finding of guilty or not guilty, the court must state its specific findings of fact in open court or in a written decision or opinion.

COMMITTEE NOTE

The language of Rule 23 has been amended as part of the general restyling of the Criminal Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

In current Rule 23(b), the term "just cause" has been replaced with the more familiar term "good cause," that appears in other rules. No change in substance is intended.

Rule 24. Trial Jurors	Rule 24. Trial Jurors
(a) Examination. The court may permit the defendant or the defendant's attorney and the attorney for the government to conduct the examination of prospective jurors or may itself conduct the examination. In the latter event the court shall permit the defendant or the defendant's attorney and the attorney for the government to supplement the examination by such further inquiry as it deems proper or shall itself submit to the prospective jurors such additional questions by the parties or their attorneys as it deems proper.	**(a) Examination.** **(1)** ***In General.*** The court may examine prospective jurors or may permit the attorneys for the parties to do so. **(2)** ***Court Examination.*** If the court examines the jurors, it must permit the attorneys for the parties to: (A) ask further questions that the court considers proper; or (B) submit further questions that the court may ask if it considers them proper.
(b) Peremptory Challenges. If the offense charged is punishable by death, each side is entitled to 20 peremptory challenges. If the offense charged is punishable by imprisonment for more than one year, the government is entitled to 6 peremptory challenges and the defendant or defendants jointly to 10 peremptory challenges. If the offense charged is punishable by imprisonment for not more than one year or by fine or both, each side is entitled to 3 peremptory challenges. If there is more than one defendant, the court may allow the defendants additional peremptory challenges and permit them to be exercised separately or jointly.	**(b) Peremptory Challenges.** Each side is entitled to the number of peremptory challenges to prospective jurors specified below. The court may allow additional peremptory challenges to multiple defendants, and may allow the defendants to exercise those challenges separately or jointly. **(1)** ***Capital Case.*** Each side has 20 peremptory challenges when the government seeks the death penalty. **(2)** ***Other Felony Case.*** The government has 6 peremptory challenges and the defendant or defendants jointly have 10 peremptory challenges when the defendant is charged with a crime punishable by imprisonment of more than one year. **(3)** ***Misdemeanor Case.*** Each side has 3 peremptory challenges when the defendant is charged with a crime punishable by fine, imprisonment of one year or less, or both.

(c) Alternate Jurors. (1) *In General.* The court may empanel no more than 6 jurors, in addition to the regular jury, to sit as alternate jurors. An alternate juror, in the order called, shall replace a juror who becomes or is found to be unable or disqualified to perform juror duties. Alternate jurors shall (i) be drawn in the same manner, (ii) have the same qualifications, (iii) be subject to the same examination and challenges, and (iv) take the same oath as regular jurors. An alternate juror has the same functions, powers, facilities and privileges as a regular juror.	**(c) Alternate Jurors.** **(1) *In General.*** The court may impanel up to 6 alternate jurors to replace any jurors who are unable to perform or who are disqualified from performing their duties. **(2) *Procedure.*** (A) Alternate jurors must have the same qualifications and be selected and sworn in the same manner as any other juror. (B) Alternate jurors replace jurors in the same sequence in which the alternates were selected. An alternate juror who replaces a juror has the same authority as the other jurors.
(2) *Peremptory Challenges.* In addition to challenges otherwise provided by law, each side is entitled to 1 additional peremptory challenge if 1 or 2 alternate jurors are empaneled, 2 additional peremptory challenges if 3 or 4 alternate jurors are empaneled, and 3 additional peremptory challenges if 5 or 6 alternate jurors are empaneled. The additional peremptory challenges may be used to remove an alternate juror only, and the other peremptory challenges allowed by these rules may not be used to remove an alternate juror. (3) *Retention of Alternate Jurors.* When the jury retires to consider the verdict, the court in its discretion may retain the alternate jurors during deliberations. If the court decides to retain the alternate jurors, it shall ensure that they do not discuss the case with any other person unless and until they replace a juror during deliberations. If an alternate replaces a regular juror after deliberations have begun, the court shall instruct the jury to begin its deliberations anew.	**(3) *Retaining Alternate Jurors.*** The court may retain alternate jurors after the jury retires to deliberate. The court must ensure that a retained alternate does not discuss the case with anyone until that alternate replaces a juror or is discharged. If an alternate replaces a juror after deliberations have begun, the court must instruct the jury to begin its deliberations anew. **(4) *Peremptory Challenges.*** Each side is entitled to the number of additional peremptory challenges to prospective alternate jurors specified below. These additional challenges may be used only to remove alternate jurors. (A) *One or Two Alternates.* One additional peremptory challenge is permitted when one or two alternates are impaneled. (B) *Three or Four Alternates.* Two additional peremptory challenges are permitted when three or four alternates are impaneled. (C) *Five or Six Alternates.* Three additional peremptory challenges are permitted when five or six alternates are impaneled.

COMMITTEE NOTE

The language of Rule 24 has been amended as part of the general restyling of the Criminal Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only, except as noted below.

In restyling Rule 24(a), the Committee deleted the language that authorized the defendant to conduct voir dire of prospective jurors. The Committee believed that the current language was potentially ambiguous and could lead one incorrectly to conclude that a defendant, represented by counsel, could personally conduct voir dire or additional voir dire. The Committee believed that the intent of the current provision was to permit a defendant to participate personally in voir dire only if the defendant was acting pro se. Amended Rule 24(a) refers only to attorneys for the parties, i.e., the defense counsel and the attorney for the government, with the understanding that if the defendant is not represented by counsel, the court may still, in its discretion, permit the defendant to participate in voir dire. In summary, the Committee intends no change in practice.

Finally, the rule authorizes the court in multi-defendant cases to grant additional peremptory challenges to the defendants. If the court does so, the prosecution may request additional challenges in a multi-defendant case, not to exceed the total number available to the defendants jointly. The court, however, is not required to equalize the number of challenges where additional challenges are granted to the defendant.

Rule 25. Judge; Disability	Rule 25. Judge's Disability
(a) During Trial. If by reason of death, sickness or other disability the judge before whom a jury trial has commenced is unable to proceed with the trial, any other judge regularly sitting in or assigned to the court, upon certifying familiarity with the record of the trial, may proceed with and finish the trial.	**(a) During Trial.** Any judge regularly sitting in or assigned to the court may complete a jury trial if: **(1)** the judge before whom the trial began cannot proceed because of death, sickness, or other disability; and **(2)** the judge completing the trial certifies familiarity with the trial record.
(b) After Verdict or Finding of Guilt. If by reason of absence, death, sickness or other disability the judge before whom the defendant has been tried is unable to perform the duties to be performed by the court after a verdict or finding of guilt, any other judge regularly sitting in or assigned to the court may perform those duties; but if that judge is satisfied that a judge who did not preside at the trial cannot perform those duties or that it is appropriate for any other reason, that judge may grant a new trial.	**(b) After a Verdict or Finding of Guilty.** **(1)** ***In General.*** After a verdict or finding of guilty, any judge regularly sitting in or assigned to a court may complete the court's duties if the judge who presided at trial cannot perform those duties because of absence, death, sickness, or other disability. **(2)** ***Granting a New Trial.*** The successor judge may grant a new trial if satisfied that: (A) a judge other than the one who presided at the trial cannot perform the post-trial duties; or (B) a new trial is necessary for some other reason.

COMMITTEE NOTE

The language of Rule 25 has been amended as part of the general restyling of the Criminal Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

Rule 25(b)(2) addresses the possibility of a new trial when a judge determines that no other judge could perform post-trial duties or when the judge determines that there is some other reason for doing so. The current rule indicates that those reasons must be "appropriate." The Committee, however, believed that a better term would be "necessary," because that term includes notions of manifest necessity. No change in meaning or practice is intended.

Rule 26. Taking of Testimony	Rule 26. Taking Testimony
In all trials the testimony of witnesses shall be taken orally in open court, unless otherwise provided by an Act of Congress, or by these rules, the Federal Rules of Evidence, or other rules adopted by the Supreme Court.	In every trial the testimony of witnesses must be taken in open court, unless otherwise provided by a statute or by rules adopted under 28 U.S.C. §§ 2072-2077.

COMMITTEE NOTE

The language of Rule 26 has been amended as part of the general restyling of the Criminal Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only, except as noted below.

Rule 26(a) is amended, by deleting the word "orally," to accommodate witnesses who are not able to present oral testimony in open court and may need, for example, a sign language interpreter. The change conforms the rule, in that respect, to Federal Rule of Civil Procedure 43.

REPORTER'S NOTES

In publishing the "style" changes to the Federal Rules of Criminal Procedure, the Committee decided to publish separately any rule that includes what it considered at least one major substantive change. The purpose for this separate publication is to highlight for the bench and the bar any proposed amendments that the Committee believes will result in significant changes in current practice. Rule 26 was one of those rules. This proposed revision of Rule 26 includes only style changes. Another version of Rule 26, which includes an amendment that would authorize a court to receive testimony from a remote location, is presented in the "substantive" package.

Rule 26.1. Determination of Foreign Law	Rule 26.1. Foreign Law Determination
A party who intends to raise an issue concerning the law of a foreign country shall give reasonable written notice. The court, in determining foreign law, may consider any relevant material or source, including testimony, whether or not submitted by a party or admissible under the Federal Rules of Evidence. The court's determination shall be treated as a ruling on a question of law.	A party intending to raise an issue of foreign law must provide the court and all parties with reasonable written notice. Issues of foreign law are questions of law, but in deciding such issues a court may consider any relevant material or source — including testimony — without regard to the Federal Rules of Evidence.

COMMITTEE NOTE

The language of Rule 26.1 has been amended as part of the general restyling of the Criminal Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

Rule 26.2. Production of Witness Statements	Rule 26.2. Producing a Witness's Statement
(a) Motion for Production. After a witness other than the defendant has testified on direct examination, the court, on motion of a party who did not call the witness, shall order the attorney for the government or the defendant and the defendant's attorney, as the case may be, to produce, for the examination and use of the moving party, any statement of the witness that is in their possession and that relates to the subject matter concerning which the witness has testified.	**(a) Motion to Produce.** After a witness other than the defendant has testified on direct examination, the court, on motion of a party who did not call the witness, must order an attorney for the government or the defendant and the defendant's attorney to produce, for the examination and use of the moving party, any statement of the witness that is in their possession and that relates to the subject matter of the witness's testimony.
(b) Production of Entire Statement. If the entire contents of the statement relate to the subject matter concerning which the witness has testified, the court shall order that the statement be delivered to the moving party.	**(b) Producing the Entire Statement.** If the entire statement relates to the subject matter of the witness's testimony, the court must order that the statement be delivered to the moving party.
(c) Production of Excised Statement. If the other party claims that the statement contains privileged information or matter that does not relate to the subject matter concerning which the witness has testified, the court shall order that it be delivered to the court in camera. Upon inspection, the court shall excise the portions of the statement that are privileged or that do not relate to the subject matter concerning which the witness has testified, and shall order that the statement, with such material excised, be delivered to the moving party. Any portion of the statement that is withheld from the defendant over the defendant's objection must be preserved by the attorney for the government, and, if the defendant appeals a conviction, must be made available to the appellate court for the purpose of determining the correctness of the decision to excise the portion of the statement.	**(c) Producing a Redacted Statement.** If the party who called the witness claims that the statement contains information that is privileged or does not relate to the subject matter of the witness's testimony, the court must inspect the statement in camera. After excising any privileged or unrelated portions, the court must order delivery of the redacted statement to the moving party. If the defendant objects to an excision, the court must preserve the entire statement with the excised portion indicated, under seal, as part of the record.
(d) Recess for Examination of Statement. Upon delivery of the statement to the moving party, the court, upon application of that party, may recess the proceedings so that counsel may examine the statement and prepare to use it in the proceedings.	**(d) Recess to Examine a Statement.** The court may recess the proceedings to allow time for a party to examine the statement and prepare for its use.
(e) Sanction for Failure to Produce Statement. If the other party elects not to comply with an order to deliver a statement to the moving party, the court shall order that the testimony of the witness be stricken from the record and that the trial proceed, or, if it is the attorney for the government who elects not to comply, shall declare a mistrial if required by the interest of justice.	**(e) Sanction for Failure to Produce or Deliver a Statement.** If the party who called the witness disobeys an order to produce or deliver a statement, the court must strike the witness's testimony from the record. If an attorney for the government disobeys the order, the court must declare a mistrial if justice so requires.

(f) Definition. As used in this rule, a "statement" of a witness means: **(1)** a written statement made by the witness that is signed or otherwise adopted or approved by the witness; **(2)** a substantially verbatim recital of an oral statement made by the witness that is recorded contemporaneously with the making of the oral statement and that is contained in a stenographic, mechanical, electrical, or other recording or a transcription thereof; or **(3)** a statement, however taken or recorded, or a transcription thereof, made by the witness to a grand jury.	**(f) "Statement" Defined.** As used in this rule, a witness's "statement" means: **(1)** a written statement that the witness makes and signs, or otherwise adopts or approves; **(2)** a substantially verbatim, contemporaneously recorded recital of the witness's oral statement that is contained in any recording or any transcription of a recording; or **(3)** the witness's statement to a grand jury, however taken or recorded, or a transcription of such a statement.
(g) Scope of Rule. This rule applies at a suppression hearing conducted under Rule 12, at trial under this rule, and to the extent specified: **(1)** in Rule 32(c)(2) at sentencing; **(2)** in Rule 32.1(c) at a hearing to revoke or modify probation or supervised release; **(3)** in Rule 46(i) at a detention hearing; **(4)** in Rule 8 of the Rules Governing Proceedings under 28 U.S.C. § 2255; and **(5)** in Rule 5.1 at a preliminary examination.	**(g) Scope.** This rule applies at trial, at a suppression hearing under Rule 12, and to the extent specified in the following rules: **(1)** Rule 5.1(h) (preliminary hearing); **(2)** Rule 32(i)(2) (sentencing); **(3)** Rule 32.1(e) (hearing to revoke or modify probation or supervised release); **(4)** Rule 46(j) (detention hearing); and **(5)** Rule 8 of the Rules Governing Proceedings under 28 U.S.C. § 2255.

COMMITTEE NOTE

The language of Rule 26.2 has been amended as part of the general restyling of the Criminal Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only, except as noted below.

Current Rule 26.2(c) states that if the court withholds a portion of a statement, over the defendant's objection, "the attorney for the government" must preserve the statement. The Committee believed that the better rule would be for the court to simply seal the entire statement as a part of the record, in the event that there is an appeal.

Also, the terminology in Rule 26.2(c) has been changed. The rule now speaks in terms of a "redacted" statement instead of an "excised" statement. No change in practice is intended.

Finally, the list of proceedings in Rule 26.2(g) has been placed in rule-number order.

Rule 26.3. Mistrial	Rule 26.3. Mistrial
Before ordering a mistrial, the court shall provide an opportunity for the government and for each defendant to comment on the propriety of the order, including whether each party consents or objects to a mistrial, and to suggest any alternatives.	Before ordering a mistrial, the court must give each defendant and the government an opportunity to comment on the propriety of the order, to state whether that party consents or objects, and to suggest alternatives.

COMMITTEE NOTE

The language of Rule 26.3 has been amended as part of the general restyling of the Criminal Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

Rule 27. Proof of Official Record	Rule 27. Proving an Official Record
An official record or an entry therein or the lack of such a record or entry may be proved in the same manner as in civil actions.	A party may prove an official record, an entry in such a record, or the lack of a record or entry in the same manner as in a civil action.

COMMITTEE NOTE

The language of Rule 27 has been amended as part of the general restyling of the Criminal Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

Rule 28. Interpreters	Rule 28. Interpreters
The court may appoint an interpreter of its own selection and may fix the reasonable compensation of such interpreter. Such compensation shall be paid out of funds provided by law or by the government, as the court may direct.	The court may select, appoint, and set the reasonable compensation for an interpreter. The compensation must be paid from funds provided by law or by the government, as the court may direct.

COMMITTEE NOTE

The language of Rule 28 has been amended as part of the general restyling of the Criminal Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

Rule 29. Motion for Judgment of Acquittal	Rule 29. Motion for a Judgment of Acquittal
(a) Motion Before Submission to Jury. Motions for directed verdict are abolished and motions for judgment of acquittal shall be used in their place. The court on motion of a defendant or of its own motion shall order the entry of judgment of acquittal of one or more offenses charged in the indictment or information after the evidence on either side is closed if the evidence is insufficient to sustain a conviction of such offense or offenses. If the defendant's motion for judgment of acquittal at the close of the evidence offered by the government is not granted, the defendant may offer evidence without having reserved the right.	**(a) Before Submission to the Jury.** After the government closes its evidence or after the close of all the evidence, the court on the defendant's motion must enter a judgment of acquittal of any offense for which the evidence is insufficient to sustain a conviction. The court may on its own consider whether the evidence is insufficient to sustain a conviction. If the court denies a motion for a judgment of acquittal at the close of the government's evidence, the defendant may offer evidence without having reserved the right to do so.
(b) Reservation of Decision on Motion. The court may reserve decision on 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 a decision, it must decide the motion on the basis of the evidence at the time the ruling was reserved.	**(b) Reserving Decision.** The court may reserve decision on the motion, 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.
(c) Motion After Discharge of Jury. If the jury returns a verdict of guilty or is discharged without having returned a verdict, a motion for judgment of acquittal may be made or renewed within 7 days after the jury is discharged or within such further time as the court may fix during the 7-day period. If a verdict of guilty is returned the court may on such motion set aside the verdict and enter judgment of acquittal. If no verdict is returned the court may enter judgment of acquittal. It shall not be necessary to the making of such a motion that a similar motion has been made prior to the submission of the case to the jury.	**(c) After Jury Verdict or Discharge.** **(1)** ***Time for a Motion.*** A defendant may move for a judgment of acquittal, or renew such a motion, within 7 days after a guilty verdict or after the court discharges the jury, whichever is later, or within any other time the court sets during the 7-day period. **(2)** ***Ruling on the Motion.*** If the jury has returned a guilty verdict, the court may set aside the verdict and enter an acquittal. If the jury has failed to return a verdict, the court may enter a judgment of acquittal. **(3)** ***No Prior Motion Required.*** A defendant is not required to move for a judgment of acquittal before the court submits the case to the jury as a prerequisite for making such a motion after jury discharge.

(d) Same: Conditional Ruling on Grant of Motion. If a motion for judgment of acquittal after verdict of guilty under this Rule is granted, the court shall also determine whether any motion for a new trial should be granted if the judgment of acquittal is thereafter vacated or reversed, specifying the grounds for such determination. If the motion for a new trial is granted conditionally, the order thereon does not affect the finality of the judgment. If the motion for a new trial has been granted conditionally and the judgment is reversed on appeal, the new trial shall proceed unless the appellate court has otherwise ordered. If such motion has been denied conditionally, the appellee on appeal may assert error in that denial, and if the judgment is reversed on appeal, subsequent proceedings shall be in accordance with the order of the appellate court.	**(d) Conditional Ruling on a Motion for a New Trial.** **(1)** ***Motion for a New Trial.*** If the court enters a judgment of acquittal after a guilty verdict, the court must also conditionally determine whether any motion for a new trial should be granted if the judgment of acquittal is later vacated or reversed. The court must specify the reasons for that determination. **(2)** ***Finality.*** The court's order conditionally granting a motion for a new trial does not affect the finality of the judgment of acquittal. **(3)** ***Appeal.*** (A) *Grant of a Motion for a New Trial.* If the court conditionally grants a motion for a new trial and an appellate court later reverses the judgment of acquittal, the trial court must proceed with the new trial unless the appellate court orders otherwise. (B) *Denial of a Motion for a New Trial.* If the court conditionally denies a motion for a new trial, an appellee may assert that the denial was erroneous. If the appellate court later reverses the judgment of acquittal, the trial court must proceed as the appellate court directs.

COMMITTEE NOTE

The language of Rule 29 has been amended as part of the general restyling of the Criminal Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only, except as noted below.

In Rule 29(a), the first sentence abolishing "directed verdicts" has been deleted because it is unnecessary. The rule continues to recognize that a judge may sua sponte enter a judgment of acquittal.

Rule 29(c)(1) addresses the issue of the timing of a motion for judgment of acquittal. The amended rule now includes language that the motion must be made within 7 days after a guilty verdict or after the judge discharges the jury, whichever occurs later. That change reflects the fact that in a capital case or in a case involving criminal forfeiture, for example, the jury may not be discharged until it has completed its sentencing duties. The court may still set another time for the defendant to make or renew the motion, if it does so within the 7-day period.

Rule 29.1. Closing Argument	29.1. Closing Argument
After the closing of evidence the prosecution shall open the argument. The defense shall be permitted to reply. The prosecution shall then be permitted to reply in rebuttal.	Closing arguments proceed in the following order: **(a)** the government argues; **(b)** the defense argues; and **(c)** the government rebuts.

COMMITTEE NOTE

The language of Rule 29.1 has been amended as part of the general restyling of the Criminal Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

Rule 30. Instructions	Rule 30. Jury Instructions
At the close of the evidence or at such earlier time during the trial as the court reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth in the requests. At the same time copies of such requests shall be furnished to all parties. The court shall inform counsel of its proposed action upon the requests prior to their arguments to the jury. The court may instruct the jury before or after the arguments are completed or at both times. No party may assign as error any portion of the charge or omission therefrom unless that party objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which that party objects and the grounds of the objection. Opportunity shall be given to make the objection out of the hearing of the jury and, on request of any party, out of the presence of the jury.	(a) **In General.** Any party may request in writing that the court instruct the jury on the law as specified in the request. The request must be made at the close of the evidence or at any earlier time during the trial that the court reasonably sets. When the request is made, the requesting party must furnish a copy to every other party. (b) **Ruling on a Request.** The court must inform the parties before closing arguments how it intends to rule on the requested instructions. (c) **Time for Giving Instructions.** The court may instruct the jury before or after the arguments are completed, or at both times. (d) **Objections to Instructions.** A party who objects to any portion of the instructions or to a failure to give a requested instruction must inform the court of the specific objection and the grounds for the objection before the jury retires to deliberate. An opportunity must be given to object out of the jury's hearing and, on request, out of the jury's presence. Failure to object in accordance with this rule precludes appellate review, except as permitted under Rule 52(b).

COMMITTEE NOTE

The language of Rule 30 has been amended as part of the general restyling of the Criminal Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only, except as noted below.

Rule 30(d) has been changed to clarify what, if anything, counsel must do to preserve a claim of error regarding an instruction or failure to instruct. The rule retains the requirement of a contemporaneous and specific objection (before the jury retires to deliberate). As the Supreme Court recognized in *Jones v. United States*, 527 U.S. 373, 388 (1999), read literally, current Rule 30 could be construed to bar any appellate review when in fact a court may conduct a limited review under a plain error standard. The topic of plain error is not addressed in Rule 30 because it is already covered in Rule 52. No change in practice is intended by the amendment.

REPORTER'S NOTES

In publishing the "style" changes to the Federal Rules of Criminal Procedure, the Committee decided to publish separately any rule that includes what it considered at least one major substantive change. The purpose for this separate publication is to highlight for the bench and the bar any proposed amendments that the Committee believes will result in significant changes in current practice. Rule 30 was one of those rules. This proposed revision of Rule 30 includes only proposed style changes. Another version of Rule 30 includes a substantive amendment that would authorize a court to require the parties to file requests for instructions before trial. That version of Rule 30 is presented in the "substantive" package.

Rule 31. Verdict	Rule 31. Jury Verdict
(a) Return. The verdict shall be unanimous. It shall be returned by the jury to the judge in open court.	**(a) Return.** The jury must return its verdict to a judge in open court. The verdict must be unanimous.
(b) Several Defendants. If there are two or more defendants, the jury at any time during its deliberations may return a verdict or verdicts with respect to a defendant or defendants as to whom it has agreed; if the jury cannot agree with respect to all, the defendant or defendants as to whom it does not agree may be tried again.	**(b) Partial Verdicts, Mistrial, and Retrial.** **(1)** ***Multiple Defendants.*** If there are multiple defendants, the jury may return a verdict at any time during its deliberations as to any defendant about whom it has agreed. **(2)** ***Multiple Counts.*** If the jury cannot agree on all counts as to any defendant, the jury may return a verdict on those counts on which it has agreed. **(3)** ***Mistrial and Retrial.*** If the jury cannot agree on a verdict on one or more counts, the court may declare a mistrial on those counts. The government may retry any defendant on any count on which the jury could not agree.
(c) Conviction of Less Offense. The defendant may be found guilty of an offense necessarily included in the offense charged or of an attempt to commit either the offense charged or an offense necessarily included therein if the attempt is an offense.	**(c) Lesser Offense or Attempt.** A defendant may be found guilty of any of the following: **(1)** an offense necessarily included in the offense charged; **(2)** an attempt to commit the offense charged; or **(3)** an attempt to commit an offense necessarily included in the offense charged, if the attempt is an offense in its own right.
(d) Poll of Jury. After a verdict is returned but before the jury is discharged, the court shall, on a party's request, or may on its own motion, poll the jurors individually. If the poll reveals a lack of unanimity, the court may direct the jury to deliberate further or may declare a mistrial and discharge the jury.	**(d) Jury Poll.** After a verdict is returned but before the jury is discharged, the court must on a party's request, or may on its own, poll the jurors individually. If the poll reveals a lack of unanimity, the court may direct the jury to deliberate further or may declare a mistrial and discharge the jury.
(e) Criminal Forfeiture. [Abrogated]	

COMMITTEE NOTE

The language of Rule 31 has been amended as part of the general restyling of the Criminal Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

Rule 31(b) has been amended to clarify that a jury may return partial verdicts, either as to multiple defendants or multiple counts, or both. *See, e.g., United States v. Cunningham*, 145 F.3d 1385, 1388-90 (D.C. Cir. 1998) (partial verdicts on multiple defendants and counts). No change in practice is intended.

VII. JUDGMENT	TITLE VII. POST-CONVICTION PROCEDURES
Rule 32. Sentence and Judgment	**Rule 32. Sentencing and Judgment**
(f) Definitions. For purposes of this rule — **(1)** "victim" means any individual against whom an offense has been committed for which a sentence is to be imposed, but the right of allocution under subdivision (c)(3)(E) may be exercised instead by — **(A)** a parent or legal guardian if the victim is below the age of eighteen years or incompetent; or **(B)** one or more family members or relatives designated by the court if the victim is deceased or incapacitated; if such person or persons are present at the sentencing hearing, regardless of whether the victim is present; and **(2)** "crime of violence or sexual abuse" means a crime that involved the use or attempted or threatened use of physical force against the person or property of another, or a crime under chapter 109A of title 18, United States Code.	**(a) Definitions.** The following definitions apply under this rule: **(1)** "Crime of violence or sexual abuse" means: (A) a crime that involves the use, attempted use, or threatened use of physical force against another's person or property; or (B) a crime under 18 U.S.C. §§ 2241-2248 or §§ 2251-2257. **(2)** "Victim" means an individual against whom the defendant committed an offense for which the court will impose sentence.
(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) Time of Sentencing.** **(1)** ***In General.*** The court must impose sentence without unnecessary delay. **(2)** ***Changing Time Limits.*** The court may, for good cause, change any time limits prescribed in this rule.

(b) Presentence Investigation and Report. **(1) When Made.** The probation officer must make a presentence investigation and submit a report to the court before 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. Notwithstanding the preceding sentence, a presentence investigation and report, or other report containing information sufficient for the court to enter an order of restitution, as the court may direct, shall be required in any case in which restitution is required to be ordered.	**(c) Presentence Investigation.** **(1)** ***Required Investigation.*** (A) *In General.* The probation officer must conduct a presentence investigation and submit a report to the court before it imposes sentence unless: (i) 18 U.S.C. § 3593(c) or another statute requires otherwise; or (ii) the court finds that the information in the record enables it to meaningfully exercise its sentencing authority under 18 U.S.C. § 3553, and the court explains its finding on the record. (B) *Restitution.* If the law requires restitution, the probation officer must conduct an investigation and submit a report that contains sufficient information for the court to order restitution.
(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.	**(2)** ***Interviewing the Defendant.*** The probation officer who interviews a defendant as part of a presentence investigation must, on request, give the defendant's attorney notice and a reasonable opportunity to attend the interview.
(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) Presentence Report.

(1) ***Applying the Sentencing Guidelines.*** The presentence report must:

(A) identify all applicable guidelines and policy statements of the Sentencing Commission;

(B) calculate the defendant's offense level and criminal history category;

(C) state the resulting sentencing range and kinds of sentences available;

(D) identify any factor relevant to:

(i) the appropriate kind of sentence, or

(ii) the appropriate sentence within the applicable sentencing range; and

(E) identify any basis for departing from the applicable sentencing range.

(2) ***Additional Information.*** The presentence report must also contain the following information:

(A) the defendant's history and characteristics, including:

(i) any prior criminal record;

(ii) the defendant's financial condition; and

(iii) any circumstances affecting the defendant's behavior that may be helpful in imposing sentence or in correctional treatment;

(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)** in appropriate cases, information sufficient for the court to enter restitution; **(G)** any report and recommendation resulting from a study ordered by the court under 18 U.S.C. § 3552(b); and **(H)** any other information required by the court.	(B) verified information, stated in a nonargumentative style, that assesses the financial, social, psychological, and medical impact on any individual against whom the offense has been committed; (C) when appropriate, the nature and extent of nonprison programs and resources available to the defendant; (D) when the law provides for restitution, information sufficient for a restitution order; (E) if the court orders a study under 18 U.S.C. § 3552(b), any resulting report and recommendation; and (F) any other information that the court requires.
(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.	(3) ***Exclusions.*** The presentence report must exclude the following: (A) any diagnoses that, if disclosed, might seriously disrupt a rehabilitation program; (B) any sources of information obtained upon a promise of confidentiality; and (C) any other information that, if disclosed, might result in physical or other harm to the defendant or others.

(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.	**(e) Disclosing the Report and Recommendation.** (1) ***Time to Disclose.*** Unless the defendant has consented in writing, the probation officer must not submit a presentence report to the court or disclose its contents to anyone until the defendant has pleaded guilty or nolo contendere, or has been found guilty. (2) ***Minimum Required Notice.*** The probation officer must give the presentence report to the defendant, the defendant's attorney, and an attorney for the government at least 35 days before sentencing unless the defendant waives this minimum period. (3) ***Sentence Recommendation.*** By local rule or by order in a case, the court may direct the probation officer not to disclose to anyone other than the court the officer's recommendation 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 attorney, 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.	**(f) Objecting to the Report.** (1) ***Time to Object.*** Within 14 days after receiving the presentence report, the parties must state in writing any objections, including objections to material information, sentencing guideline ranges, and policy statements contained in or omitted from the report. (2) ***Serving Objections.*** An objecting party must provide a copy of its objections to the opposing party and to the probation officer. (3) ***Action on Objections.*** After receiving objections, the probation officer may meet with the parties to discuss the objections. The probation officer may then investigate further 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.	**(g) Submitting the Report.** At least 7 days before sentencing, the probation officer must submit to the court and to the parties the presentence report and an addendum containing any unresolved objections, the grounds for those objections, and the probation officer's comments on them. **(h) Notice of Possible Departure from Sentencing Guidelines.** Before the court may depart from the applicable sentencing range on a ground not identified for departure either in the presentence report or in a party's prehearing submission, the court must give the parties reasonable notice that it is contemplating such a departure. The notice must specify any ground on which the court is contemplating a departure.

(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 in 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) and (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.	**(i) Sentencing.** **(1)** ***In General.*** At sentencing, the court: (A) must verify that the defendant and the defendant's attorney have read and discussed the presentence report and any addendum to the report; (B) must give to the defendant and an attorney for the government a written summary of — or summarize in camera — any information excluded from the presentence report under Rule 32(d)(3) on which the court will rely in sentencing, and give them a reasonable opportunity to comment on that information; (C) must allow the parties' attorneys to comment on the probation officer's determinations and other matters relating to an appropriate sentence; and (D) may, for good cause, allow a party to make a new objection at any time before sentence is imposed. **(2)** ***Introducing Evidence; Producing a Statement.*** The court may permit the parties to introduce evidence on the objections. If a witness testifies at sentencing, Rule 26.2(a)-(d) and (f) applies. If a party fails to comply with a Rule 26.2 order to produce a witness's statement, the court must not consider that witness's testimony.

(3) Imposition of Sentence. Before imposing sentence, the court must: **(A)** verify that the defendant and the 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.	**(3)** ***Court Determinations.*** At sentencing, the court: (A) may accept any undisputed portion of the presentence report as a finding of fact; (B) must — for any disputed portion of the presentence report or other controverted matter — rule on the dispute or determine that a ruling is unnecessary either because the matter will not affect sentencing, or because the court will not consider the matter in sentencing; and (C) must append a copy of the court's determinations under this rule to any copy of the presentence report made available to the Bureau of Prisons.
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; **(D)** afford the attorney for the Government an opportunity to speak equivalent to that of the defendant's counsel to speak to the court;	**(4)** ***Opportunity to Speak.*** (A) *By a Party.* Before imposing sentence, the court must: (i) provide the defendant's attorney an opportunity to speak on the defendant's behalf; (ii) address the defendant personally in order to permit the defendant to speak or present any information to mitigate the sentence; and (iii) provide an attorney for the government an opportunity to speak equivalent to that of the defendant's attorney.

(E) if sentence is to be imposed for a crime of violence or sexual abuse, address the victim personally if the victim is present at the sentencing hearing and determine if the victim wishes to make a statement or present any information in relation to the sentence.	(B) *By a Victim.* Before imposing sentence, the court must address any victim of a crime of violence or sexual abuse who is present at sentencing and must permit the victim to speak or submit any information about the sentence. Whether or not the victim is present, a victim's right to address the court may be exercised by the following persons if present: (i) a parent or legal guardian, if the victim is younger than 18 years or is incompetent; or (ii) one or more family members or relatives the court designates, if the victim is deceased or incapacitated.
(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 the attorney for the Government, the court may hear in camera the statements — made under subdivision (c)(3)(B), (C), (D), and (E) — by the defendant, the defendant's counsel, the victim, or the attorney for the government.	(C) *In Camera Proceedings.* Upon a party's motion and for good cause, the court may hear in camera any statement made under Rule 32(i)(4).

(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 the 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.	**(j) Defendant's Right to Appeal.** **(1)** ***Advice of a Right to Appeal.*** (A) *Appealing a Conviction.* If the defendant pleaded not guilty and was convicted, after sentencing the court must advise the defendant of the right to appeal the conviction. (B) *Appealing a Sentence.* After sentencing — regardless of the defendant's plea — the court must advise the defendant of any right to appeal the sentence. (C) *Appeal Costs.* The court must advise a defendant who is unable to pay appeal costs of the right to ask for permission to appeal in forma pauperis. **(2)** ***Clerk's Filing of Notice.*** If the defendant so requests, the clerk must immediately prepare and file a notice of appeal on the defendant's behalf.
(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.** Forfeiture procedures are governed by Rule 32.2.	**(k) Judgment.** **(1)** ***In General.*** In the judgment of conviction, the court must set forth the plea, the jury verdict or the court's findings, the adjudication, and the sentence. If the defendant is found not guilty or is otherwise entitled to be discharged, the court must so order. The judge must sign the judgment, and the clerk must enter it. **(2)** ***Criminal Forfeiture.*** Forfeiture procedures are governed by Rule 32.2.
(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 language of Rule 32 has been amended as part of the general restyling of the Criminal Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only, except as noted below.

The rule has been completely reorganized to make it easier to follow and apply. For example, the definitions in the rule have been moved to the first section and the sequencing of the sections generally follows the procedure for presentencing and sentencing procedures.

Revised Rule 32(a) contains definitions that currently appear in Rule 32(f). One substantive change was made in Rule 32(a)(2). The Committee expanded the definition of victims of crimes of violence or sexual abuse to include victims of child pornography under 18 U.S.C. §§ 2251-2257 (child pornography and related offenses). The Committee considered those victims to be similar to victims of sexual offenses under 18 U.S.C. §§ 2241-2248, who already possess that right.

Revised Rule 32(d) has been amended to more clearly set out the contents of the presentence report concerning the application of the Sentencing Guidelines.

Current Rule 32(e), which addresses the ability of a defendant to withdraw a guilty plea, has been moved to Rule 11(e).

Rule 32(h) is a new provision that reflects *Burns v. United States*, 501 U.S. 129, 138-39 (1991). In *Burns*, the Court held that, before a sentencing court could depart upward on a ground not previously identified in the presentence report as a ground for departure, Rule 32 requires the court to give the parties reasonable notice that it is contemplating such a ruling and to identify the specific ground for the departure. The Court also indicated that because the procedural entitlements in Rule 32 apply equally to both parties, it was equally appropriate to frame the issue as whether notice is required before the sentencing court departs either upward or downward. *Id.* at 135, n.4.

Revised Rule 32(i)(3) addresses changes to current Rule 32(c)(1). Under the current rule, the court is required to "rule on any unresolved objections to the presentence report." The rule does not specify, however, whether that provision should be read literally to mean every objection that might have been made to the report or only on those objections that might in some way actually affect the sentence. The Committee believed that a broad reading of the current rule might place an unreasonable burden on the court without providing any real benefit to the sentencing process. Revised Rule 32(i)(3) narrows the requirement for court findings to those instances when the objection addresses a "controverted matter." If the objection satisfies that criterion, the court must either make a finding on the objection or decide that a finding is not required because the matter will not affect sentencing or that the matter will not be considered at all in sentencing.

Revised Rule 32(i)(4)(B) provides for the right of certain victims to address the court during sentencing. As noted, *supra*, revised Rule 32(a)(2) expands the definition of victims to include victims of crimes under 18 U.S.C. §§ 2251-57 (child pornography and related offenses). Thus, they too will now be permitted to address the court.

Revised Rule 32(i)(1)(B) is intended to clarify language that currently exists in Rule 32(h)(3), that the court must inform both parties that the court will rely on information not in the presentence report and provide them with an opportunity to comment on the information.

Rule 32(i)(4)(C) includes a change concerning who may request an in camera proceeding. Under current Rule 32(c)(4), the parties must file a joint motion for an in camera proceeding to hear the statements by defense counsel, the defendant, the attorney for the government, or any victim. Under the revised rule, any party may move (for good cause) that the court hear in camera any statement—by a party or a victim—made under revised Rule 32(i)(4).

Finally, the Committee considered, but did not adopt, an amendment that would have required the court to rule on any "unresolved objection to a material matter" in the presentence report, whether or not the court will consider it in imposing an appropriate sentence. The amendment was considered because an unresolved objection that has no impact on determining a sentence under the Sentencing Guidelines may affect other important post-sentencing decisions. For

example, the Bureau of Prisons consults the presentence report in deciding where a defendant will actually serve his or her sentence of confinement. *See A Judicial Guide to the Federal Bureau of Prisons*, 11 (United States Department of Justice, Federal Bureau of Prisons 1995) (noting that the "Bureau relies primarily on the Presentence Investigator Report ..."). And as some courts have recognized, Rule 32 was intended to guard against adverse consequences of a statement in the presentence report that the court may have been found to be false. *United States v. Velasquez*, 748 F.2d 972, 974 (8th Cir. 1984) (rule designed to protect against evil that false allegation that defendant was notorious alien smuggler would affect defendant for years to come); *see also United States v. Brown*, 715 F.2d 387, 389 n.2 (5th Cir. 1983) (sentencing report affects "place of incarceration, chances for parole, and relationships with social service and correctional agencies after release from prison").

To avoid unduly burdening the court, the Committee elected not to require resolution of objections that go only to service of sentence. However, because of the presentence report's critical role in post-sentence administration, counsel may wish to point out to the court those matters that are typically considered by the Bureau of Prisons in designating the place of confinement. For example, the Bureau considers:

> the type of offense, the length of sentence, the defendant's age, the defendant's release residence, the need for medical or other special treatment, and any placement recommendation made by the court.

A Judicial Guide to the Federal Bureau of Prisons, supra, at 11. Further, a question as to whether or not the defendant has a "drug problem" could have an impact on whether the defendant would be eligible for prison drug abuse treatment programs. 18 U.S.C. § 3621(e) (Substance abuse treatment).

If counsel objects to material in the presentence report that could affect the defendant's service of sentence, the court may resolve the objection, but is not required to do so.

REPORTER'S NOTES

In publishing the "style" changes to the Federal Rules of Criminal Procedure, the Committee decided to publish separately any rule that includes what it considered at least one major substantive change. The purpose for this separate publication is to highlight for the bench and the bar any proposed amendments that the Committee believes will result in significant changes in current practice. Rule 32 is one of those rules. In revising Rule 32, the Committee decided to also propose a substantive change that would limit the occasions that the sentencing judge would have to rule on unresolved objections to the presentence report. That version of Rule 32 is being published simultaneously in a separate pamphlet.

Rule 32.1. Revocation or Modification of Probation or Supervised Release.	Rule 32.1. Revoking or Modifying Probation or Supervised Release
(a) Revocation of Probation or Supervised Release. **(1) Preliminary Hearing.** Whenever a person is held in custody on the ground that the person has violated a condition of probation or supervised release, the person shall be afforded a prompt hearing before any judge, or a United States magistrate who has been given the authority pursuant to 28 U.S.C. § 636 to conduct such hearings, in order to determine whether there is probable cause to hold the person for a revocation hearing. The person shall be given **(A)** notice of the preliminary hearing and its purpose and of the alleged violation; **(B)** an opportunity to appear at the hearing and present evidence in the person's own behalf; **(C)** upon request, the opportunity to question witnesses against the person unless, for good cause, the federal magistrate decides that justice does not require the appearance of the witness; and **(D)** notice of the person's right to be represented by counsel. The proceedings shall be recorded stenographically or by an electronic recording device. If probable cause is found to exist, the person shall be held for a revocation hearing. The person may be released pursuant to Rule 46(c) pending the revocation hearing. If probable cause is not found to exist, the proceeding shall be dismissed.	**(a) Initial Appearance.** (1) ***Person In Custody.*** A person held in custody for violating probation or supervised release must be taken without unnecessary delay before a magistrate judge. (A) If the person is held in custody in the district where an alleged violation occurred, the initial appearance must be in that district. (B) If the person is held in custody in a district other than where an alleged violation occurred, the initial appearance must be in that district, or in an adjacent district if the appearance can occur more promptly there. (2) ***Upon a Summons.*** When a person appears in response to a summons for violating probation or supervised release, a magistrate judge must proceed under this rule. (3) ***Advice.*** The judge must inform the person of the following: (A) the alleged violation of probation or supervised release; (B) the person's right to retain counsel or to request that counsel be appointed if the person cannot obtain counsel; and (C) the person's right, if held in custody, to a preliminary hearing under Rule 32.1(b)(1).
	(4) ***Appearance in the District With Jurisdiction.*** If the person is arrested or appears in the district that has jurisdiction to conduct a revocation hearing — either originally or by transfer of jurisdiction — the court must proceed under Rule 32.1(b)–(e).

	(5) ***Appearance in a District Lacking Jurisdiction.*** If the person is arrested or appears in a district that does not have jurisdiction to conduct a revocation hearing, the magistrate judge must: (A) if the alleged violation occurred in the district of arrest, conduct a preliminary hearing under Rule 32.1(b) and either: (i) transfer the person to the district that has jurisdiction, if the judge finds probable cause to believe that a violation occurred; or (ii) dismiss the proceedings and so notify the court that has jurisdiction, if the judge finds no probable cause to believe that a violation occurred; or (B) if the alleged violation did not occur in the district of arrest, transfer the person to the district that has jurisdiction if: (i) the government produces certified copies of the judgment, warrant, and warrant application; and (ii) the judge finds that the person is the same person named in the warrant.
	(6) ***Release or Detention.*** The magistrate judge may release or detain the person under 18 U.S.C. § 3143(a) pending further proceedings. The burden of establishing that the person will not flee or pose a danger to any other person or to the community rests with the person.
	(b) Revocation. (1) ***Preliminary Hearing.*** (A) *In General.* If a person is in custody for violating a condition of probation or supervised release, a magistrate judge must promptly conduct a hearing to determine whether there is probable cause to believe that a violation occurred. The person may waive the hearing.

	(B) *Requirements.* The hearing must be recorded by a court reporter or by a suitable recording device. The judge must give the person: (i) notice of the hearing and its purpose, the alleged violation, and the person's right to retain counsel or to request that counsel be appointed if the person cannot obtain counsel; (ii) an opportunity to appear at the hearing and present evidence; and (iii) upon request, an opportunity to question any adverse witness, unless the judge determines that the interest of justice does not require the witness to appear.
	(C) *Referral.* If the judge finds probable cause, the judge must conduct a revocation hearing. If the judge does not find probable cause, the judge must dismiss the proceeding.
(2) **Revocation Hearing.** The revocation hearing, unless waived by the person, shall be held within a reasonable time in the district of jurisdiction. The person shall be given: **(A)** written notice of the alleged violation; **(B)** disclosure of the evidence against the person; **(C)** an opportunity to appear and to present evidence in the person's own behalf; **(D)** the opportunity to question adverse witnesses; and **(E)** notice of the person's right to be represented by counsel.	(2) ***Revocation Hearing.*** Unless waived by the person, the court must hold the revocation hearing within a reasonable time in the district having jurisdiction. The person is entitled to: (A) written notice of the alleged violation; (B) disclosure of the evidence against the person; (C) an opportunity to appear, present evidence, and question any adverse witness unless the court determines that the interest of justice does not require the witness to appear; and (D) notice of the person's right to retain counsel or to request that counsel be appointed if the person cannot obtain counsel.

(b) Modification of Probation or Supervised Release. A hearing and assistance of counsel are required before the terms or conditions of probation or supervised release can be modified, unless the relief to be granted to the person on probation or supervised release upon the person's request or on the court's own motion is favorable to the person, and the attorney for the government, after having been given notice of the proposed relief and a reasonable opportunity to object, has not objected. An extension of the term of probation or supervised release is not favorable to the person for the purposes of this rule.	**(c) Modification.** **(1)** ***In General.*** Before modifying the conditions of probation or supervised release, the court must hold a hearing, at which the person has the right to counsel. **(2)** ***Exceptions.*** A hearing is not required if: (A) the person waives the hearing; or (B) the relief sought is favorable to the person and does not extend the term of probation or of supervised release; and (C) an attorney for the government has received notice of the relief sought, has had a reasonable opportunity to object, and has not done so.
	(d) Disposition of the Case. The court's disposition of the case is governed by 18 U.S.C. § 3563 and § 3565 (probation) and § 3583 (supervised release).
(c) Production of Statements. **(1) In General.** Rule 26.2(a)-(d) and (f) applies at any hearing under this rule. **(2) Sanctions for Failure to Produce Statement.** If a party elects not to comply with an order under Rule 26.2(a) to deliver a statement to the moving party, the court may not consider the testimony of a witness whose statement is withheld.	**(e) Producing a Statement.** Rule 26.2(a)–(d) and (f) applies at a hearing under this rule. If a party fails to comply with a Rule 26.2 order to produce a witness's statement, the court must not consider that witness's testimony.

COMMITTEE NOTE

The language of Rule 32.1 has been amended as part of the general restyling of the Criminal Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only, except as noted below.

Rule 32.1 has been completely revised and expanded. The Committee believed that it was important to spell out more completely in this rule the various procedural steps that must be met when dealing with a revocation or modification of probation or supervised release. To that end, some language formerly located in Rule 40 has been moved to revised Rule 32.1. Throughout the rule, the terms "magistrate judge," and "court" (*see* revised Rule 1(b)(Definitions)) are used to reflect that in revocation cases, initial proceedings in both felony and misdemeanor cases will normally be conducted before a magistrate judge, although a district judge may also conduct them. But a district judge must make the revocation decision if the offense of conviction was a felony. *See* 18 U.S.C. § 3401(i) (recognizing that district judge may designate a magistrate judge to conduct a hearing and submit proposed findings of fact and recommendations).

Revised Rule 32.1(a)(1)-(4) is new material. Presently, there is no provision in the rules for conducting initial appearances for defendants charged with violating probation or supervised release—although some districts apply such procedures. Although the rule labels these proceedings as initial appearances, the Committee believed that it was best to separate those proceedings from Rule 5 proceedings, because the procedures differ for persons who are charged with violating conditions of probation or supervised release.

The Committee is also aware that, in some districts, it is not the practice to have an initial appearance for a revocation of probation or supervised release proceeding. Although Rule 32.1(a) will require such an appearance, nothing in the rule prohibits a court from combining the initial appearance proceeding, if convened consistent with the "without unnecessary delay" time requirement of the rule, with the preliminary hearing under Rule 32.1(b).

Revised Rule 32.1(a)(5) is derived from current Rule 40(d).

Revised Rule 32.1(a)(6), which is derived from current Rule 46(c), provides that the defendant bears the burden of showing that he or she will not flee or pose a danger pending a hearing on the revocation of probation or supervised release. The Committee believes that the new language is not a substantive change because it makes no change in practice.

Rule 32.1(b)(1)(B)(iii) and Rule 32.1(b)(2)(C) address the ability of a releasee to question adverse witnesses at the preliminary and revocation hearings. Those provisions recognize that the court should apply a balancing test at the hearing itself when considering the releasee's asserted right to cross-examine adverse witnesses. The court is to balance the person's interest in the constitutionally guaranteed right to confrontation against the government's good cause for denying it. *See, e.g.*, *Morrissey v. Brewer*, 408 U.S. 471, 489 (1972); *United States v. Comito*, 177 F.3d 1166 (9th Cir. 1999); *United States v. Walker*, 117 F.3d 417 (9th Cir. 1997); *United States v. Zentgraf*, 20 F.3d 906 (8th Cir. 1994).

Rule 32.1(c)(2)(A) permits the person to waive a hearing to modify the conditions of probation or supervised release. Although that language is new to the rule, the Committee believes that it reflects current practice.

The remainder of revised Rule 32.1 is derived from the current Rule 32.1.

Rule 32.2. Criminal Forfeiture	Rule 32.2. Criminal Forfeiture
(a) Notice to the Defendant. A court shall not enter a judgment of forfeiture in a criminal proceeding unless the indictment or information contains notice to the defendant that the government will seek the forfeiture of property as part of any sentence in accordance with the applicable statute.	**(a) Notice to the Defendant.** A court must not enter a judgment of forfeiture in a criminal proceeding unless the indictment or information contains notice to the defendant that the government will seek the forfeiture of property as part of any sentence in accordance with the applicable statute.
(b) Entry of Preliminary Order of Forfeiture; Post Verdict Hearing. (1) As soon as practicable after entering a guilty verdict or accepting a plea of guilty or *nolo contendere* on any count in an indictment or information with regard to which criminal forfeiture is sought, the court shall determine what property is subject to forfeiture under the applicable statute. If forfeiture of specific property is sought, the court shall determine whether the government has established the requisite nexus between the property and the offense. If the government seeks a personal money judgment against the defendant, the court shall determine the amount of money that the defendant will be ordered to pay. The court's determination may be based on evidence already in the record, including any written plea agreement or, if the forfeiture is contested, on evidence or information presented by the parties at a hearing after the verdict or finding of guilt. (2) If the court finds that property is subject to forfeiture, it shall promptly enter a preliminary order of forfeiture setting forth the amount of any money judgment or directing the forfeiture of specific property without regard to any third party's interest in all or part of it. Determining whether a third party has such an interest shall be deferred until any third party files a claim in an ancillary proceeding under Rule 32.2(c).	**(b) Entering a Preliminary Order of Forfeiture.** (1) ***In General.*** As soon as practicable after a verdict or finding of guilty, or after a plea of guilty or nolo contendere is accepted, on any count in an indictment or information regarding which criminal forfeiture is sought, the court must determine what property is subject to forfeiture under the applicable statute. If the government seeks forfeiture of specific property, the court must determine whether the government has established the requisite nexus between the property and the offense. If the government seeks a personal money judgment, the court must determine the amount of money that the defendant will be ordered to pay. The court's determination may be based on evidence already in the record, including any written plea agreement or, if the forfeiture is contested, on evidence or information presented by the parties at a hearing after the verdict or finding of guilt.
(3) The entry of a preliminary order of forfeiture authorizes the Attorney General (or a designee) to seize the specific property subject to forfeiture; to conduct any discovery the court considers proper in identifying, locating, or disposing of the property; and to commence proceedings that comply with any statutes governing third-party rights. At sentencing—or at any time before sentencing if the defendant consents—the order of forfeiture becomes final as to the defendant and shall be made a part of the sentence and included in the judgment. The court may include in the order of forfeiture conditions reasonably necessary to preserve the property's value pending any appeal.	(2) ***Preliminary Order.*** If the court finds that property is subject to forfeiture, it must promptly enter a preliminary order of forfeiture setting forth the amount of any money judgment or directing the forfeiture of specific property without regard to any third party's interest in all or part of it. Determining whether a third party has such an interest must be deferred until any third party files a claim in an ancillary proceeding under Rule 32.2(c).

	(3) ***Seizing Property.*** The entry of a preliminary order of forfeiture authorizes the Attorney General (or a designee) to seize the specific property subject to forfeiture; to conduct any discovery the court considers proper in identifying, locating, or disposing of the property; and to commence proceedings that comply with any statutes governing third-party rights. At sentencing — or at any time before sentencing if the defendant consents — the order of forfeiture becomes final as to the defendant and must be made a part of the sentence and be included in the judgment. The court may include in the order of forfeiture conditions reasonably necessary to preserve the property's value pending any appeal.
(4) Upon a party's request in a case in which a jury returns a verdict of guilty, the jury shall determine whether the government has established the requisite nexus between the property and the offense committed by the defendant.	(4) ***Jury Determination.*** Upon a party's request in a case in which a jury returns a verdict of guilty, the jury must determine whether the government has established the requisite nexus between the property and the offense committed by the defendant.

(c) Ancillary Proceeding; Final Order of Forfeiture. (1) If, as prescribed by statute, a third party files a petition asserting an interest in the property to be forfeited, the court shall conduct an ancillary proceeding but no ancillary proceeding is required to the extent that the forfeiture consists of a money judgment. (A) In the ancillary proceeding, the court may, on motion, dismiss the petition for lack of standing, for failure to state a claim, or for any other lawful reason. For purposes of the motion, the facts set forth in the petition are assumed to be true. (B) After disposing of any motion filed under Rule 32.2(c)(1)(A) and before conducting a hearing on the petition, the court may permit the parties to conduct discovery in accordance with the Federal Rules of Civil Procedure if the court determines that discovery is necessary or desirable to resolve factual issues. When discovery ends, a party may move for summary judgment under Rule 56 of the Federal Rules of Civil Procedure.	**(c) Ancillary Proceeding; Entering a Final Order of Forfeiture.** (1) ***In General.*** If, as prescribed by statute, a third party files a petition asserting an interest in the property to be forfeited, the court must conduct an ancillary proceeding, but no ancillary proceeding is required to the extent that the forfeiture consists of a money judgment. (A) In the ancillary proceeding, the court may, on motion, dismiss the petition for lack of standing, for failure to state a claim, or for any other lawful reason. For purposes of the motion, the facts set forth in the petition are assumed to be true. (B) After disposing of any motion filed under Rule 32.2(c)(1)(A) and before conducting a hearing on the petition, the court may permit the parties to conduct discovery in accordance with the Federal Rules of Civil Procedure if the court determines that discovery is necessary or desirable to resolve factual issues. When discovery ends, a party may move for summary judgment under Federal Rule of Civil Procedure 56.

(2) When the ancillary proceeding ends, the court shall enter a final order of forfeiture by amending the preliminary order as necessary to account for any third-party rights. If no third party files a timely claim, the preliminary order becomes the final order of forfeiture, if the court finds that the defendant (or any combination of defendants convicted in the case) had an interest in the property that is forfeitable under the applicable statute. The defendant may not object to the entry of the final order of forfeiture on the ground that the property belongs, in whole or in part, to a codefendant or third party, nor may a third party object to the final order on the ground that the third party had an interest in the property. (3) If multiple third-party petitions are filed in the same case, an order dismissing or granting one petition is not appealable until rulings are made on all petitions, unless the court determines that there is no just reason for delay. (4) An ancillary proceeding is not part of sentencing.	(2) ***Entering a Final Order.*** When the ancillary proceeding ends, the court must enter a final order of forfeiture by amending the preliminary order as necessary to account for any third-party rights. If no third party files a timely petition, the preliminary order becomes the final order of forfeiture if the court finds that the defendant (or any combination of defendants convicted in the case) had an interest in the property that is forfeitable under the applicable statute. The defendant may not object to the entry of the final order on the ground that the property belongs, in whole or in part, to a codefendant or third party; nor may a third party object to the final order on the ground that the third party had an interest in the property. (3) ***Multiple Petitions.*** If multiple third-party petitions are filed in the same case, an order dismissing or granting one petition is not appealable until rulings are made on all the petitions, unless the court determines that there is no just reason for delay. (4) ***Ancillary Proceeding Not Part of Sentencing.*** An ancillary proceeding is not part of sentencing.
(d) Stay Pending Appeal. If a defendant appeals from a conviction or order of forfeiture, the court may stay the order of forfeiture on terms appropriate to ensure that the property remains available pending appellate review. A stay does not delay the ancillary proceeding or the determination of a third party's rights or interests. If the court rules in favor of any third party while an appeal is pending, the court may amend the order of forfeiture but shall not transfer any property interest to a third party until the decision on appeal becomes final, unless the defendant consents in writing or on the record.	**(d) Stay Pending Appeal.** If a defendant appeals from a conviction or an order of forfeiture, the court may stay the order of forfeiture on terms appropriate to ensure that the property remains available pending appellate review. A stay does not delay the ancillary proceeding or the determination of a third party's rights or interests. If the court rules in favor of any third party while an appeal is pending, the court may amend the order of forfeiture but must not transfer any property interest to a third party until the decision on appeal becomes final, unless the defendant consents in writing or on the record.

(e) Subsequently Located Property; Substitute Property. (1) On the government's motion, the court may at any time enter an order of forfeiture or amend an existing order of forfeiture to include property that: (A) is subject to forfeiture under an existing order of forfeiture but was located and identified after that order was entered; or (B) is substitute property that qualifies for forfeiture under an applicable statute.	**(e) Subsequently Located Property; Substitute Property.** **(1)** ***In General.*** On the government's motion, the court may at any time enter an order of forfeiture or amend an existing order of forfeiture to include property that: (A) is subject to forfeiture under an existing order of forfeiture but was located and identified after that order was entered; or (B) is substitute property that qualifies for forfeiture under an applicable statute.
(2) If the government shows that the property is subject to forfeiture under Rule 32.2(e)(1), the court shall: (A) enter an order forfeiting that property, or amend an existing preliminary or final order to include it; and (B) if a third party files a petition claiming an interest in the property, conduct an ancillary proceeding under Rule 32.2(c). (3) There is no right to trial by jury under Rule 32.2(e).	**(2)** ***Procedure.*** If the government shows that the property is subject to forfeiture under Rule 32.2(e)(1), the court must: (A) enter an order forfeiting that property, or amend an existing preliminary or final order to include it; and (B) if a third party files a petition claiming an interest in the property, conduct an ancillary proceeding under Rule 32.2(c). **(3)** ***Jury Trial Limited.*** There is no right to a jury trial under Rule 32.2(e).

COMMITTEE NOTE

The language of Rule 32.2 has been amended as part of the general restyling of the Criminal Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

Rule 33. New Trial	Rule 33. New Trial
On a defendant's motion, the court may grant a new trial to that defendant if the interests of justice so require. If trial was by the court without a jury, the court may— on defendant's motion for new trial— vacate the judgment, take additional testimony, and direct the entry of a new judgment. A motion for a new trial based on newly discovered evidence may be made only within three years after the verdict or finding of guilty. But if an appeal is pending, the court may grant the motion only on remand of the case. A motion for a new trial based on any other grounds may be made only within 7 days after the verdict or finding of guilty or within such further time as the court may fix during the 7-day period.	**(a) Defendant's Motion.** Upon the defendant's motion, the court may vacate any judgment and grant a new trial if the interest of justice so requires. If the case was tried without a jury, the court may take additional testimony and enter a new judgment. **(b) Time to File.** **(1)** ***Newly Discovered Evidence.*** Any motion for a new trial grounded on newly discovered evidence must be filed within 3 years after the verdict or finding of guilty. If an appeal is pending, the court may not grant a motion for a new trial until the appellate court remands the case. **(2)** ***Other Grounds.*** Any motion for a new trial grounded on any reason other than newly discovered evidence must be filed within 7 days after the verdict or finding of guilty, or within such further time as the court sets during the 7-day period.

COMMITTEE NOTE

The language of Rule 33 has been amended as part of the general restyling of the Criminal Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

Rule 34. Arrest of Judgment	Rule 34. Arresting Judgment
The court on motion of a defendant shall arrest judgment if the indictment or information does not charge an offense or if the court was without jurisdiction of the offense charged. The motion in arrest of judgment shall be made within 7 days after verdict or finding of guilty, or after plea of guilty or *nolo contendere,* or within such further time as the court may fix during the 7-day period.	**(a) In General.** Upon the defendant's motion or on its own, the court must arrest judgment if: **(1)** the indictment or information does not charge an offense; or **(2)** the court does not have jurisdiction of the charged offense. **(b) Time to File.** The defendant must move to arrest judgment within 7 days after the court accepts a verdict or finding of guilty, or after a plea of guilty or nolo contendere, or within such further time as the court sets during the 7-day period.

COMMITTEE NOTE

The language of Rule 34 has been amended as part of the general restyling of the Criminal Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

Rule 35. Correction or Reduction of Sentence	Rule 35. Correcting or Reducing a Sentence
(a) Correction of Sentence on Remand. The court shall correct a sentence that is determined on appeal under 18 U.S.C. 3742 to have been imposed in violation of law, to have been imposed as a result of an incorrect application of the sentencing guidelines, or to be unreasonable, upon remand of the case to the court– **(1)** for imposition of a sentence in accord with the findings of the court of appeals; or **(2)** for further sentencing proceedings if, after such proceedings, the court determines that the original sentence was incorrect.	**(a) Correcting Clear Error.** Within 7 days after sentencing, the court may correct a sentence that resulted from arithmetical, technical, or other clear error.
(b) Reduction of Sentence for Substantial Assistance. If the Government so moves within one year after the sentence is imposed, the court may reduce a sentence to reflect a defendant's subsequent, substantial assistance in investigating or prosecuting another person in accordance with the guidelines and policy statements issued by the Sentencing Commission under 28 U.S.C. § 994. The court may consider a government motion to reduce a sentence made one year or more after the sentence is imposed if the defendant's substantial assistance involves information or evidence not known by the defendant until one year or more after sentence is imposed. In evaluating whether substantial assistance has been rendered, the court may consider the defendant's pre-sentence assistance. In applying this subdivision, the court may reduce the sentence to a level below that established by statute as a minimum sentence.	**(b) Reducing a Sentence for Substantial Assistance.** **(1)** ***In General.*** Upon the government's motion made within one year after sentencing, the court may reduce a sentence if: (A) the defendant, after sentencing, provided substantial assistance in investigating or prosecuting another person; and (B) reducing the sentence accords with the Sentencing Commission's guidelines and policy statements. **(2)** ***Later Motion.*** The court may consider a government motion to reduce a sentence made more than one year after sentencing if the defendant's substantial assistance involved information not known to the defendant until more than one year after sentencing. **(3)** ***Evaluating Substantial Assistance.*** In evaluating whether the defendant has provided substantial assistance, the court may consider the defendant's presentence assistance. **(4)** ***Below Statutory Minimum.*** When acting under Rule 35(b), the court may reduce the sentence to a level below the minimum sentence established by statute.
(c) Correction of Sentence by Sentencing Court. The court, acting within 7 days after the imposition of sentence, may correct a sentence that was imposed as the result of arithmetical, technical, or other clear error.	

COMMITTEE NOTE

The language of Rule 35 has been amended as part of the general restyling of the Criminal Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only, except as noted below.

The Committee deleted current Rule 35(a) (Correction on Remand). Congress added that rule, which currently addresses the issue of the district court's actions following a remand on the issue of sentencing, in the Sentencing Reform Act of 1984, Pub. L. No. 98-473. The rule cross-references 18 U.S.C. § 3742, also enacted in 1984, which provides detailed guidance on the various options available to the appellate courts in addressing sentencing errors. In reviewing both provisions, the Committee concluded that Rule 35(a) was no longer needed. First, the statute clearly covers the subject matter, and second, it is not necessary to address an issue that would be very clear to a district court following a decision by a court of appeals.

Former Rule 35(c), which addressed the authority of the court to correct certain errors in the sentence, is now located in Rule 35(a). In the current version of Rule 35(c), the sentencing court is authorized to correct errors in the sentence if the correction is made within seven days of the imposition of the sentence. The revised rule uses the term "sentencing." No change in practice is intended by using that term.

REPORTER'S NOTES

In publishing the "style" changes to the Federal Rules of Criminal Procedure, the Committee decided to publish separately any rule that includes what it considered at least one major substantive change. The purpose for this separate publication is to highlight for the bench and the bar any proposed amendments that the Committee believes will result in significant changes in current practice. Rule 35 was one of those rules. Another version of Rule 35, which includes a substantive change, is presented in the "substantive" package.

Rule 36. Clerical Mistakes.	Rule 36. Clerical Error
Clerical mistakes in judgments, orders, or other parts of the record and errors in the record arising from oversight or omission may be corrected by the court at any time and after such notice, if any, as the court orders.	After giving any notice it considers appropriate, the court may at any time correct a clerical error in a judgment, order, or other part of the record, or correct an error in the record arising from oversight or omission.

COMMITTEE NOTE

The language of Rule 36 has been amended as part of the general restyling of the Criminal Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

VIII. APPEAL	
Rule 37. Taking Appeal. [Abrogated 1968.]	**Rule 37. [Reserved]**

Rule 38. Stay of Execution	**Rule 38. Staying a Sentence or a Disability**
(a) Stay of Execution. A sentence of death shall be stayed if an appeal is taken from the conviction or sentence.	**(a) Death Sentence.** The court must stay a death sentence if the defendant appeals the conviction or sentence.
(b) Imprisonment. A sentence of imprisonment shall be stayed if an appeal is taken from the conviction or sentence and the defendant is released pending disposition of appeal pursuant to Rule 9(b) of the Federal Rules of Appellate Procedure. If not stayed, the court may recommend to the Attorney General that the defendant be retained at, or transferred to, a place of confinement near the place of trial or the place where an appeal is to be heard, for a period reasonably necessary to permit the defendant to assist in the preparation of an appeal to the court of appeals.	**(b) Imprisonment.** **(1)** ***Stay Granted.*** If the defendant is released pending appeal, the court must stay a sentence of imprisonment. **(2)** ***Stay Denied; Place of Confinement.*** If the defendant is not released pending appeal, the court may recommend to the Attorney General that the defendant be confined near the place of the trial or appeal for a period reasonably necessary to permit the defendant to assist in preparing the appeal.
(c) Fine. A sentence to pay a fine or a fine and costs, if an appeal is taken, may be stayed by the district court or by the court of appeals upon such terms as the court deems proper. The court may require the defendant pending appeal to deposit the whole or any part of the fine and costs in the registry of the district court, or to give bond for the payment thereof, or to submit to an examination of assets, and it may make any appropriate order to restrain the defendant from dissipating such defendant's assets.	**(c) Fine.** If the defendant appeals, the district court, or the court of appeals under Federal Rule of Appellate Procedure 8, may stay a sentence to pay a fine or a fine and costs. The court may stay the sentence on any terms considered appropriate and may require the defendant to: **(1)** deposit all or part of the fine and costs into the district court's registry pending appeal; **(2)** post a bond to pay the fine and costs; or **(3)** submit to an examination concerning the defendant's assets and, if appropriate, order the defendant to refrain from dissipating assets.
(d) Probation. A sentence of probation may be stayed if an appeal from the conviction or sentence is taken. If the sentence is stayed, the court shall fix the terms of the stay.	**(d) Probation.** If the defendant appeals, the court may stay a sentence of probation. The court must set the terms of any stay.

(e) Notice to Victims and Restitution. A sanction imposed as part of the sentence pursuant to 18 U.S.C. 3555 or 3556 may, if an appeal of the conviction or sentence is taken, be stayed by the district court or by the court of appeals upon such terms as the court finds appropriate. The court may issue such orders as may be reasonably necessary to ensure compliance with the sanction upon disposition of the appeal, including the entering of a restraining order or an injunction or requiring a deposit in whole or in part of the monetary amount involved into the registry of the district court or execution of a performance bond.	**(e) Restitution and Notice to Victims.** **(1)** ***In General.*** If the defendant appeals, the district court, or the court of appeals under Federal Rule of Appellate Procedure 8, may stay — on any terms considered appropriate — any sentence providing for restitution under 18 U.S.C. § 3556 or notice under 18 U.S.C. § 3555. **(2)** ***Ensuring Compliance.*** The court may issue any order reasonably necessary to ensure compliance with a restitution order or a notice order after disposition of an appeal, including: (A) a restraining order; (B) an injunction; (C) an order requiring the defendant to deposit all or part of any monetary restitution into the district court's registry; or (D) an order requiring the defendant to post a bond.
(f) Disabilities. A civil or employment disability arising under a Federal statute by reason of the defendant's conviction or sentence may, if an appeal is taken, be stayed by the district court or by the court of appeals upon such terms as the court finds appropriate. The court may enter a restraining order or an injunction, or take any other action that may be reasonably necessary to protect the interest represented by the disability pending disposition of the appeal.	**(f) Forfeiture.** A stay of a forfeiture order is governed by Rule 32.2(d). **(g) Disability.** If the defendant's conviction or sentence creates a civil or employment disability under federal law, the district court, or the court of appeals under Federal Rule of Appellate Procedure 8, may stay the disability pending appeal on any terms considered appropriate. The court may issue any order reasonably necessary to protect the interest represented by the disability pending appeal, including a restraining order or an injunction.

COMMITTEE NOTE

The language of Rule 38 has been amended as part of the general restyling of the Criminal Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

The reference to Appellate Rule 9(b) is deleted. The Committee believed that the reference was unnecessary and its deletion was not intended to be substantive in nature.

Rule 39. Supervision of Appeal [Abrogated 1968]	Rule 39. [Reserved]

IX. SUPPLEMENTARY AND SPECIAL PROCEEDINGS	TITLE VIII. SUPPLEMENTARY AND SPECIAL PROCEEDINGS
Rule 40. Commitment to Another District	**Rule 40. Arrest for Failing to Appear in Another District**
(a) Appearance Before Federal Magistrate Judge. If a person is arrested in a district other than that in which the offense is alleged to have been committed, that person shall be taken without unnecessary delay before the nearest available federal magistrate judge, in accordance with the provisions of Rule 5. Preliminary proceedings concerning the defendant shall be conducted in accordance with Rules 5 and 5.1, except that if no preliminary examination is held because an indictment has been returned or an information filed or because the defendant elects to have the preliminary hearing conducted in the district in which the prosecution is pending, the person shall be held to answer upon a finding that such person is the person named in the indictment, information, or warrant. If held to answer, the defendant shall be held to answer in the district court in which the prosecution is pending — provided that a warrant is issued in that district if the arrest was made without a warrant — upon production of the warrant or a certified copy thereof. The warrant or certified copy may be produced by facsimile transmission.	**(a) In General.** If a person is arrested under a warrant issued in another district for failing to appear — as required by the terms of that person's release under 18 U.S.C. §§ 3141-3156 or by a subpoena — the person must be taken without unnecessary delay before a magistrate judge in the district of the arrest. **(b) Proceedings.** The judge must proceed under Rule 5(c)(3) as applicable. **(c) Release or Detention Order.** The judge may modify any previous release or detention order issued in another district, but must state in writing the reasons for doing so.
(b) Statement by Federal Magistrate Judge. In addition to the statements required by Rule 5, the federal magistrate judge shall inform the defendant of the provisions of Rule 20.	
(c) Papers. If a defendant is held or discharged, the papers in the proceeding and any bail taken shall be transmitted to the clerk of the district court in which the prosecution is pending.	

(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 must 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 the 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 judge is the person named in the warrant.	
(e) Arrest for Failure to Appear. If a person is arrested on a warrant in a district other than that in which the warrant was issued, and the warrant was issued because of the failure of the person named therein to appear as required pursuant to a subpoena or the terms of that person's release, the person arrested must be taken without unnecessary delay before the nearest available federal magistrate judge. Upon production of the warrant or a certified copy thereof and a finding that the person before the magistrate judge is the person named in the warrant, the federal magistrate judge shall hold the person to answer in the district in which the warrant was issued.	
(f) Release or Detention. If a person was previously detained or conditionally released, pursuant to chapter 207 of title 18, United States Code, in another district where a warrant, information, or indictment issued, the federal magistrate judge shall take into account the decision previously made and the reasons set forth therefor, if any, but will not be bound by that decision. If the federal magistrate judge amends the release or detention decision or alters the conditions of release, the magistrate judge shall set forth the reasons therefor in writing.	

COMMITTEE NOTE

The language of Rule 40 has been amended as part of the general restyling of the Criminal Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

Rule 40 has been completely revised. The Committee believed that it would be much clearer and more helpful to locate portions of Rule 40 in Rules 5 (initial appearances), 5.1 (preliminary hearings), and 32.1 (revocation or modification of probation or supervised release). Accordingly, current Rule 40(a) has been relocated in Rules 5 and 5.1. Current Rule 40(b) has been relocated in Rule 5(c)(2)(B) and current Rule 40(c) has been moved to Rule 5(c)(2)(F).

Current Rule 40(d) has been relocated in Rule 32.1(a)(5). The first sentence of current Rule 40(e) is now located in revised Rule 40(a). The second sentence of current Rule 40(e) is now in revised Rule 40(b) and current Rule 40(f) is revised Rule 40(c).

Rule 41. Search and Seizure	Rule 41. Search and Seizure
(a) Authority to Issue Warrant. Upon the request of a federal law enforcement officer or an attorney for the government, a search warrant authorized by this rule may be issued (1) by a federal magistrate judge, or a state court of record within the federal district, for a search of property or for a person within the district and (2) by a federal magistrate judge for a search of property or for a person either within or outside the district if the property or person is within the district when the warrant is sought but might move outside the district before the warrant is executed.	**(a) Scope and Definitions.** **(1)** ***Scope.*** This rule does not modify any statute regulating search or seizure, or the issuance and execution of a search warrant in special circumstances.
	(2) ***Definitions.*** The following definitions apply under this rule: (A) "Property" includes documents, books, papers, any other tangible objects, and information. (B) "Daytime" means the hours between 6:00 a.m. and 10:00 p.m. according to local time. (C) "Federal law enforcement officer" means a government agent (other than an attorney for the government) who is engaged in enforcing the criminal laws and is within any category of officers authorized by the Attorney General to request a search warrant.

	(b) **Authority to Issue a Warrant.** At the request of a federal law enforcement officer or an attorney for the government: (1) a magistrate judge with authority in the district — or if none is reasonably available, a judge of a state court of record in the district — has authority to issue a warrant to search for and seize a person or property located within the district; and (2) a magistrate judge with authority in the district has authority to issue a warrant for a person or property outside the district if the person or property is located within the district when the warrant is issued but might move or be moved outside the district before the warrant is executed.
(b) Property or Persons Which May be Seized With a Warrant. A warrant may be issued under this rule to search for and seize any (1) property that constitutes evidence of the commission of a criminal offense; or (2) contraband, the fruits of the crime, or things otherwise criminally possessed; or (3) property designed or intended for use or which has been used as the means of committing a criminal offense; or (4) person for whose arrest there is probable cause, or who is unlawfully restrained.	(c) **Persons or Property Subject to Search or Seizure.** A warrant may be issued for any of the following: (1) evidence of a crime; (2) contraband, fruits of crime, or other items illegally possessed; (3) property designed for use, intended for use, or used in committing a crime; or (4) a person to be arrested or a person who is unlawfully restrained.

(c) Issuance and Contents. **(1) Warrant Upon Affidavit.** A warrant other than a warrant upon oral testimony under paragraph (2) of this subdivision shall issue only on an affidavit or affidavits sworn to before the federal magistrate judge or state judge and establishing grounds for issuing the warrant. If the federal magistrate judge or state judge is satisfied that the grounds for the application exist or that there is probable cause to believe that they exist, that magistrate judge or state judge shall issue a warrant identifying the property or person to be seized and naming or describing the person or place to be searched. The finding of probable cause may be based upon hearsay evidence in whole or in part. Before ruling on a request for a warrant the federal magistrate judge or state judge may require the affiant to appear personally and may examine under oath the affiant and any witnesses the affiant may produce, provided that such proceeding shall be taken down by a court reporter or recording equipment and made part of the affidavit.	**(d) Obtaining a Warrant.** **(1)** ***Probable Cause.*** After receiving an affidavit or other information, a magistrate judge or a judge of a state court of record must issue the warrant if there is probable cause to search for and seize a person or property under Rule 41(c). **(2)** ***Requesting a Warrant in the Presence of a Judge.*** (A) *Warrant on an Affidavit.* When a federal law enforcement officer or an attorney for the government presents an affidavit in support of a warrant, the judge may require the affiant to appear personally and may examine under oath the affiant and any witness the affiant produces. (B) *Warrant on Sworn Testimony.* The judge may wholly or partially dispense with a written affidavit and base a warrant on sworn testimony if doing so is reasonable under the circumstances. (C) *Recording Testimony.* Testimony taken in support of a warrant must be recorded by a court reporter or by a suitable recording device, and the judge must file the transcript or recording with the clerk, along with any affidavit.
The warrant shall be directed to a civil officer of the United States authorized to enforce or assist in enforcing any law thereof or to a person so authorized by the President of the United States.	
It shall command the officer to search, within a specified period of time not to exceed 10 days, the person or place named for the property or person specified. The warrant shall be served in the daytime, unless the issuing authority, by appropriate provision in the warrant, and for reasonable cause shown, authorized its execution at times other than daytime. It shall designate a federal magistrate judge to whom it shall be returned.	

(2) Warrant Upon Oral Testimony. **(A) General Rule.** If the circumstances make it reasonable to dispense, in whole or in part, with a written affidavit, a Federal magistrate judge may issue a warrant based upon sworn testimony communicated by telephone or other appropriate means, including facsimile transmission. **(B) Application.** The person who is requesting the warrant shall prepare a document to be known as a duplicate original warrant and shall read such duplicate original warrant, verbatim, to the Federal magistrate judge. The Federal magistrate judge shall enter, verbatim, what is so read to such magistrate judge on a document to be known as the original warrant. The Federal magistrate judge may direct that the warrant be modified.	(3) ***Requesting a Warrant by Telephonic or Other Means.*** (A) *In General.* A magistrate judge may issue a warrant based on information communicated by telephone or other appropriate means, including facsimile transmission. (B) *Recording Testimony.* Upon learning that an applicant is requesting a warrant, a magistrate judge must: (i) place under oath the applicant and any person on whose testimony the application is based; and (ii) make a verbatim record of the conversation with a suitable recording device, if available, or by a court reporter, or in writing.
(C) Issuance. If the Federal magistrate judge is satisfied that the circumstances are such as to make it reasonable to dispense with a written affidavit and that the grounds for the application exist or that there is probable cause to believe that they exist, the Federal magistrate judge shall order the issuance of a warrant by directing the person requesting the warrant to sign the Federal magistrate judge's name on the duplicate original warrant. The Federal magistrate judge shall immediately sign the original warrant and enter on the face of the original warrant the exact time when the warrant was ordered to be issued. The finding of probable cause for a warrant upon oral testimony may be based on the same kind of evidence as is sufficient for a warrant upon affidavit.	

(D) Recording and Certification of Testimony. When a caller informs the Federal magistrate judge that the purpose of the call is to request a warrant, the Federal magistrate judge shall immediately place under oath each person whose testimony forms a basis of the application and each person applying for that warrant. If a voice recording device is available, the Federal magistrate judge shall record by means of such device all of the call after the caller informs the Federal magistrate judge that the purpose of the call is to request a warrant. Otherwise a stenographic or longhand verbatim record shall be made. If a voice recording device is used or a stenographic record made, the Federal magistrate judge shall have the record transcribed, shall certify the accuracy of the transcription, and shall file a copy of the original record and the transcription with the court. If a longhand verbatim record is made, the Federal magistrate judge shall file a signed copy with the court.	(C) *Certifying Testimony.* The magistrate judge must have any recording or court reporter's notes transcribed, certify the transcription's accuracy, and file a copy of the record and the transcription with the clerk. Any written verbatim record must be signed by the magistrate judge and filed with the clerk. (D) *Suppression Limited.* Absent a finding of bad faith, evidence obtained from a warrant issued under Rule 41(d)(3)(A) is not subject to suppression on the ground that issuing the warrant in that manner was unreasonable under the circumstances.
(E) Contents. The contents of a warrant upon oral testimony shall be the same as the contents of a warrant upon affidavit.	**(e) Issuing the Warrant.** (1) ***In General.*** The magistrate judge or a judge of a state court of record must issue the warrant to an officer authorized to execute it. (2) ***Contents of the Warrant.*** The warrant must identify the person or property to be searched, identify any person or property to be seized, and designate the magistrate judge to whom it must be returned. The warrant must command the officer to: (A) execute the warrant within a specified time no longer than 10 days; (B) execute the warrant during the daytime, unless the judge for good cause expressly authorizes execution at another time; and (C) return the warrant to the magistrate judge designated in the warrant.

(F) Additional Rule for Execution. The person who executes the warrant shall enter the exact time of execution on the face of the duplicate original warrant.	(3) ***Warrant by Telephonic or Other Means.*** If a magistrate judge decides to proceed under Rule 41(d)(3)(A), the following additional procedures apply: (A) *Preparing a Proposed Duplicate Original Warrant.* The applicant must prepare a "proposed duplicate original warrant" and must read or otherwise transmit the contents of that document verbatim to the magistrate judge. (B) *Preparing an Original Warrant.* The magistrate judge must enter the contents of the proposed duplicate original warrant into an original warrant. (C) *Modifications.* The magistrate judge may direct the applicant to modify the proposed duplicate original warrant. In that case, the judge must also modify the original warrant.
(G) Motion to Suppress Precluded. Absent a finding of bad faith, evidence obtained pursuant to a warrant issued under this paragraph is not subject to a motion to suppress on the ground that the circumstances were not such as to make it reasonable to dispense with a written affidavit.	(D) *Signing the Original Warrant and the Duplicate Original Warrant.* Upon determining to issue the warrant, the magistrate judge must immediately sign the original warrant, enter on its face the exact time it is issued, and direct the applicant to sign the judge's name on the duplicate original warrant.

(d) Execution and Return with Inventory. The officer taking property under the warrant shall give to the person from whom or from whose premises the property was taken a copy of the warrant and a receipt for the property taken or shall leave the copy and receipt at the place from which the property was taken.	**(f) Executing and Returning the Warrant.** **(1)** ***Noting the Time.*** The officer executing the warrant must enter on its face the exact date and time it is executed. **(2)** ***Inventory.*** An officer present during the execution of the warrant must prepare and verify an inventory of any property seized. The officer must do so in the presence of another officer and the person from whom, or from whose premises, the property was taken. If either one is not present, the officer must prepare and verify the inventory in the presence of at least one other credible person. **(3)** ***Receipt.*** The officer executing the warrant must: (A) give a copy of the warrant and a receipt for the property taken to the person from whom, or from whose premises, the property was taken; or (B) leave a copy of the warrant and receipt at the place where the officer took the property.
The return shall be made promptly and shall be accompanied by a written inventory of any property taken. The inventory shall be made in the presence of the applicant for the warrant and the person from whose possession or premises the property was taken, if they are present, or in the presence of at least one credible person other than the applicant for the warrant or the person from whose possession or premises the property was taken, and shall be verified by the officer. The federal magistrate judge shall upon request deliver a copy of the inventory to the person from whom or from whose premises the property was taken and to the applicant for the warrant.	**(4)** ***Return.*** The officer executing the warrant must promptly return it — together with a copy of the inventory — to the magistrate judge designated on the warrant. The judge must, on request, give a copy of the inventory to the person from whom, or from whose premises, the property was taken and to the applicant for the warrant.

(e) Motion for Return of Property. A person aggrieved by an unlawful search and seizure or by the deprivation of property may move the district court for the district in which the property was seized for the return of the property on the ground that such person is entitled to lawful possession of the property. The court shall receive evidence on any issue of fact necessary to the decision of the motion. If the motion is granted, the property shall be returned to the movant, although reasonable conditions may be imposed to protect access and use of the property in subsequent proceedings. If a motion for return of property is made or comes on for hearing in the district of trial after an indictment or information is filed, it shall be treated also as a motion to suppress under Rule 12.	(g) **Motion to Return Property.** A person aggrieved by an unlawful search and seizure of property or by the deprivation of property may move for the property's return. The motion must be filed in the district where the property was seized. The court must receive evidence on any factual issue necessary to decide the motion. If it grants the motion, the court must return the property to the movant, but may impose reasonable conditions to protect access to the property and its use in later proceedings.
(f) Motion to Suppress. A motion to suppress evidence may be made in the court of the district of trial as provided in Rule 12.	(h) **Motion to Suppress.** A defendant may move to suppress evidence in the court where the trial will occur, as Rule 12 provides.
(g) Return of Papers to Clerk. The federal magistrate judge before whom the warrant is returned shall attach to the warrant a copy of the return, inventory and all other papers in connection therewith and shall file them with the clerk of the district court for the district in which the property was seized.	(i) **Forwarding Papers to the Clerk.** The magistrate judge to whom the warrant is returned must attach to the warrant a copy of the return, of the inventory, and of all other related papers and must deliver them to the clerk in the district where the property was seized.
(h) Scope and Definitions. This rule does not modify any act, inconsistent with it, regulating search, seizure and the issuance and execution of search warrants in circumstances for which special provision is made. The term "property" is used in this rule to include documents, books, papers and any other tangible objects. The term "daytime" is used in this rule mean hours from 6:00 a.m. to 10:00 p.m. according to local time. The phrase "federal law enforcement officer" is used in this rule to mean any government agent, other than an attorney for the government as defined in Rule 54(c), who is engaged in the enforcement of the criminal laws and is within any category of officers authorized by the Attorney General to request the issuance of a search warrant.	

COMMITTEE NOTE

The language of Rule 41 has been amended as part of the general restyling of the Criminal Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only, except as otherwise noted below. Rule 41 has been completely reorganized to make it easier to read and apply its key provisions.

Current Rule 41(c)(1), which refers to the fact that hearsay evidence may be used to support probable cause, has been deleted. That language was added to the rule in 1972, apparently to reflect emerging federal case law. *See* Advisory Committee Note to 1972 Amendments to Rule 41 (citing cases). Similar language was added to Rule 4 in 1974. In the intervening years, however, the case law has become perfectly clear on that proposition. Thus, the Committee believed that the reference to hearsay was no longer necessary. Furthermore, the limited reference to hearsay evidence was misleading to the extent that it might have suggested that other forms of inadmissible evidence could not be considered. For example, the rule made no reference to considering a defendant's prior criminal record, which clearly may be considered in deciding whether probable cause exists. *See, e.g., Brinegar v. United States*, 338 U.S. 160 (1949) (officer's knowledge of defendant's prior criminal activity). Rather than address that issue, or any other similar issues, the Committee believed that the matter was best addressed in Rule 1101(d)(3), Federal Rules of Evidence. That rule explicitly provides that the Federal Rules of Evidence do not apply to "preliminary examinations in criminal cases, . . . issuance of warrants for arrest, criminal summonses, and search warrants ...." The Advisory Committee Note accompanying that rule recognizes that: "The nature of the proceedings makes application of the formal rules of evidence inappropriate and impracticable." The Committee did not intend to make any substantive changes in practice by deleting the reference to hearsay evidence.

Current Rule 41(d) provides that the officer taking the property under the warrant must provide a receipt for the property and complete an inventory. The revised rule indicates that the inventory may be completed by an officer present during the execution of the warrant, and not necessarily the officer actually executing the warrant.

Rule 42. Criminal Contempt	Rule 42. Criminal Contempt
(b) Disposition Upon Notice and Hearing. A criminal contempt except as provided in subdivision (a) of this rule shall be prosecuted on notice. The notice shall state the time and place of hearing, allowing a reasonable time for the preparation of the defense, and shall state the essential facts constituting the criminal contempt charged and describe it as such. The notice shall be given orally by the judge in open court in the presence of the defendant or, on application of the United States attorney or of an attorney appointed by the court for that purpose, by an order to show cause or an order of arrest. The defendant is entitled to a trial by jury in any case in which an act of Congress so provides. The defendant is entitled to admission to bail as provided in these rules. If the contempt charged involves disrespect to or criticism of a judge, that judge is disqualified from presiding at the trial or hearing except with the defendant's consent. Upon a verdict or finding of guilt the court shall enter an order fixing the punishment.	**(a) Disposition After Notice.** Any person who commits criminal contempt may be punished for that contempt after prosecution on notice. **(1)** ***Notice.*** The court must give the person notice in open court, in an order to show cause, or in an arrest order. The notice must: (A) state the time and place of the trial; (B) allow the defendant a reasonable time to prepare a defense; and (C) state the essential facts constituting the charged criminal contempt and describe it as such. **(2)** ***Appointing a Prosecutor.*** The court must request that the contempt be prosecuted by an attorney for the government, unless the interest of justice requires the appointment of another attorney. If the government declines the request, the court must appoint another attorney to prosecute the contempt. **(3)** ***Trial and Disposition.*** A person being prosecuted for criminal contempt is entitled to a jury trial in any case in which federal law so provides and must be released or detained as Rule 46 provides. If the criminal contempt involves disrespect toward or criticism of a judge, that judge is disqualified from presiding at the contempt trial or hearing unless the defendant consents. Upon a finding or verdict of guilty, the court must impose the punishment.
(a) Summary Disposition. A criminal contempt may be punished summarily if the judge certifies that the judge saw or heard the conduct constituting the contempt and that it was committed in the actual presence of the court. The order of contempt shall recite the facts and shall be signed by the judge and entered of record.	**(b) Summary Disposition.** Notwithstanding any other provision of these rules, the court (other than a magistrate judge) may summarily punish a person who commits criminal contempt in its presence if the judge saw or heard the contemptuous conduct and so certifies; a magistrate judge may summarily punish a person as provided in 28 U.S.C. § 636(e). The contempt order must recite the facts, be signed by the judge, and be filed with the clerk.

COMMITTEE NOTE

The language of Rule 42 has been amended as part of the general restyling of the Criminal Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only, except as noted below.

The revised rule is intended to more clearly set out the procedures for conducting a criminal contempt proceeding. The current rule implicitly recognizes that an attorney for the government may be involved in the prosecution of such cases. Revised Rule 42(a)(2) now explicitly addresses the appointment of a "prosecutor" and adopts language to reflect the holding in *Young v. United States ex rel. Vuitton*, 481 U.S. 787 (1987). In that case the Supreme Court indicated that ordinarily the court should request that an attorney for the government prosecute the contempt; only if that request is denied, should the court appoint a private prosecutor. The rule envisions that a disinterested counsel should be appointed to prosecute the contempt.

Rule 42(b) has been amended to make it clear that a court may summarily punish a person for committing contempt in the court's presence without regard to whether other rules, such as Rule 32 (sentencing procedures), might otherwise apply. *See, e.g., United States v. Martin-Trigona*, 759 F.2d 1017 (2d Cir. 1985). Further, Rule 42(b) has been amended to recognize the contempt powers of a court (other than a magistrate judge) and a magistrate judge.

X. GENERAL PROVISIONS	TITLE IX. GENERAL PROVISIONS
Rule 43. Presence of the Defendant	**Rule 43. Defendant's Presence**
(a) Presence Required. The defendant shall be present at the arraignment, at the time of the plea, at every stage of the trial including the impaneling of the jury and the return of the verdict, and at the imposition of sentence, except as otherwise provided by this rule.	**(a) When Required.** Unless this rule provides otherwise, the defendant must be present at: **(1)** the initial appearance, the arraignment, and the plea; **(2)** every trial stage, including jury impanelment and the return of the verdict; and **(3)** sentencing.
(b) Continued Presence Not Required. The further progress of the trial to and including the return of the verdict, and the imposition of sentence, will not be prevented and the defendant will be considered to have waived the right to be present whenever a defendant, initially present at trial, or having pleaded guilty or nolo contendere, **(1)** is voluntarily absent after the trial has commenced (whether or not the defendant has been informed by the court of the obligation to remain during the trial), **(2)** in a noncapital case, is voluntarily absent at the imposition of sentence, or **(3)** after being warned by the court that disruptive conduct will cause the removal of the defendant from the courtroom, persists in conduct which is such as to justify exclusion from the courtroom.	**(b) When Not Required.** A defendant need not be present under any of the following circumstances: **(1)** ***Organizational Defendant.*** The defendant is an organization represented by counsel who is present. **(2)** ***Misdemeanor Offense.*** The offense is punishable by fine or by imprisonment for not more than one year, or both, and with the defendant's written consent, the court permits arraignment, plea, trial, and sentencing to occur in the defendant's absence. **(3)** ***Conference or Hearing on a Legal Question.*** The proceeding involves only a conference or hearing on a question of law. **(4)** ***Sentence Correction.*** The proceeding involves the correction or reduction of sentence under Rule 35 or 18 U.S.C. § 3582(c).

(c) Presence Not Required. A defendant need not be present: **(1)** when represented by counsel and the defendant is an organization, as defined in 18 U.S.C. § 18; **(2)** when the offense is punishable by fine or by imprisonment for not more than one year or both, and the court, with the written consent of the defendant, permits arraignment, plea, trial, and imposition of sentence in the defendant's absence; **(3)** when the proceeding involves only a conference or hearing upon a question of law; or **(4)** when the proceeding involves a reduction or correction of sentence under Rule 35(b) or (c) or 18 U.S.C. § 3582(c).	**(c) Waiving Continued Presence.** **(1)** ***In General.*** A defendant who was initially present at trial, or who had pleaded guilty or nolo contendere, waives the right to be present under the following circumstances: (A) when the defendant is voluntarily absent after the trial has begun, regardless of whether the court informed the defendant of an obligation to remain during trial; (B) in a noncapital case, when the defendant is voluntarily absent during sentencing; or (C) when the court warns the defendant that it will remove the defendant from the courtroom for disruptive behavior, but the defendant persists in conduct that justifies removal from the courtroom.
	(2) ***Waiver's Effect.*** If the defendant waives the right to be present, the trial may proceed to completion, including the verdict's return and sentencing, during the defendant's absence.

COMMITTEE NOTE

The language of Rule 43 has been amended as part of the general restyling of the Criminal Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

REPORTER'S NOTES

In publishing the "style" changes to the Federal Rules of Criminal Procedure, the Committee decided to publish separately any rule that includes what it considered at least one major substantive change. The purpose for this separate publication is to highlight for the bench and the bar any proposed amendments that the Committee believes will result in significant changes in current practice. Rule 43 was one of those rules. Another version of Rule 43, which recognizes that the proposed Rules 5 and 10 would authorize video teleconferencing of certain proceedings, is included in the "substantive" package.

Rule 44. Right to and Assignment of Counsel	Rule 44. Right to and Appointment of Counsel
(a) Right to Assigned Counsel. Every defendant who is unable to obtain counsel shall be entitled to have counsel assigned to represent that defendant at every stage of the proceedings from initial appearance before the federal magistrate judge or the court through appeal, unless the defendant waives such appointment.	**(a) Right to Appointed Counsel.** A defendant who is unable to obtain counsel is entitled to have counsel appointed to represent the defendant at every stage of the proceeding from initial appearance through appeal, unless the defendant waives this right.
(b) Assignment Procedure. The procedures for implementing the right set out in subdivision (a) shall be those provided by law and by local rules of court established pursuant thereto.	**(b) Appointment Procedure.** Federal law and local court rules govern the procedure for implementing the right to counsel.
(c) Joint Representation. Whenever two or more defendants have been jointly charged pursuant to Rule 8(b) or have been joined for trial pursuant to Rule 13, and are represented by the same retained or assigned counsel or by retained or assigned counsel who are associated in the practice of law, the court shall promptly inquire with respect to such joint representation and shall personally advise each defendant of the right to the effective assistance of counsel, including separate representation. Unless it appears that there is good cause to believe no conflict of interest is likely to arise, the court shall take such measures as may be appropriate to protect each defendant's right to counsel.	**(c) Inquiry Into Joint Representation.** (1) ***Joint Representation***. Joint representation occurs when: (A) two or more defendants have been charged jointly under Rule 8(b) or have been joined for trial under Rule 13; and (B) the defendants are represented by the same counsel, or counsel who are associated in law practice. (2) ***Court's Responsibilities in Cases of Joint Representation.*** The court must promptly inquire about the propriety of joint representation and must personally advise each defendant of the right to the effective assistance of counsel, including separate representation. Unless there is good cause to believe that no conflict of interest is likely to arise, the court must take appropriate measures to protect each defendant's right to counsel.

COMMITTEE NOTE

The language of Rule 44 has been amended as part of the general restyling of the Criminal Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

Revised Rule 44 now refers to the "appointment" of counsel, rather than the assignment of counsel; the Committee believed the former term was more appropriate. *See* 18 U.S.C. § 3006A. In Rule 44(c), the term "retained or assigned" has been deleted as being unnecessary, without changing the court's responsibility to conduct an inquiry where joint representation occurs.

Rule 45. Time	Rule 45. Computing and Extending Time
(a) Computation. In computing any period of time the day of the act or event from which the designated period of time begins to run shall not be included. The last day of the period so computed shall be included, unless it is a Saturday, a Sunday, or a legal holiday, or, when the act to be done is the filing of some paper in court, a day on which weather or other conditions have made the office of the clerk of the district court inaccessible, in which event the period runs until the end of the next day which is not one of the aforementioned days. When a period of time prescribed or allowed is less than 11 days, intermediate Saturdays, Sundays and legal holidays shall be excluded in the computation. As used in these rules, "legal holiday" includes New Year's Day, Birthday of Martin Luther King, Jr., Washington's Birthday, Memorial Day, Independence Day, Labor Day, Columbus Day, Veterans Day, Thanksgiving Day, Christmas Day, and any other day appointed as a holiday by the President or the Congress of the United States, or by the state in which the district court is held.	**(a) Computing Time.** The following rules apply in computing any period of time specified in these rules, any local rule, or any court order: **(1)** ***Day of the Event Excluded.*** Exclude the day of the act, event, or default that begins the period. **(2)** ***Exclusion from Brief Periods.*** Exclude intermediate Saturdays, Sundays, and legal holidays when the period is less than 11 days. **(3)** ***Last Day.*** Include the last day of the period unless it is a Saturday, Sunday, legal holiday, or day on which weather or other conditions make the clerk's office inaccessible. When the last day is excluded, the period runs until the end of the next day that is not a Saturday, Sunday, legal holiday, or day when the clerk's office is inaccessible. **(4)** ***"Legal Holiday" Defined.*** As used in this rule, "legal holiday" means: (A) the day set aside by statute for observing: (i) New Year's Day; (ii) Martin Luther King, Jr.'s Birthday; (iii) Washington's Birthday; (iv) Memorial Day; (v) Independence Day; (vi) Labor Day; (vii) Columbus Day; (viii)Veterans' Day; (ix) Thanksgiving Day; (x) Christmas Day; and (B) any other day declared a holiday by the President, the Congress, or the state where the district court is held.

(b) Enlargement. When an act is required or allowed to be done at or within a specified time, the court for cause shown may at any time in its discretion (1) with or without motion or notice, order the period enlarged if request therefor is made before the expiration of the period originally prescribed or as extended by a previous order or (2) upon motion made after the expiration of the specified period permit the act to be done if the failure to act was the result of excusable neglect; but the court may not extend the time for taking any action under Rules 29, 33, 34 and 35, except to the extent and under the conditions stated in them.	**(b) Extending Time.** **(1)** ***In General.*** When an act must or may be done within a specified period, the court on its own may extend the time, or for good cause may do so on a party's motion made: (A) before the originally prescribed or previously extended time expires; or (B) after the time expires if the party failed to act because of excusable neglect. **(2)** ***Exceptions.*** The court may not extend the time to take any action under Rules 29, 33, 34, and 35, except as stated in those rules.
[(c) Unaffected by Expiration of Term.] Rescinded Feb. 28, 1966, eff. July 1, 1966.	
(d) For Motions; Affidavits. A written motion, other than one which may be heard *ex parte,* and notice of the hearing thereof shall be served not later than 5 days before the time specified for the hearing unless a different period is fixed by rule or order of the court. For cause shown such an order may be made on *ex parte* application. When a motion is supported by an affidavit, the affidavit shall be served with the motion; and opposing affidavits may be served not less than 1 day before the hearing unless the court permits them to be served at a later time.	
(e) Additional Time After Service by Mail. Whenever a party has the right or is required to do an act within a prescribed period after the service of a notice or other paper upon that party and the notice or other paper is served by mail, 3 days shall be added to the prescribed period.	**(c) Additional Time After Service.** When these rules permit or require a party to act within a specified period after a notice or a paper has been served on that party, 3 days are added to the period if service occurs in the manner provided under Federal Rule of Civil Procedure 5(b)(2)(B), (C), or (D).

COMMITTEE NOTE

The language of Rule 45 has been amended as part of the general restyling of the Criminal Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

The additional three days provided by Rule 45(c) is extended to the means of service authorized by the new paragraph (D) added to Rule 5(b) of the Federal Rules of Civil Procedure, including — with the consent of the person served — service by electronic means. The means of service authorized in civil actions apply to criminal cases under Rule 49 (b).

Rule 45(d), which governs the timing of written motions and affidavits, has been moved to Rule 47.

Rule 46. Release from Custody	Rule 46. Release from Custody; Supervising Detention
(a) Release Prior to Trial. Eligibility for release prior to trial shall be in accordance with 18 U.S.C. §§ 3142 and 3144.	**(a) Before Trial.** The provisions of 18 U.S.C. §§ 3142 and 3144 govern pretrial release.
(b) Release During Trial. A person released before trial shall continue on release during trial under the same terms and conditions as were previously imposed unless the court determines that other terms and conditions or termination of release are necessary to assure such person's presence during the trial or to assure that such person's conduct will not obstruct the orderly and expeditious progress of the trial.	**(b) During Trial.** A person released before trial continues on release during trial under the same terms and conditions. But the court may order different terms and conditions or terminate the release if necessary to ensure that the person will be present during trial or that the person's conduct will not obstruct the orderly and expeditious progress of the trial.
(c) Pending Sentence and Notice of Appeal. Eligibility for release pending sentence or pending notice of appeal or expiration of the time allowed for filing notice of appeal, shall be in accordance with 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 rests with the defendant.	**(c) Pending Sentencing or Appeal.** The provisions of 18 U.S.C. § 3143 govern release pending sentencing or appeal. The burden of establishing that the defendant will not flee or pose a danger to any other person or to the community rests with the defendant.
	(d) Pending Hearing on a Violation of Probation or Supervised Release. Rule 32.1(a)(6) governs release pending a hearing on a violation of probation or supervised release.
(d) Justification of Sureties. Every surety, except a corporate surety which is approved as provided by law, shall justify by affidavit and may be required to describe in the affidavit the property by which the surety proposes to justify and the encumbrances thereon, the number and amount of other bonds and undertakings for bail entered into by the surety and remaining undischarged and all the other liabilities of the surety. No bond shall be approved unless the surety thereon appears to be qualified.	**(e) Surety.** The court must not approve a bond unless any surety appears to be qualified. Every surety, except a legally approved corporate surety, must demonstrate by affidavit that its assets are adequate. The court may require the affidavit to describe the following: **(1)** the property that the surety proposes to use as security; **(2)** any encumbrance on that property; **(3)** the number and amount of any other undischarged bonds and bail undertakings the surety has issued; and **(4)** any other liability of the surety.

(e) Forfeiture. **(1) Declaration.** If there is a breach of condition of a bond, the district court shall declare a forfeiture of the bail. **(2) Setting Aside.** The court may direct that a forfeiture be set aside in whole or in part, upon such conditions as the court may impose, if a person released upon an execution of an appearance bond with a surety is subsequently surrendered by the surety into custody or if it otherwise appears that justice does not require the forfeiture.	**(f) Bail Forfeiture.** (1) ***Declaration.*** The court must declare the bail forfeited if a condition of the bond is breached. (2) ***Setting Aside.*** The court may set aside in whole or in part a bail forfeiture upon any condition the court may impose if: (A) the surety later surrenders into custody the person released on the surety's appearance bond; or (B) it appears that justice does not require bail forfeiture.
(3) Enforcement: When a forfeiture has not been set aside, the court shall on motion enter a judgment of default and execution may issue thereon. By entering into a bond the obligors submit to the jurisdiction of the district court and irrevocably appoint the clerk of the court as their agent upon whom any papers affecting their liability may be served. Their liability may be enforced on motion without the necessity of an independent action. The motion and such notice of the motion as the court prescribes may be served on the clerk of the court, who shall forthwith mail copies to the obligors to their last known addresses. **(4) Remission.** After entry of such judgment, the court may remit it in whole or in part under the conditions applying to the setting aside of forfeiture in paragraph (2) of this subdivision.	(3) ***Enforcement.*** (A) *Default Judgment and Execution.* If it does not set aside a bail forfeiture, the court must, upon the government's motion, enter a default judgment. (B) *Jurisdiction and Service.* By entering into a bond, each surety submits to the district court's jurisdiction and irrevocably appoints the district clerk as its agent to receive service of any filings affecting its liability. (C) *Motion to Enforce.* The court may, upon the government's motion, enforce the surety's liability without an independent action. The government must serve any motion, and notice as the court prescribes, on the district clerk. If so served, the clerk must promptly mail a copy to the surety at its last known address. (4) ***Remission.*** After entering a judgment under Rule 46(f)(3), the court may remit in whole or in part the judgment under the same conditions specified in Rule 46(f)(2).

(f) Exoneration. When a condition of the bond has been satisfied or the forfeiture thereof has been set aside or remitted, the court shall exonerate the obligors and release any bail. A surety may be exonerated by a deposit of cash in the amount of the bond or by a timely surrender of the defendant into custody.	**(g) Exoneration.** The court must exonerate the surety and release any bail when a bond condition has been satisfied or when the court has set aside or remitted the forfeiture. The court must exonerate a surety who deposits cash in the amount of the bond or timely surrenders the defendant into custody.
(g) Supervision of Detention Pending Trial. The court shall exercise supervision over the detention of defendants and witnesses within the district pending trial for the purpose of eliminating all unnecessary detention. The attorney for the government shall make a biweekly report to the court listing each defendant and witness who has been held in custody pending indictment, arraignment, or trial for a period in excess of ten days. As to each witness so listed the attorney for the government shall make a statement of the reasons why such witness should not be released with or without the taking of a deposition pursuant to Rule 15(a). As to each defendant so listed the attorney for the government shall make a statement of the reasons why the defendant is still held in custody.	**(h) Supervising Detention Pending Trial.** **(1)** ***In General.*** To eliminate unnecessary detention, the court must supervise the detention within the district of any defendants awaiting trial and of any persons held as material witnesses. **(2)** ***Reports.*** An attorney for the government must report biweekly to the court, listing each material witness held in custody for more than 10 days pending indictment, arraignment, or trial. For each material witness listed in the report, an attorney for the government must state why the witness should not be released with or without a deposition being taken under Rule 15(a).
(h) Forfeiture of Property. Nothing in this rule or in chapter 207 of title 18, United States Code, shall prevent the court from disposing of any charge by entering an order directing forfeiture of property pursuant to 18 U.S.C. 3142(c)(1)(B)(xi) if the value of the property is an amount that would be an appropriate sentence after conviction of the offense charged and if such forfeiture is authorized by statute or regulation.	**(i) Forfeiture of Property.** The court may dispose of a charged offense by ordering the forfeiture of 18 U.S.C. § 3142(c)(1)(B)(xi) property under 18 U.S.C. § 3146(d), if a fine in the amount of the property's value would be an appropriate sentence for the charged offense.
(i) Production of Statements. **(1) In General.** Rule 26.2(a)-(d) and (f) applies at a detention hearing held under 18 U.S.C. § 3142, unless the court, for good cause shown, rules otherwise in a particular case. **(2) Sanctions for Failure to Produce Statement.** If a party elects not to comply with an order under Rule 26.2(a) to deliver a statement to the moving party, at the detention hearing the court may not consider the testimony of a witness whose statement is withheld.	**(j) Producing a Statement.** **(1)** ***In General.*** Rule 26.2(a)-(d) and (f) applies at a detention hearing under 18 U.S.C. § 3142, unless the court for good cause rules otherwise. **(2)** ***Sanctions for Not Producing a Statement.*** If a party disobeys a Rule 26.2 order to produce a witness's statement, the court must not consider that witness's testimony at the detention hearing.

COMMITTEE NOTE

The language of Rule 46 has been amended as part of the general restyling of the Criminal Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only, except as noted below.

Although the general rule is that an appeal to a circuit court deprives the district court of jurisdiction, Rule 46(c) recognizes the apparent exception to that rule — that the district court retains jurisdiction to decide whether the defendant should be detained, even if a notice of appeal has been filed. *See, e.g., United States v. Meyers*, 95 F.3d 1475 (10th Cir. 1996), *cert. denied*, 522 U.S. 1006 (1997) (initial decision of whether to release defendant pending appeal is to be made by district court); *United States v. Affleck*, 765 F.2d 944 (10th Cir. 1985); *Jago v. United States District Court*, 570 F.2d 618 (6th Cir. 1978) (release of defendant pending appeal must first be sought in district court). *See also* Federal Rule of Appellate Procedure 9(b) and the accompanying Committee Note.

Revised Rule 46(h) deletes the requirement that the attorney for the government file bi-weekly reports with the court concerning the status of any defendants in pretrial detention. The Committee believed that the requirement was no longer necessary in light of the Speedy Trial Act provisions, 18 U.S.C. §§ 3161, et seq. On the other hand, the requirement that the attorney for the government file reports regarding detained material witnesses has been retained in the rule.

Rule 46(i) addresses the ability of a court to order forfeiture of property where a defendant has failed to appear as required by the court. The language in the current rule, Rule 46(h), was originally included by Congress. The new language has been restyled with no change in substance or practice intended. Under this provision, the court may only forfeit property as permitted under 18 U.S.C. §§ 3146(d) and 3142(c)(1)(B)(xi). The term "appropriate sentence" means a sentence that is consistent with the Sentencing Guidelines.

Rule 47. Motions	Rule 47. Motions and Supporting Affidavits
An application to the court for an order shall be by motion. A motion other than one made during a trial or hearing shall be in writing unless the court permits it to be made orally. It shall state the grounds upon which it is made and shall set forth the relief or order sought. It may be supported by affidavit.	**(a) In General.** A party applying to the court for an order must do so by motion. **(b) Form and Content of a Motion.** A motion — except when made during a trial or hearing — must be in writing, unless the court permits the party to make the motion by other means. A motion must state the grounds on which it is based and the relief or order sought. A motion may be supported by affidavit.
	(c) Timing of a Motion. A party must serve a written motion — other than one that the court may hear ex parte — and any hearing notice at least 5 days before the hearing date, unless a rule or court order sets a different period. For good cause, the court may set a different period upon ex parte application. **(d) Affidavit Supporting a Motion.** The moving party must serve any supporting affidavit with the motion. A responding party must serve any opposing affidavit at least one day before the hearing, unless the court permits later service.

COMMITTEE NOTE

The language of Rule 47 has been amended as part of the general restyling of the Criminal Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only, except as noted below.

In Rule 47(b), the word "orally" has been deleted. The Committee believed, first, that the term should not act as a limitation on those who are not able to speak orally and, second, a court may wish to entertain motions through electronic or other reliable means. Deletion of the term also comports with a similar change in Rule 26, regarding the taking of testimony during trial. In place of that word, the Committee substituted the broader phrase "by other means."

Rule 48. Dismissal	Rule 48. Dismissal
(a) By Attorney for Government. The Attorney General or the United States attorney may by leave of court file a dismissal of an indictment, information, or complaint and the prosecution shall thereupon terminate. Such a dismissal may not be filed during the trial without the consent of the defendant. **(b) By Court.** If there is unnecessary delay in presenting the charge to the grand jury or in filing an information against a defendant who has been held to answer to the district court, or if there is unnecessary delay in bringing a defendant to trial, the court may dismiss the indictment, information, or complaint.	**(a) By the Government.** The government may, with leave of court, dismiss an indictment, information, or complaint. The government may not dismiss the prosecution during trial without the defendant's consent. **(b) By the Court.** The court may dismiss an indictment, information, or complaint if unnecessary delay occurs in: **(1)** presenting a charge to a grand jury; **(2)** filing an information against a defendant; or **(3)** bringing a defendant to trial.

COMMITTEE NOTE

The language of Rule 48 has been amended as part of the general restyling of the Criminal Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

The Committee considered the relationship between Rule 48(b) and the Speedy Trial Act. *See* 18 U.S.C. §§ 3161, et seq. Rule 48(b), of course, operates independently from the Act. *See, e.g.*, *United States v. Goodson*, 204 F.3d 508 (4th Cir. 2000) (noting purpose of Rule 48(b)); *United States v. Carlone*, 666 F.2d 1112, 1116 (7th Cir. 1981) (suggesting that Rule 48(b) could provide an alternate basis in an extreme case to dismiss an indictment, without reference to Speedy Trial Act); *United States v. Balochi*, 527 F.2d 562, 563-64 (4th Cir. 1976) (per curiam) (Rule 48(b) is broader in compass). In re-promulgating Rule 48(b), the Committee intends no change in the relationship between that rule and the Speedy Trial Act.

Rule 49. Service and Filing of Papers	Rule 49. Serving and Filing Papers
(a) Service: When Required. Written motions other than those which are heard *ex parte,* written notices, designations of record on appeal and similar papers shall be served upon each of the parties.	**(a) When Required.** A party must serve on every other party any written motion (other than one to be heard ex parte), written notice, designation of the record on appeal, or similar paper.
(b) Service: How Made. Whenever under these rules or by an order of the court service is required or permitted to be made upon a party represented by an attorney, the service shall be made upon the attorney unless service upon the party personally is ordered by the court. Service upon the attorney or upon a party shall be made in the manner provided in civil actions.	**(b) How Made.** Service must be made in the manner provided for a civil action. When these rules or a court order requires or permits service on a party represented by an attorney, service must be made on the attorney instead of the party, unless the court orders otherwise.
(c) Notice of Orders. Immediately upon the entry of an order made on a written motion subsequent to arraignment the clerk shall mail to each party a notice thereof and shall make a note in the docket of the mailing. Lack of notice of the entry by the clerk does not affect the time to appeal or relieve or authorize the court to relieve a party for failure to appeal within the time allowed, except as permitted by Rule 4(b) of the Federal Rules of Appellate Procedure.	**(c) Notice of a Court Order.** When the court issues an order on any post-arraignment motion, the clerk must provide notice in a manner provided for in a civil action. Except as Federal Rule of Appellate Procedure 4(b) provides otherwise, the clerk's failure to give notice does not affect the time to appeal, or relieve — or authorize the court to relieve — a party's failure to appeal within the allowed time.
(d) Filing. Papers required to be served shall be filed with the court. Papers shall be filed in the manner provided in civil actions.	**(d) Filing.** A party must file with the court a copy of any paper the party is required to serve. A paper must be filed in a manner provided for in a civil action.
[**(e)** Abrogated April 27, 1995, eff. December 1, 1995]	

COMMITTEE NOTE

The language of Rule 49 has been amended as part of the general restyling of the Criminal Rules to make them more easily understood and to make style and terminology consistent throughout the rules.

Rule 49(c) has been amended to reflect proposed changes in the Federal Rules of Civil Procedure that permit (but do not require) a court to provide notice of its orders and judgments through electronic means. *See* Federal Rules of Civil Procedure 5(b) and 77(d). As amended, Rule 49(c) now parallels a similar extant provision in Rule 49(b), regarding service of papers.

Rule 50. Calendars; Plan for Prompt Disposition	Rule 50. Prompt Disposition
(a) Calendars. The district courts may provide for placing criminal proceedings upon appropriate calendars. Preference shall be given to criminal proceedings as far as practicable. **(b) Plans for Achieving Prompt Disposition of Criminal Cases.** To minimize undue delay and to further the prompt disposition of criminal cases, each district court shall conduct a continuing study of the administration of criminal justice in the district court and before United States magistrate judges of the district and shall prepare plans for the prompt disposition of criminal cases in accordance with the provisions of Chapter 208 of Title 18, United States Code.	Scheduling preference must be given to criminal proceedings as far as practicable.

COMMITTEE NOTE

The language of Rule 50 has been amended as part of the general restyling of the Criminal Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only, except as noted below.

The first sentence in current Rule 50(a), which says that a court may place criminal proceedings on a calendar, has been deleted. The Committee believed that the sentence simply stated a truism and was no longer necessary.

Current Rule 50(b), which simply mirrors 18 U.S.C. § 3165, has been deleted in its entirety. The rule was added in 1971 to meet congressional concerns in pending legislation about deadlines in criminal cases. Provisions governing deadlines were later enacted by Congress and protections were provided in the Speedy Trial Act. The Committee concluded that in light of those enactments, Rule 50(b) was no longer necessary.

Rule 51. Exceptions Unnecessary.	Rule 51. Preserving Claimed Error
Exceptions to rulings or orders of the court are unnecessary and for all purposes for which an exception has heretofore been necessary it is sufficient that a party, at the time the ruling or order of the court is made or sought, makes known to the court the action which that party desires the court to take or that party's objection to the action of the court and the grounds therefor; but if a party has no opportunity to object to a ruling or order, the absence of an objection does thereafter prejudice that party.	**(a) Exceptions Unnecessary.** Exceptions to rulings or orders of the court are unnecessary. **(b) Preserving a Claim of Error.** A party may preserve a claim of error by informing the court — when the court ruling or order is made or sought — of the action the party wishes the court to take, or the party's objection to the court's action and the grounds for that objection. If a party does not have an opportunity to object to a ruling or order, the absence of an objection does not later prejudice that party. A ruling or order that admits or excludes evidence is governed by Federal Rule of Evidence 103.

COMMITTEE NOTE

The language of Rule 51 has been amended as part of the general restyling of the Criminal Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

The Rule includes a new sentence that explicitly states that any rulings regarding evidence are governed by Federal Rule of Evidence 103. The sentence was added because of concerns about the Supersession Clause, 28 U.S.C. § 2072(b), of the Rules Enabling Act, and the possibility that an argument might have been made that Congressional approval of this rule would supersede that Rule of Evidence.

Rule 52. Harmless Error and Plain Error	Rule 52. Harmless and Plain Error
(a) Harmless Error. Any error, defect, irregularity, or variance which does not affect substantial rights shall be disregarded.	**(a) Harmless Error.** Any error, defect, irregularity, or variance that does not affect substantial rights must be disregarded.
(b) Plain Error. Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.	**(b) Plain Error.** A plain error that affects substantial rights may be considered even though it was not brought to the court's attention.

COMMITTEE NOTE

The language of Rule 52 has been amended as part of the general restyling of the Criminal Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

Rule 52(b) has been amended by deleting the words "or defect" after the words "plain error." The change is intended to remove any ambiguity in the rule. As noted by the Supreme Court, the language "plain error or defect" was misleading to the extent that it might be read in the disjunctive. *See United States v. Olano*, 507 U.S. 725, 732 (1993) (incorrect to read Rule 52(b) in the disjunctive); *United States v. Young*, 470 U.S. 1, 15 n. 12 (1985) (use of disjunctive in Rule 52(b) is misleading).

Rule 53. Regulation of Conduct in the Court Room.	Rule 53. Courtroom Photographing and Broadcasting Prohibited
The taking of photographs in the court room during the progress of judicial proceedings or radio broadcasting of judicial proceedings from the court room shall not be permitted by the court.	Except as otherwise provided by a statute or these rules, the court must not permit the taking of photographs in the courtroom during judicial proceedings or the broadcasting of judicial proceedings from the courtroom.

COMMITTEE NOTE

The language of Rule 53 has been amended as part of the general restyling of the Criminal Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only, except as noted below.

Although the word "radio" has been deleted from the rule, the Committee does not believe that the amendment is a substantive change but rather one that accords with judicial interpretation applying the current rule to other forms of broadcasting and functionally equivalent means. *See, e.g., United States v. Hastings*, 695 F.2d 1278, 1279, n. 5 (11th Cir. 1983) (television proceedings prohibited); *United States v. McVeigh*, 931 F. Supp. 753 (D. Colo. 1996) (release of tape recordings of proceedings prohibited). Given modern technology capabilities, the Committee believed that a more generalized reference to "broadcasting" is appropriate.

Also, although the revised rule does not explicitly recognize exceptions within the rules themselves, the restyled rule recognizes that other rules might permit, for example, video teleconferencing, which clearly involves "broadcasting" of the proceedings, even if only for limited purposes.

REPORTER'S NOTES

In publishing the "style" changes to the Federal Rules of Criminal Procedure, the Committee decided to publish separately any rule that includes what it considered at least one major substantive change. The purpose for this separate publication is to highlight for the bench and the bar any proposed amendments that the Committee believes will result in significant changes in current practice. That separate publication includes substantive amendments to Rules 5 and 10 that would permit video teleconferencing of initial appearances and arraignments and to Rule 26 that would permit remote transmission of live testimony. Those amendments would thus impact on Rule 53.

Rule 54. Application and Exception	Rule 54. (Transferred)[1]
(a) Courts. These rules apply to all criminal proceedings in the United States District Courts; in the District Court of Guam; in the District Court for the Northern Mariana Islands, except as otherwise provided in articles IV and V of the covenant provided by the Act of March 24, 1976 (90 Stat. 263); and in the District Court of the Virgin Islands; in the United States Courts of Appeals; and in the Supreme Court of the United States; except that the prosecution of offenses in the District Court of the Virgin Islands shall be by indictment or information as otherwise provided by law.	

[1]All of Rule 54 was moved to Rule 1.

(b) Proceedings.

(1) Removed Proceedings. These rules apply to criminal prosecutions removed to the United States district courts from state courts and govern all procedure after removal, except that dismissal by the attorney for the prosecution shall be governed by state law.

(2) Offenses Outside a District or State. These rules apply to proceedings for offenses committed upon the high seas or elsewhere out of the jurisdiction of any particular state or district, except that such proceedings may be had in any district authorized by 18 U.S.C. § 3238.

(3) Peace Bonds. These rules do not alter the power of judges of the United States or of United States magistrate judges to hold security of the peace and for good behavior under Revised Statutes, § 4069, 50 U.S.C. § 23, but in such cases the procedure shall conform to these rules so far as they are applicable.

(4) Proceedings Before United States Magistrate Judges. Proceedings involving misdemeanors and other petty offenses are governed by Rule 58.

(5) Other Proceedings. These rules are not applicable to extradition and rendition of fugitives; civil forfeiture of property for violation of a statute of the United States; or the collection of fines and penalties. Except as provided in Rule 20(d) they do not apply to proceedings under 18 U.S.C. Chapter 403 — Juvenile Delinquency — so far as they are inconsistent with that chapter. They do not apply to summary trials for offenses against the navigation laws under Revised Statutes §§ 4300-4305, 33 U.S.C. §§ 391-396, or to proceedings involving disputes between seamen under Revised Statutes §§ 4079-4081, as amended, 22 U.S.C. §§ 256-258, or to proceedings for fishery offenses under the Act of June 28, 1937, c. 392, 50 Stat. 325-327, 16 U.S.C. §§ 772-772i, or to proceedings against a witness in a foreign country under 28 U.S.C. § 1784.

(c) Application of Terms. As used in these rules the following terms have the designated meanings.

"Act of Congress" includes any act of Congress locally applicable to and in force in the District of Columbia, in Puerto Rico, in a territory or in any insular possession.

"Attorney for the government" means the Attorney General, an authorized assistant of the Attorney General, a United States Attorney, an authorized assistant of a United States Attorney, when applicable to cases arising under the laws of Guam the Attorney General of Guam or such other person or persons as may be authorized by the laws of Guam to act therein, and when applicable to cases arising under the laws of the Northern Mariana Islands the Attorney General of the Northern Mariana Islands or any other person or persons as may be authorized by the laws of the Northern Marianas to act therein.

"Civil action" refers to a civil action in a district court.

The words "demurrer," "motion to quash," "plea in abatement," "plea in bar" and "special plea in bar," or words to the same effect, in any act of Congress shall be construed to mean the motion raising a defense or objection provided in Rule 12.

"District court" includes all district courts named in subdivision (a) of this rule.

"Federal magistrate judge" means a United States magistrate judge as defined in 28 U.S.C. §§ 631-639, a judge of the United States or another judge or judicial officer specifically empowered by statute in force in any territory or possession, the Commonwealth of Puerto Rico, or the District of Columbia, to perform a function to which a particular rule relates.

"Judge of the United States" includes a judge of the district court, court of appeals, or the Supreme Court.

"Law" includes statutes and judicial decisions.

"Magistrate judge" includes a United States magistrate judge as defined in 28 U.S.C. §§ 631-639, a judge of the United States, another judge or judicial officer specifically empowered by statute in force in any territory or possession, the Commonwealth of Puerto Rico, or the District of Columbia, to perform a function to which a particular rule relates, and a state or local judicial officer, authorized by 18 U.S.C. § 3041 to perform the functions prescribed by Rules 3, 4, and 5. "Oath" includes affirmations. "Petty offense" is defined in 18 U.S.C. § 19. "State" includes District of Columbia, Puerto Rico, territory and insular possession. "United States magistrate judge" means the officer authorized by 28 U.S.C. §§ 631-639.	

COMMITTEE NOTE

Certain provisions in current Rule 54 have been moved to revised Rule 1 as part of a general restyling of the Criminal Rules to make them more easily understood and to make style and terminology consistent throughout the rules. Other provisions in Rule 54 have been deleted as being unnecessary.

Rule 55. Records	Rule 55. Records
The clerk of the district court and each United States magistrate judge shall keep records in criminal proceedings in such form as the Director of the Administrative Office of the United States Courts may prescribe. The clerk shall enter in the records each order or judgment of the court and the date such entry is made.	The clerk of the district court must keep records of criminal proceedings in the form prescribed by the Director of the Administrative Office of the United States Courts. The clerk must enter in the records every court order or judgment and the date of entry.

COMMITTEE NOTE

The language of Rule 55 has been amended as part of the general restyling of the Criminal Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

Rule 56. Courts and Clerks	Rule 56. When Court Is Open
The district court shall be deemed always open for the purpose of filing any proper paper, of issuing and returning process and of making motions and orders. The clerk's office with the clerk or a deputy in attendance shall be open during business hours on all days except Saturdays, Sundays, and legal holidays, but a court may provide by local rule or order that its clerk's office shall be open for specified hours on Saturdays or particular legal holidays other than New Year's Day, Birthday of Martin Luther King, Jr., Washington's Birthday, Memorial Day, Independence Day, Labor Day, Columbus Day, Veterans Day, Thanksgiving Day, and Christmas Day.	**(a) In General.** A district court is considered always open for any filing, and for issuing and returning process, making a motion, or entering an order. **(b) Office Hours.** The clerk's office — with the clerk or a deputy in attendance — must be open during business hours on all days except Saturdays, Sundays, and legal holidays. **(c) Special Hours.** A court may provide by local rule or order that its clerk's office will be open for specified hours on Saturdays or legal holidays other than than those set aside by statute for observing New Year's Day, Martin Luther King, Jr.'s Birthday, Washington's Birthday, Memorial Day, Independence Day, Labor Day, Columbus Day, Veterans' Day, Thanksgiving Day, and Christmas Day.

COMMITTEE NOTE

The language of Rule 56 has been amended as part of the general restyling of the Criminal Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

Rule 57. Rules by District Courts	Rule 57. District Court Rules
(a) In General **(1)** Each district court acting by a majority of its district judges may, after giving appropriate public notice and an opportunity to comment, make and amend rules governing its practice. A local rule shall be consistent with — but not duplicative of — Acts of Congress and rules adopted under 28 U.S.C. § 2072 and shall conform to any uniform numbering system prescribed by the Judicial Conference of the United States. **(2)** A local rule imposing a requirement of form shall not be enforced in a manner that causes a party to lose rights because of nonwillful failure to comply with the requirement.	**(a) In General.** **(1)** ***Adopting Local Rules.*** Each district court acting by a majority of its district judges may, after giving appropriate public notice and an opportunity to comment, make and amend rules governing its practice. A local rule must be consistent with — but not duplicative of — federal statutes and rules adopted under 28 U.S.C. § 2072 and must conform to any uniform numbering system prescribed by the Judicial Conference of the United States. **(2)** ***Limiting Enforcement.*** A local rule imposing a requirement of form must not be enforced in a manner that causes a party to lose rights because of an unintentional failure to comply with the requirement.
(b) Procedure When There Is No Controlling Law. A judge may regulate practice in any manner consistent with federal law, these rules, and local rules of the district. No sanction or other disadvantage may be imposed for noncompliance with any requirement not in federal law, federal rules, or the local district rules unless the alleged violator has been furnished in the particular case with actual notice of the requirement.	**(b) Procedure When There Is No Controlling Law.** A judge may regulate practice in any manner consistent with federal law, these rules, and the local rules of the district. No sanction or other disadvantage may be imposed for noncompliance with any requirement not in federal law, federal rules, or the local district rules unless the alleged violator was furnished with actual notice of the requirement before the noncompliance.
(c) Effective Date and Notice. A local rule so adopted shall take effect upon the date specified by the district court and shall remain in effect unless amended by the district court or abrogated by the judicial council of the circuit in which the district is located. Copies of the rules and amendments so made by any district court shall upon their promulgation be furnished to the judicial council and the Administrative Office of the United States Courts and shall be made available to the public.	**(c) Effective Date and Notice.** A local rule adopted under this rule takes effect on the date specified by the district court and remains in effect unless amended by the district court or abrogated by the judicial council of the circuit in which the district is located. Copies of local rules and their amendments, when promulgated, must be furnished to the judicial council and the Administrative Office of the United States Courts and must be made available to the public.

COMMITTEE NOTE

The language of Rule 57 has been amended as part of the general restyling of the Criminal Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

Rule 58. Procedure for Misdemeanors and Other Petty Offenses	Rule 58. Petty Offenses and Other Misdemeanors
(a) Scope. **(1) In General.** This rule governs the procedure and practice for the conduct of proceedings involving misdemeanors and other petty offenses, and for appeals to district judges in such cases tried by United States magistrate judges. **(2) Applicability of Other Federal Rules of Criminal Procedure.** In proceedings concerning petty offenses for which no sentence of imprisonment will be imposed the court may follow such provisions of these rules as it deems appropriate, to the extent not inconsistent with this rule. In all other proceedings the other rules govern except as specifically provided in this rule. **(3) Definition.** The term "petty offenses for which no sentence of imprisonment will be imposed" as used in this rule, means any petty offenses as defined in 18 U.S.C. § 19 as to which the court determines, that, in the event of conviction, no sentence of imprisonment will actually be imposed.	**(a) Scope.** (1) ***In General.*** These rules apply in petty offense and other misdemeanor cases and on appeal to a district judge in a case tried by a magistrate judge, unless this rule provides otherwise. (2) ***Petty Offense Case Without Imprisonment.*** In a case involving a petty offense for which no sentence of imprisonment will be imposed, the court may follow any provision of these rules that is not inconsistent with this rule and that the court considers appropriate. (3) ***Definition.*** As used in this rule, the term "petty offense for which no sentence of imprisonment will be imposed" means a petty offense for which the court determines that, in the event of conviction, no sentence of imprisonment will be imposed.
(b) Pretrial Procedures. **(1) Trial Document.** The trial of a misdemeanor may proceed on an indictment, information, or complaint or, in the case of a petty offense, on a citation or violation notice.	**(b) Pretrial Procedure.** (1) ***Charging Document.*** The trial of a misdemeanor may proceed on an indictment, information, or complaint. The trial of a petty offense may also proceed on a citation or violation notice.

(2) Initial Appearance. At the defendant's initial appearance on a misdemeanor or other petty offense charge, the court shall inform the defendant of: **(A)** the charge, and the maximum possible penalties provided by law, including payment of a special assessment under 18 U.S.C. § 3013, and restitution under 18 U.S.C. § 3663; **(B)** the right to retain counsel; **(C)** the right to request the appointment of counsel if the defendant is unable to retain counsel, unless the charge is a petty offense for which an appointment of counsel is not required; **(D)** the right to remain silent and that any statement made by the defendant may be used against the defendant; **(E)** the right to trial, judgment, and sentencing before a district judge, unless: (i) the charge is a Class B misdemeanor motor-vehicle offense, a Class C misdemeanor, or an infraction; or (ii) the defendant consents to trial, judgment, and sentencing before the magistrate judge; **(F)** the right to trial by jury before either a United States magistrate judge or a district judge, unless the charge is a petty offense; and **(G)** the right to a preliminary examination in accordance with 18 U.S.C. § 3060, and the general circumstances under which the defendant may secure pretrial release, if the defendant is held in custody and charged with a misdemeanor other than a petty offense.	(2) ***Initial Appearance.*** At the defendant's initial appearance on a petty offense or other misdemeanor charge, the magistrate judge must inform the defendant of the following: (A) the charge, and the minimum and maximum penalties, including imprisonment, fines, any special assessment under 18 U.S.C. § 3013, and restitution under 18 U.S.C. § 3556; (B) the right to retain counsel; (C) the right to request the appointment of counsel if the defendant is unable to retain counsel — unless the charge is a petty offense for which the appointment of counsel is not required; (D) the defendant's right not to make a statement, and that any statement made may be used against the defendant; (E) the right to trial, judgment, and sentencing before a district judge — unless: (i) the charge is a petty offense; or (ii) the defendant consents to trial, judgment, and sentencing before a magistrate judge; (F) the right to a jury trial before either a magistrate judge or a district judge — unless the charge is a petty offense; and (G) if the defendant is held in custody and charged with a misdemeanor other than a petty offense, the right to a preliminary hearing under Rule 5.1, and the general circumstances, if any, under which the defendant may secure pretrial release.

(3) Consent and Arraignment. **(A) Plea Before a United States Magistrate Judge.** A magistrate judge shall take the defendant's plea in a Class B misdemeanor charging a motor vehicle offense, a class C misdemeanor, or an infraction. In every other misdemeanor case, a magistrate judge may take the plea only if the defendant consents either in writing or orally on the record to be tried before the magistrate judge and specifically waives trial before a district judge. The defendant may plead not guilty, guilty, or with the consent of the magistrate judge, nolo contendere. **(B) Failure to Consent.** In a misdemeanor case — other than a Class B misdemeanor charging a motor-vehicle offense, a Class C misdemeanor, or an infraction — magistrate judge shall order the defendant to appear before a district judge for further proceedings on notice, unless the defendant consents to the trial before the magistrate judge.	**(3)** ***Arraignment.*** (A) *Plea Before a Magistrate Judge.* A magistrate judge may take the defendant's plea in a petty offense case. In every other misdemeanor case, a magistrate judge may take the plea only if the defendant consents either in writing or on the record to be tried before a magistrate judge and specifically waives trial before a district judge. The defendant may plead not guilty, guilty, or (with the consent of the magistrate judge) nolo contendere. (B) *Failure to Consent.* Except in a petty offense case, the magistrate judge must order a defendant who does not consent to trial before a magistrate judge to appear before a district judge for further proceedings.
(c) Additional Procedures Applicable Only to Petty Offenses for Which No Sentence of Imprisonment Will be Imposed. With respect to petty offenses for which no sentence of imprisonment will be imposed, the following additional procedures are applicable: **(1) Plea of Guilty or Nolo Contendere.** No plea of guilty or nolo contendere shall be accepted unless the court is satisfied that the defendant understands the nature of the charge and the maximum possible penalties provided by law. **(2) Waiver of Venue for Plea and Sentence.** A defendant who is arrested, held, or present in a district other than that in which the indictment, information, complaint, citation, or violation notice is pending against that defendant may state in writing a wish to plead guilty or nolo contendere, to waive venue and trial in the district in which the proceeding is pending, and to consent to disposition of the case in the district in which that defendant was arrested, is held, or is present. Unless the defendant thereafter pleads not guilty, the prosecution shall be had as if venue were in such district, and notice of same shall be given to the magistrate judge in the district where the proceeding was originally commenced. The defendant's statement of a desire to plead guilty or nolo contendere is not admissible against the defendant.	**(c) Additional Procedures in Certain Petty Offense Cases.** The following procedures also apply in a case involving a petty offense for which no sentence of imprisonment will be imposed: **(1)** ***Guilty or Nolo Contendere Plea.*** The court must not accept a guilty or nolo contendere plea unless satisfied that the defendant understands the nature of the charge and the maximum possible penalty. **(2)** ***Waiving Venue.*** (A) *Conditions of Waiving Venue.* If a defendant is arrested, held, or present in a district different from the one where the indictment, information, complaint, citation, or violation notice is pending, the defendant may state in writing a desire to plead guilty or nolo contendere; to waive venue and trial in the district where the proceeding is pending; and to consent to the court's disposing of the case in the district where the defendant was arrested, is held, or is present.

	(B) *Effect of Waiving Venue.* Unless the defendant later pleads not guilty, the prosecution will proceed in the district where the defendant was arrested, is held, or is present. The district clerk must notify the clerk in the original district of the defendant's waiver of venue. The defendant's statement of a desire to plead guilty or nolo contendere is not admissible against the defendant.
(3) Sentence. The court shall afford the defendant an opportunity to be heard in mitigation. The court shall then immediately proceed to sentence the defendant, except that in the discretion of the court, sentencing may be continued to allow an investigation by the probation service or submission of additional information by either party. **(4) Notification of Right to Appeal.** After imposing sentence in a case which has gone to trial on a plea of not guilty, the court shall advise the defendant of the defendant's right to appeal including any right to appeal the sentence. There shall be no duty on the court to advise the defendant of any right of appeal after sentence is imposed following a plea of guilty or nolo contendere, except the court shall advise the defendant of any right to appeal the sentence.	(3) ***Sentencing.*** The court must give the defendant an opportunity to be heard in mitigation and then proceed immediately to sentencing. The court may, however, postpone sentencing to allow the probation service to investigate or to permit either party to submit additional information. (4) ***Notice of a Right to Appeal.*** After imposing sentence in a case tried on a not-guilty plea, the court must advise the defendant of a right to appeal the conviction and of any right to appeal the sentence. If the defendant was convicted on a plea of guilty or nolo contendere, the court must advise the defendant of any right to appeal the sentence.

(d) Securing the Defendant's Appearance; Payment in Lieu of Appearance. **(1) Forfeiture of Collateral.** When authorized by local rules of the district court, payment of a fixed sum may be accepted in suitable cases in lieu of appearance and as authorizing termination of the proceedings. Local rules may make provision for increases in fixed sums not to exceed the maximum fine which could be imposed. **(2) Notice to Appear.** If a defendant fails to pay a fixed sum, request a hearing, or appear in response to a citation or violation notice, the clerk or a magistrate judge may issue a notice for the defendant to appear before the court on a date certain. The notice may also afford the defendant an additional opportunity to pay a fixed sum in lieu of appearance, and shall be served upon the defendant by mailing a copy to the defendant's last known address. **(3) Summons or Warrant.** Upon an indictment or a showing by one of the other documents specified in subdivision (b)(1) of probable cause to believe that an offense has been committed and that the defendant has committed it, the court may issue an arrest warrant or, if no warrant is requested by the attorney for the prosecution, a summons. The showing of probable cause shall be made in writing upon oath or under penalty of perjury, but the affiant need not appear before the court. If the defendant fails to appear before the court in response to a summons, the court may summarily issue a warrant for the defendant's immediate arrest and appearance before the court.	**(d) Paying a Fixed Sum in Lieu of Appearance.** **(1)** ***In General.*** If the court has a local rule governing forfeiture of collateral, the court may accept a fixed-sum payment in lieu of the defendant's appearance and end the case, but the fixed sum may not exceed the maximum fine allowed by law. **(2)** ***Notice to Appear.*** If the defendant fails to pay a fixed sum, request a hearing, or appear in response to a citation or violation notice, the district clerk or a magistrate judge may issue a notice for the defendant to appear before the court on a date certain. The notice may give the defendant an additional opportunity to pay a fixed sum in lieu of appearance. The district clerk must serve the notice on the defendant by mailing a copy to the defendant's last known address. **(3)** ***Summons or Warrant.*** Upon an indictment, or upon a showing by one of the other charging documents specified in Rule 58(b)(1) of probable cause to believe that an offense has been committed and that the defendant has committed it, the court may issue an arrest warrant or, if no warrant is requested by an attorney for the government, a summons. The showing of probable cause must be made under oath or under penalty of perjury, but the affiant need not appear before the court. If the defendant fails to appear before the court in response to a summons, the court may summarily issue a warrant for the defendant's arrest.
(e) Record. Proceedings under this rule shall be taken down by a reporter or recorded by suitable sound equipment.	**(e) Recording the Proceedings.** The court must record any proceedings under this rule by using a court reporter or a suitable recording device.
(f) New Trial. The provisions of Rule 33 shall apply.	**(f) New Trial.** Rule 33 applies to a motion for a new trial.

(g) Appeal. **(1) Decision, Order, Judgment or Sentence by a District Judge.** An appeal from a decision, order, judgment or conviction or sentence by a district judge shall be taken in accordance with the Federal Rules of Appellate Procedure. **(2) Decision, Order, Judgment or Sentence by a United States Magistrate Judge.** **(A) Interlocutory Appeal.** A decision or order by a magistrate judge which, if made by a district judge, could be appealed by the government or defendant under any provision of law, shall be subject to an appeal to a district judge provided such appeal is taken within 10 days of the entry of the decision or order. An appeal shall be taken by filing with the clerk of court a statement specifying the decision or order from which an appeal is taken and by serving a copy of the statement upon the adverse party, personally or by mail, and by filing a copy with the magistrate judge. **(B) Appeal from Conviction or Sentence.** An appeal from a judgment of conviction or sentence by a magistrate judge to a district judge shall be taken within 10 days after entry of judgment. An appeal shall be taken by filing with the clerk of the court a statement specifying the judgment from which an appeal is taken, and by serving a copy of the statement upon the United States Attorney, personally or by mail, and by filing a copy with the magistrate judge.	**(g) Appeal.** (1) ***From a District Judge's Order or Judgment.*** The Federal Rules of Appellate Procedure govern an appeal from a district judge's order or a judgment of conviction or sentence. (2) ***From a Magistrate Judge's Order or Judgment.*** (A) *Interlocutory Appeal.* Either party may appeal an order of a magistrate judge to a district judge within 10 days of its entry if a district judge's order could similarly be appealed. The party appealing must file a notice with the clerk specifying the order being appealed and must serve a copy on the adverse party. (B) *Appeal from a Conviction or Sentence.* A defendant may appeal a magistrate judge's judgment of conviction or sentence to a district judge within 10 days of its entry. To appeal, the defendant must file a notice with the clerk specifying the judgment being appealed and must serve a copy on an attorney for the government.

(C) Record. The record shall consist of the original papers and exhibits in the case together with any transcript, tape, or other recording of the proceedings and a certified copy of the docket entries which shall be transmitted promptly to the clerk of court. For purposes of the appeal, a copy of the record of such proceedings shall be made available at the expense of the United States to a person who establishes by affidavit the inability to pay or give security therefor, and the expense of such copy shall be paid by the Director of the Administrative Office of the United States Courts.	(C) *Record.* The record consists of the original papers and exhibits in the case; any transcript, tape, or other recording of the proceedings; and a certified copy of the docket entries. For purposes of the appeal, a copy of the record of the proceedings must be made available to a defendant who establishes by affidavit an inability to pay or give security for the record. The Director of the Administrative Office of the United States Courts must pay for those copies.
(D) Scope of Appeal. The defendant shall not be entitled to a trial de novo by a district judge. The scope of appeal shall be the same as an appeal from a judgment of a district court to a court of appeals.	(D) *Scope of Appeal.* The defendant is not entitled to a trial de novo by a district judge. The scope of the appeal is the same as in an appeal to the court of appeals from a judgment entered by a district judge.
(3) **Stay of Execution; Release Pending Appeal.** The provisions of Rule 38 relating to stay of execution shall be applicable to a judgment of conviction or sentence. The defendant may be released pending an appeal in accordance with the provisions of law relating to release pending appeal from a judgment of a district court to a court of appeals.	(3) ***Stay of Execution and Release Pending Appeal.*** Rule 38 applies to a stay of a judgment of conviction or sentence. The court may release the defendant pending appeal under the law relating to release pending appeal from a district court to a court of appeals.

COMMITTEE NOTE

The language of Rule 58 has been amended as part of the general restyling of the Criminal Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

The title of the rule has been changed to "Petty Offenses and Other Misdemeanors." In Rule 58(c)(2)(B) (regarding waiver of venue), the Committee amended the rule to require that the "district clerk," instead of the magistrate judge, inform the original district clerk if the defendant waives venue and the prosecution proceeds in the district where the defendant was arrested. The Committee intends no change in practice.

In Rule 58(g)(1) and (g)(2)(A), the Committee deleted as unnecessary the word "decision" because its meaning is covered by existing references to an "order, judgment, or sentence" by a district judge or magistrate judge. In the Committee's view, deletion of that term does not amount to a substantive change.

Rule 59. Effective Date	**Rule 59.** [Deleted]
These rules take effect on the day which is 3 months subsequent to the adjournment of the first regular session of the 79th Congress, but if that day is prior to September 1, 1945, then they take effect on September 1, 1945. They govern all criminal proceedings thereafter commenced and so far as just and practicable all proceedings then pending.	

COMMITTEE NOTE

Rule 59, which dealt with the effective date of the Federal Rules of Criminal Procedure, is no longer necessary and has been deleted.

Rule 60. Title	Rule 60. Title
These rules may be known and cited as the Federal Rules of Criminal Procedure.	These rules may be known and cited as the Federal Rules of Criminal Procedure.

COMMITTEE NOTE

No changes have been made to Rule 60, as a result of the general restyling of the Criminal Rules.

SUMMARY OF PUBLIC COMMENTS

RECEIVED ON

PROPOSED STYLE CHANGES

TO

THE FEDERAL RULES OF CRIMINAL PROCEDURE (RULES 1 TO 60)

MAY, 2001

ADVISORY COMMITTEE ON FEDERAL RULES OF CRIMINAL PROCEDURE

PROPOSED AMENDMENTS TO THE STYLE PACKAGE

I. SUMMARY OF COMMENTS: STYLE PACKAGE

A number of the comments received by the Committee, a number of commentators presented written statements on the "style" package. Those comments are noted here.

Written comments about substantive changes to particular rules have been summarized on a rule-by-rule basis.

II. LIST OF COMMENTATORS: STYLE PACKAGE

CR-001 (Style)	Joe F. Spaniol, Jr., Esq., Bethesda, MD., August 24, 2000
CR-002 (Style)	Judge Donald C. Ashmanskas, United States Magistrate Judge, District of Oregon, October 4, 2000
CR-003 (Style)	Jack E. Horsley, Mattoon, Illinois, October 134, 2000
CR-004 (Style)	Holly Bench, Williamsburg, VA, November 29, 2000
CR-005 (Style)	Steven W. Allen, Jersey City, NJ, December 19, 2000
CR-006 (Style)	Judge Sam A. Joyner, United States Magistrate Judge, Northern District of OK, January 30, 2001
CR-007 (Style)	Judge James B. Seibert, :United States Magistrate Judge, ND of West Virginia, February 7, 2001
CR-008 (Style)	Judge William G. Hussmann, United States Magistrate Judge, February 5, 2001
CR-009 (Style)	Judge Robert G. Doumar, Norfolk, VA, February 9, 2001
CR-010 (Style)	Judge William Beaman, February 12, 2001

COMMENTS: STYLE PACKAGE

Joe F. Spaniol, Jr., Esq. (CR-001 (Style))
Bethesda, MD.
August 24, 2000

Mr. Spaniol offers two style changes.

Rule 5. First, he recommends that Rule 5(a)(1)(B) should be clarified by adding the words "without a warrant"

Rule 11. He believes there is an inconsistency between terms used in Rule 11(e) and 28 U.S.C. § 2255. Rule 11(e) refers to an appellate court setting aside a guilty plea but § 2255 speaks in terms of a court setting aside judgments and sentences. He notes that there are thus problems using the words "the plea may be set aside" in Rule 11. He recommends that the words in Rule 11(e) should be changed to "and a judgment or sentence may be set aside."

Judge Donald C. Ashmanskas (CR-002 (Style))
United States Magistrate Judge
District of Oregon
October 4, 2000

Rule 6. Judge Ashmanskas recommends changes to Rules 6 and 53. With regard to Rule 6(f) he suggests substituting the term "presiding grand juror" for jury foreperson. And in Rule 6(f) he suggests that unless there is a provision for district judges to assume the responsibilities of a magistrate judge, that the indictment could be returned to either a federal magistrate judge or a district court judge.

Rule 53. In Rule 53 he recommends new language that would extend the prohibition of cameras, etc. to other areas in the courthouse. He also recommends that the rule be amended to permit cameras for coverage of naturalization, ceremonial, or investiture proceedings and for instructional purposes in educational institutions.

Jack E. Horsley, Esq. (CR-003 (Style))
Mattoon, Illinois
October 13, 2000

Rule 5. Mr. Horsley suggests that in referring to an affidavit, the words "or any other document" be added before the words "filed with it."

Holly Bench (CR-004 (Style))
Williamsburg, VA
November 29, 2000

Rule 4. Ms. Bench points out that in Rule 4(b)(1)(C) the words "none" may be referring to something other than the magistrate not being available. She suggests the following language: "command that the defendant be arrested an brought without unnecessary delay before a magistrate judge or, if none is available, before a state or local judicial officer."

She also suggests adding commas in Rule 4(c)(3)(C) (See her memo)

Ms. Bench also suggests that the language in Rule (c)(4)(B) be changed to read, "the person on whom the summons was served must return it" as opposed to "the person to whom a summons was delivered for service must return it."

In Rule 4(c)(4)(C), she suggests adding a comma after the word "summons."

Rule 5. She notes that there may be ambiguity in Rule 5(a)(1)(A) and (a)(1)(B) regarding who must be the one to personally take the defendant before a magistrate judge. She asks whether person executing the arrest must be the one or can that person merely have the responsibility for insuring that the defendant is taken to the magistrate.

She states that there is a possible inconsistency in Rules 5(b) and Rule 5(c)(2)(C). In (b) if the defendant is arrested without a warrant, a complaint must be filed. But in (c)(2)(C), if a defendant is arrested without a warrant, a warrant must be issued before the defendant can be transferred.

Steven W. Allen, Esq. (CR-005 (Style))
Jersey City, NJ
December 19, 2000

Rule 26.2(a). Mr. Allen, who is responsible for incorporating the new rules into MOORE'S FEDERAL PRACTICE has noticed several errors. First in regard to Rule 26.2(a), he notes that the phrase "the possession" is ungrammatical. The existing rule, he notes, uses the term "their possession" which is also ungrammatical but better than the new language. He suggests adding the words, "of the party that called the witness," after the words, "the possession."

Second, in the same rule, he states that the word "witnesses's" appears to be a typo although he notes that it might mean that production is required if it relates to the testimony of all of the witnesses.

Judge Sam A. Joyner (CR-006 (Style))
United States Magistrate Judge
Northern District of Oklahoma
January 30, 2001

Judge Joyner provides a positive endorsement for all of the rules but gives his strongest recommendation for Rules 1(b), 4, 5,5.1, 9(b), 17(a), 32.1, 41, 43, and 55 as the most helpful.

He offers no changes to the rules.

Judge James B. Seibert (CR-007 (Style))
(Also CR-022 on the Substantive Rules)
United States Magistrate Judge
ND of West Virginia
February 7, 2001

Rule 5. Judge Seibert strongly approves the consolidation of Rules 32.1 and 40 into Rule 5.

Judge William G. Hussmann (CR-008 (Style))
(Also CR-023 on the Substantive Rules)
United States Magistrate Judge
February 5, 2001

Judge Hussmann believes that all of the rules that most directly impact his work are improvements to current practice (E.g. Rules 5, 5.1, 9, 10, 12, 41, and 43).

Judge Robert G. Doumar (CR-009 (Style))
Norfolk, VA
February 9, 2001

Judge Doumar offers style suggestions on a number of rules:

Rule 6. He suggests that in Rules 6(e)(3)(A) and 6(e)(3)(B) that the words "laws of the United States" be used instead of the "Federal criminal laws." He notes that it may be problematical on those situations where it is not clear whether the act violates the civil laws and prosecution may proceed in an indirect manner.

In Rule 6(f) he suggests that the words "federal judge" should be substituted for "magistrate judge' because it is district judges that most often receive indictments in open court.

Rule 7. In Rule 7(d) he recommends the following language, "the court may itself or on motion of any party strike surplusage from the indictment or information" instead of the proposed language.

Rule 11. He suggests substitute wording for Rule 11(b)(H): "Any maximum possible prison penalty, special assessment, criminal forfeiture, fine, term of supervised release and that restitution may be ordered as determined as a result of the commission of the offense." This wording, he notes, would eliminate other possible penalties and clarify the issue of restitution.

He also suggests that in Rule 11(b)(J) that the word "authority" should be deleted and substitute the words "that the court's ability to depart from the guidelines is severely limited." He believes that the word "authority" can create problems beyond belief.

He commends the Committee for deleting the language in Rule 11(d) concerning whether the defendant had talked with the government about a plea. He states that that portion of the inquiry has always caused problems.

In Rule 11(d)(2)(B) he recommends that it be changed to "on motion of the defendant, if the court determines good cause to have been shown, to allow withdrawal of the plea."

Rule 12.1 Rule 12.1(b)(2). He suggests adding the words, "unless the court otherwise directs." The 10-day rule may be impossible, he notes, because of the time of service of the alibi defense.

Rule 12.2 Regarding Rule 12.2(a), he recommends that the words "in the case" be added as well as Rule 12.2(b) after the words "attorney for the government."

Rule 12.3. In Rule 12.3 he would add "in the case" after the words "attorney for the government."

Rule 16. Regarding Rule 16(a)(1)(G), recommends that the experts to be disclosed be "technical or scientific" expert witnesses, not "specialized knowledge." He notes that lay witnesses sometimes have specialized knowledge and that the disclosure should be limited to technical or scientific experts.

Rule 17. He recommends that it should be a requisite to returned all served subpoenas to the clerk before trial and also those summons not served

Rule 24. Rule 24(a)(2)(A). He suggests that instead of the proposed language, that the following be substituted: "submit further questions that the court may ask if it considers them proper or with the court's permission ask further questions that the court considers proper."

Finally, in Rule 24(b) he recommends the reduction of the number of peremptory challenges to six and three instead of ten and six. *Batson,* he says, has eliminated the need for any peremptory challenges.

Judge William Beaman (CR-010 (Style))
February 12, 2001

Rule 41. He agrees with the language regarding covert searches but notes that often it is necessary to continue those observations beyond 7 days. Reasonableness, he states, is the appropriate test.

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

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CRIMINAL RULES

MILTON I. SHADUR
EVIDENCE RULES

TO: **Hon. Anthony J. Scirica, Chair**
Standing Committee on Rules of Practice and Procedure

FROM: **W. Eugene Davis, Chair**
Advisory Committee on Federal Rules of Criminal Procedure

SUBJECT: **Report of the Advisory Committee on Criminal Rules**

DATE: **May 10, 2001**

I. Introduction

The Advisory Committee on the Rules of Criminal Procedure met on April 25-26 in Washington, D.C. and acted on the proposed restyling of the Rules of Criminal Procedure and on proposed substantive amendments to some of those rules. The Minutes of that meeting are included at Appendix E.

II. Action Items—Summary and Recommendations.

This report contains two action items:

- Approval and forwarding to the Judicial Conference of restyled Criminal Rules 1 through 60 (Appendix A); and

- Approval and forwarding to the Judicial Conference of substantive amendments to eight rules—Rules 5, 5.1, 10, 12.2, 26, 30, 35, and 43 (Appendix B).

III. ACTION ITEM—Approval and Forwarding to Judicial Conference of Restyled Criminal Rules 1-60 (Appendix A)

* * * * *

B. Publication of Style and Substantive Packages for Public Comment

In June 2000, the Standing Committee authorized publication for public comment of two packages of amendments. The purpose of presenting the proposed amendments in two separate pamphlets was to highlight for the public that in addition to the "style" changes in Rules 1 to 60, a number of significant (perhaps controversial) amendments were also being proposed.

1. The "Style" Package

The first package (Appendix A)—referred to as the "style" package, included Rules 1 to 60. For those rules where the Committee was proposing significant substantive changes (Rules 5, 5.1, 10, 12.2, 26, 30, 35, 41, and 43), the language containing those

changes was deleted from the "style" package. A "Reporter's Note" explained to the public that additional substantive changes for that particular rule were being published simultaneously in a separate package.

2. The "Substantive" Package

The second package (Appendix B)—referred to as the "substantive" package, consisted of Rules 5, 5.1, 10, 12.2, 26, 30, 32, 35, 41, and 43, which all provide for significant changes in practice. This version of the package included not only the restyled version of the rule but also the language that would effect the change in practice. The Committee Notes reflect those changes and again, a "Reporter's Note" explained that another version of each of these rules (which included only style changes) was being published simultaneously in a separate package.

* * * * *

IV. ACTION ITEM—Approval and Forwarding to Judicial Conference of Amendments to Rules 5, 5.1, 10, 12.2, 12.4, 26, 30, 35, and 43 in the Substantive Package (Appendix B)

A. The Substantive Package of Amendments—An Overview

In June 2000, the Standing Committee approved publication of a separate package of amendments, known as the "substantive" package. That package originally consisted of Rules 5, 5.1, 10, 12.2, 26, 30, 32, 35, 41, and 43, which all provide for significant changes in practice. This version of the package includes not only the restyled version of the rule but also the language that would effect the change in practice. The Committee Notes reflect those changes and a

"Reporter's Note" explained to the public that another version of each of these rules (which includes only style changes) was being published simultaneously in a separate package.

The Advisory Committee received approximately 80 written comments, and heard the testimony of five witnesses, on the proposed substantive amendments. Most of the comments focused on the proposed amendments to Rules 5, 10, and 26, which would provide for video teleconferencing of initial appearances and arraignments and for video transmission of trial testimony. Those comments and testimony are summarized by rule at Appendix C.

B. Presentation of Substantive Package to Judicial Conference

As noted, above, the Advisory Committee published two separate packages of amendments: the "style" package and the "substantive" package. Throughout the post-publication review of the public comments and revisions, and for purposes of discussion by the Standing Committee, the Advisory Committee has maintained the two distinct packages.

The "style" package of amendments to Rules 1-60 is designed to stand on its own and could be presented to the Judicial Conference and Supreme Court in that format. The proposed amendments in the separate, "substantive" package include not only the style changes to those particular rules, but more importantly, the significant substantive amendments that may generate some controversy. Following the public comment, the Committee made a number of changes to proposed Rules 5 and 10 and withdrew two amendments that seemed particularly controversial—the amendments to Rule 32 and 41. The Committee does not believe that the substantive amendments as presently written will draw significant controversy.

The Standing Committee must decide whether to submit the style and substantive packages separately to the Judicial Conference. Whatever the Standing Committee decides to do in this respect, the Advisory Committee assumes that the rules that the Judicial Conference approves will be blended together for submission to the Supreme Court.

C. Rule-by-Rule Summary of Post-Publication Changes to the Substantive" Package

1. Rule 5. Initial Appearance: Video Teleconferencing

The substantive change to Rule 5 is in new Rule 5(d), which permits video teleconferencing for an appearance under this rule—if the defendant consents. This change reflects the growing practice among state courts to use video teleconferencing to conduct initial proceedings. A similar amendment was proposed to Rule 10 concerning arraignments. In amending Rules 5, 10, and 43 (which generally requires the defendant's presence at all proceedings), the Committee was very much aware of the argument that permitting a defendant to appear by video teleconferencing might be considered an erosion of an important element of the judicial process.

As originally presented to the Standing Committee in January 2000, the proposed rule included a provision to use video teleconferencing for initial appearances—if the defendant consents. Upon further reflection, the Advisory Committee recommended, and the Standing Committee adopted, a proposal to publish not only that provision but also an alternate provision that would permit the court to conduct such procedures, even without the defendant's consent. Thus, the published version offered two alternatives.

After further discussion, the Advisory Committee recommends, by a vote of 7 to 4, that the Standing Committee approve the version that requires the defendant's consent.

The public comment (which included responses from district judges and magistrate judges) on the proposed amendments was mixed. For example, on behalf of the Committee on Defender Services, its chair objected to the use of video teleconferencing without the defendant's consent and expressed reservations about its use under any circumstances. The Committee nonetheless believes that in appropriate circumstances the court and the defendant should have the option of using video teleconferencing, as long as the defendant consents to that procedure. The question of when it would be appropriate for a defendant to consent is not spelled out in the rule. That is left to the defendant and the court in each case. Nor does the rule specify any particular technical requirements for the video conferencing system to be used.

The Committee Note to Rule 5 has been expanded to include additional discussion on the factors that a court may wish to consider in deciding whether to use video teleconferencing for initial appearances.

Recommendation: The Advisory Committee recommends that the substantive amendment to Rule 5 be approved and forwarded to the Judicial Conference with the recommendation that if it is approved, the "substantive" version be substituted for the "style" version.

2. Rule 5.1. Preliminary Hearing: Authority of Magistrate Judge to Grant Continuance

Rule 5.1(c) contains a substantive change that creates a conflict between the rule and a federal statute—18 U.S.C. § 3060(c). The proposed amendment is being offered at the recommendation of the Judicial Conference at its Spring 1998 meeting.

In 1997, the Advisory Committee considered a proposed amendment to Rule 5(c), which would permit a magistrate judge to continue a preliminary hearing even if, the defendant objects. The Committee decided to recommend to the Standing Committee that it first propose legislative changes to § 3060(c). The Standing Committee, however, believed it more appropriate for the Advisory Committee to propose a change to Rule 5(c) through the Rules Enabling Act and remanded the issue to the Advisory Committee. At its October 1997 meeting, the Committee considered the issue and decided not to pursue the issue any further, and reported that position to the Standing Committee at its January 1998 meeting.

The matter was ultimately presented to the Judicial Conference during its Spring 1998 meeting. In its summary of actions, the Conference remanded the issue to the Advisory Committee with:

> instructions to the Rules Committee to propose an amendment to Criminal Rule 5.1(c) consistent with the amendment to 18 U.S.C. § 3060 which has been proposed by the Magistrate Judges Committee.

Revised Rule 5.1 includes language that expands the authority of a magistrate judge to grant a continuance for a preliminary hearing conducted under the rule. Currently, if the defendant does not

consent, then the government must present the matter to a district judge. As noted above, the proposed amendment conflicts with 18 U.S.C. § 3060, which tracks the original language of the rule and permits only a district judge to grant a continuance when the defendant objects. The Committee believes that this restriction is an anomaly. The Committee also believes that the change will promote judicial economy and that it is entirely appropriate to seek this change to the rule through the Rules Enabling Act procedures. *See* 28 U.S.C. § 2072(b). Under those procedures, approval by Congress of this rule change would supersede the parallel provisions in 18 U.S.C. § 3060. The Committee understands that if the amendment is approved, the appropriate Congressional staff will be advised and an amendment of the existing law pursued.

No post-publication changes were made to Rule 5.1, other than minor stylistic changes.

Recommendation: The Advisory Committee recommends that the substantive amendment to Rule 5.1 be approved and forwarded to the Judicial Conference with the recommendation that if it is approved, the "substantive" version be substituted for the "style" version.

3. Rule 10. Arraignment

The proposed amendments to Rule 10 create two exceptions to the requirement that the defendant be personally present in court for an arraignment. First, revised Rule 10(b) permits the court to hold an arraignment in the defendant's absence when the defendant has waived the right to be present in writing and the court consents to that waiver. Second, revised Rule 10(c) permits the court to hold

arraignments by video teleconferencing—with the defendant's consent. A conforming amendment will also be made to Rule 43.

a. Waiver of Appearance at Arraignment: Rule 10(b)

Although the Committee considered the traditional objections to permitting a defendant to waive a personal appearance, the Committee nonetheless believed that in appropriate circumstances the court, and the defendant, should have the option of conducting the arraignment in the defendant's absence—a procedure used in some state courts. Under Rule 10(b), the defendant must give his or her consent in writing and it must be signed by both the defendant and the defendant's attorney. Finally, the amendment requires that the waiver specifically state that the defendant has received a copy of the charging instrument.

The amendment does not permit waiver of an appearance when the defendant is charged with a felony information. In that instance, the defendant is required by Rule 7(b) to be present in court to waive the indictment. Nor does the amendment permit a waiver of appearance when the defendant is standing mute, or entering a conditional plea, a nolo contendere plea, or a guilty plea. In each of those instances the Committee believed that it was more appropriate for the defendant to appear personally.

The amendment does not permit the defendant to waive the arraignment itself, which may be a triggering mechanism for time limits in other rules.

The Committee voted unanimously to recommend approval of Rule 10(b).

b. Video Teleconferencing for Arraignments: Rule 10(c).

Rule 10(c) addresses the second substantive change in the rule. That rule would permit the court to conduct arraignments through video teleconferencing. Although the practice is now used in state courts and in some federal courts, Rules 10 and 43 have generally prevented federal courts from using that method for arraignments in criminal cases over the defendant's objection. *See, e.g., Valenzuela-Gonzales v. United States*, 915 F.2d 1276, 1280 (9th Cir. 1990) (Rules 10 and 43 require personal appearance; thus, pilot program for video teleconferencing not permitted). A similar amendment was proposed by the Committee in 1993 and published for public comment but was later withdrawn from consideration in order to consider the results of several planned pilot programs. Upon further consideration, the Committee believed that the benefits of using video teleconferencing outweighed the costs of doing so. This amendment also parallels a proposed change Rule 5(d) that would permit initial appearances to be conducted by video teleconferencing.

When this rule was published for public comment, an alternative version was also provided. The alternative version of Rule 10(c) would have permitted the court to use teleconferencing without the defendant's consent.

In deciding to adopt the amendment, the Committee was persuaded in part by the fact that some districts deal with a very high volume of arraignments of defendants who are in custody and because of the distances involved, must be transported long distances. That procedure can also present security risks to law enforcement and court personnel.

Unlike the waiver for any appearance whatsoever at an arraignment, noted above, this particular provision would not require that the waiver for video teleconferencing be in writing. Nor does it require that the defendant waive that appearance in person, in open court.

The Committee voted 8 to 3 to recommend this amendment to Rule 10. As with Rule 5, above, the Committee Note has been expanded to address issues that the court may wish to consider in using video teleconferencing.

Recommendation: The Advisory Committee recommends that the substantive amendments to Rule 10 be approved and forwarded to the Judicial Conference with the recommendation that if they are approved, the "substantive" version be substituted for the "style" version.

4. Rule 12.2. Notice of Insanity Defense; Mental Examination

Rule 12.2, which addresses the notice requirements for presenting an insanity defense or evidence of mental condition on the merits, contains several significant amendments.

First, Rule 12.2(c) clarifies that a court may order a mental examination for a defendant who has indicated an intention to raise a defense of mental condition bearing on the issue of guilt. Second, under Rule 12.2(b), the defendant is required to give notice of an intent to present expert evidence of the defendant's mental condition during a capital sentencing proceeding. Third, Rule 12.2(c) addresses the ability of the trial court to order a mental examination for a defendant who has given notice of an intent to present evidence of

mental condition during capital sentencing proceedings and sets out when the results of that examination may be disclosed. Fourth, the amendment addresses the timing of disclosure of the results and reports of the defendant's expert examination. Finally, the amendment extends the sanctions for failure to comply with the rule's requirements to the punishment phase of a capital case. Rule 12.2(d).

The Committee made several post-publication changes to Rule 12.2. First, it deleted the words "upon motion of the government" from Rule 12.2 (c)(1) to reflect that examinations may also be requested by either the defendant or the government. Second, Rule 12.2(c)(4)(A) has been modified to clarify that a defendant's statements are admissible only after the defendant has introduced evidence requiring the notice in Rule 12.2(a) or (b)(1). Finally, Rule 12.2(c)(4)(B) has been amended to clarify that introduction of expert testimony in a capital sentencing proceeding requiring notice under Rule 12.2(b)(2) will trigger use of a defendant's statements.

The Committee voted unanimously to recommend approval of the substantive amendments to Rule 12.2.

Recommendation: The Advisory Committee recommends that the substantive amendments to Rule 12.2 be approved and forwarded to the Judicial Conference with the recommendation that if they are approved, the "substantive" version be substituted for the "style" version.

5. Rule 12.4. Disclosure Statement (New Rule)

The Committee made several post-publication changes to new Rule 12.4. First, regarding Rule 12.4(a)(2), the Committee recognized the potential difficulty in requiring the prosecution to

learn all of the disclosable information about an organizational defendant early in the proceedings. Thus, the Committee added the words, "to the extent it can be obtained through due diligence" at the end of that section. Second, the language in Rule 12.4(b)(1) was intended to track similar language in the Civil Rules counterpart to this rule but that approach creates problems in applying the requirements to a criminal proceeding. Thus, the Committee modified Rule 12.4(b)(1) to indicate that the disclosure requirements are triggered with the defendant's initial appearance. Finally, the Committee has recommended deleting the reference in Rule 12.4(a)(1)(B), which delegates authority to the Judicial Conference to prescribe additional disclosure requirements that may preempt local rules governing disclosure.

Recommendation: The Advisory Committee recommends that Rule 12.4 be approved and forwarded to the Judicial Conference with the recommendation that it be approved.

6. Rule 26. Taking Testimony: Video Transmission of Testimony

The proposed amendment to Rule 26(b) would permit the court to use remote transmission of live testimony. Current Rule 26 indicates that normally only testimony given in open court will be considered, unless otherwise provided by the rules, an Act of Congress, or any other rule adopted by the Supreme Court. For example, Rule 15 recognizes that depositions, in conjunction with Federal Rule of Evidence 804, may be used to preserve and present testimony if there are exceptional circumstances in the case and it is in the interest of justice to do so. The revision to Rule 26(b) extends the logic underlying that exception to contemporaneous video

testimony of an unavailable witness. The amendment generally parallels a similar provision in Federal Rule of Civil Procedure 43.

As a result of public comments, the Committee modified the rule in several respects. First, the rule was changed to make it clear that the Committee envisions two-way video transmission. Second, the term "compelling circumstances" was changed to "exceptional circumstances" to reflect the standard for taking depositions in Rule 15 and the standard applied by courts that have addressed the Confrontation Clause issue. Finally, the Committee Note has been expanded.

Although a number of public comments raised concerns about whether the amendment would violate a defendant's rights under the Confrontation Clause, the Committee believes that the rule is constitutional and that permitting use of video transmission of testimony only in those instances when certain requirements are met, is appropriate. *See United States v. Gigante*, 166 F.3d 75 (2d Cir. 1999) (use of remote transmission of unavailable witness' testimony did not violate confrontation clause).

The amendment recognizes that there is a need for the trial court to impose appropriate safeguards and procedures to insure the accuracy and quality of the transmission, the ability of the jurors to hear and view the testimony, and the ability of the judge, counsel, and the witness to hear and understand each other during questioning. Deciding what safeguards are appropriate is left to the sound discretion of the trial court. That topic is discussed in an expanded Committee Note.

The Committee voted unanimously to recommend approval of the amendment to Rule 26.

Recommendation: The Advisory Committee recommends that the substantive amendment to Rule 26 be approved and forwarded to the Judicial Conference with the recommendation that if it is approved, the "substantive" version be substituted for the "style" version.

7. Rule 30. Jury Instructions

The amendment to Rule 30 would permit the court to request the parties to submit their requested instructions before trial. The current rule indicates that a court may request those instructions after the trial has started. Several public comments raised concerns that permitting the court to require the defense to disclose its theory of the case prior to trial might be problematic. The Committee concluded, however, that the court should have the option of requesting pretrial submission of requested instructions and has included a comment in the Note to the effect that the amendment is not intended to change the practice of submitting supplemental requests after trial has started.

The Committee has also addressed the issue of waiver of objections to the instructions by adding a sentence at the end of Rule 30(d). The Committee decided not to address more explicitly the issue of whether a party must renew an objection after the instructions are given.

The Committee voted 9 to 2 to recommend approval of the amendment to Rule 30.

Recommendation: The Advisory Committee recommends that the substantive amendment to Rule 30 be approved and forwarded to the Judicial Conference with the recommendation that if it is approved, the "substantive" version be substituted for the "style" version.

8. Rule 35. Correcting or Reducing Sentence

Rule 35 contains several changes. First, as noted, *supra*, the published version of Rule 35 used the term "sentencing" to describe the triggering element for the two "time" requirements in the rule. While the rule was out for public comment, and at the suggestion of the Standing Committee, the Advisory Committee discussed the issue of further defining or clarifying the term "sentencing." The Committee's initial decision was to use the term "oral announcement of the sentence." That is the view of the majority of the courts that have addressed the issue. Upon further reflection, however, the Committee decided to add a new provision (now Rule 35(a)) and define sentencing as the entry of the judgment. Even though that may result in the change in practice in some circuits, it is more consistent with describing the triggering event, for example, of an approval of a sentence.**

** At the request of the Advisory Committee on Criminal Rules, the Committee on Rules of Practice and Procedure agreed at its June 7-8, 2001, meeting, to withdraw the proposal defining "sentencing" as the entry of the judgment. The Committee also agreed with the advisory committee's recommendation to publish the withdrawn proposal for public comment.

Rule 35(c) (published as Rule 35(b)) includes a substantive change that had been under consideration apart from the restyling project. Rule 35(c) includes new language to the effect that the government may file a late motion to reduce a sentence if it demonstrates that the defendant had presented information, the usefulness of which could not reasonably be known until more than one year following sentencing. The current rule, however, did not address the issue and the courts were split on the issue. *Compare United States v. Morales*, 52 F.3d 7 (1st Cir. 1995) (permitting filing and granting of motion) *with United States v. Orozco*, 160 F.3d 1309 (11th Cir. 1998) (denying relief and citing cases). Although the court in *Orozco* felt constrained to deny relief under Rule, the court urged an amendment of the rule to:

> address the apparent unforeseen situation presented in this case where a convicted defendant provides information to the government prior to the expiration of the jurisdictional, one-year period from sentence imposition, but that information does not become useful to the government until more than one year after sentence imposition. *Id.* at 1316, n.13.

The amendment to Rule 35(c) is intended to address the instances identified by the court in *Orozco*. The proposed amendment would not eliminate the one-year requirement as a generally operative element.

Following additional consideration of the rule, the Committee has recommended, post-publication, a slight expansion in Rule 35(c) that would permit the government to file a motion for sentence reduction when the defendant is not aware of the helpful nature of the

information until after one year, but provides it to the government promptly upon learning of its usefulness.

The Committee voted unanimously to recommend the approval of the proposed amendments to Rule 35.

Recommendation: The Advisory Committee recommends that the substantive amendments to Rule 35 be approved and forwarded to the Judicial Conference with the recommendation that if they are approved, the "substantive" version be substituted for the "style" version.

9. Rule 43. Defendant's Presence

The amendments to Rule 43 are conforming changes, that hinge on approval of Rules 5 and 10 concerning video teleconferencing, and Rule 10 that permits the defendant to waive appearance at an arraignment. The Committee made no post-publication changes to Rule 43.

Recommendation: The Advisory Committee recommends that the substantive amendment to Rule 43 be approved and forwarded to the Judicial Conference with the recommendation that if it is approved, the "substantive" version be substituted for the "style" version.

VI. INFORMATION ITEM—Withdrawal of Substantive Amendment to Rule 32 and Deferral of Substantive Amendment to Rule 41

A. Rule 32. Sentencing: Ruling on Material Matters.

The Standing Committee approved publication of an amendment to Rule 32 that would have required the sentencing judge to resolve objections to "material" matters in the presentencing report—even if those matters would not directly affect the actual sentence. The rationale for that proposed change rested on the understanding that the presentence report is used by the Bureau of Prisons in making important post-sentencing decisions regarding such issues as the ability of the defendant to receive drug treatment. Upon further consideration, and after considering comments from the Bureau of Prisons, the Committee decided to withdraw the recommendation. Nonetheless, the Committee decided to include information in the Committee Note that would draw attention to the potential problems associated with incorrect information in the presentence report.

B. Rule 41. Search and Seizure: Covert Searches

The Standing Committee approved publication of an amendment to Rule 41 that would have addressed the procedures for issuing a warrant for covert entries. After considering the public comments on the rule, and further discussion, the Committee has decided to defer further action on that amendment. The Committee envisions continued discussions of the amendment and contemporaneous consideration of amendments to Rule 41 that would address the topic of issuing what are often referred to as "tracking device" warrants.

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PROPOSED AMENDMENTS TO THE FEDERAL RULES OF CRIMINAL PROCEDURE*

~~**Rule 5. Initial Appearance Before the Magistrate Judge**~~

~~**(a) In General.** Except as otherwise provided in this rule, an officer making an arrest under a warrant issued upon a complaint or any person making an arrest without a warrant shall take the arrested person without unnecessary delay before the nearest available federal magistrate judge or, if a federal magistrate judge is not reasonably available, before a state or local judicial officer authorized by 18 U.S.C. § 3041. If a person arrested without a warrant is brought before a magistrate judge, a complaint, satisfying the probable cause requirements of Rule 4(a), shall be promptly filed. When a person, arrested with or without a warrant or given a summons, appears initially before the magistrate judge, the magistrate judge shall proceed in accordance with the~~

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

~~applicable subdivisions of this rule. An officer making an arrest under a warrant issued upon a complaint charging solely a violation of 18 U.S.C. § 1073 need not comply with this rule if the person arrested is transferred without unnecessary delay to the custody of appropriate state or local authorities in the district of arrest and an attorney for the government moves promptly, in the district in which the warrant was issued, to dismiss the complaint.~~

~~**(b) Misdemeanors and Other Petty Offenses.** If the charge against the defendant is a misdemeanor or other petty offense triable by a United States magistrate judge under 18 U.S.C. § 3401, the magistrate judge shall proceed in accordance with Rule 58.~~

~~**(c) Offenses Not Triable by the United States Magistrate Judge.** If the charge against the defendant is not triable by the United States magistrate judge, the defendant shall~~

~~not be called upon to plead. The magistrate judge shall inform the defendant of the complaint against the defendant and of any affidavit filed therewith, of the defendant's right to retain counsel or to request the assignment of counsel if the defendant is unable to obtain counsel, and of the general circumstances under which the defendant may secure pretrial release. The magistrate judge shall inform the defendant that the defendant is not required to make a statement and that any statement made by the defendant may be used against the defendant. The magistrate judge shall also inform the defendant of the right to a preliminary examination. The magistrate judge shall allow the defendant reasonable time and opportunity to consult counsel and shall detain or conditionally release the defendant as provided by statute or in these rules. A defendant is entitled to a preliminary examination, unless waived, when charged~~

~~with any offense, other than a petty offense, which is to be tried by a judge of the district court. If the defendant waives preliminary examination, the magistrate judge shall forthwith hold the defendant to answer in the district court. If the defendant does not waive the preliminary examination, the magistrate judge shall schedule a preliminary examination. Such examination shall be held within a reasonable time but in any event not later than 10 days following the initial appearance if the defendant is in custody and no later than 20 days if the defendant is not in custody, provided, however, that the preliminary examination shall not be held if the defendant is indicted or if an information against the defendant is filed in district court before the date set for the preliminary examination. With the consent of the defendant and upon a showing of good cause, taking into account the public interest in the prompt disposition of~~

~~criminal cases, time limits specified in this subdivision may be extended one or more times by a federal magistrate judge. In the absence of such consent by the defendant, time limits may be extended by a judge of the United States only upon a showing that extraordinary circumstances exist and that delay is indispensable to the interests of justice.~~

Rule 5. Initial Appearance

(a) In General.

(1) ***Appearance Upon an Arrest.***

(A) A person making an arrest within the United States must take the defendant without unnecessary delay before a magistrate judge, or before a state or local judicial officer as Rule 5(c) provides, unless a statute provides otherwise.

(B) A person making an arrest outside the United States must take the defendant without unnecessary delay before a magistrate judge, unless a statute provides otherwise.

(2) ***Exceptions.***

(A) An officer making an arrest under a warrant issued upon a complaint charging solely a violation of 18 U.S.C. § 1073 need not comply with this rule if:

(i) the person arrested is transferred without unnecessary delay to the custody of appropriate state or local authorities in the district of arrest; and

(ii) an attorney for the government moves promptly, in the district where the warrant was issued, to dismiss the complaint.

(B) If a defendant is arrested for violating probation or supervised release, Rule 32.1 applies.

(C) If a defendant is arrested for failing to appear in another district, Rule 40 applies.

(3) ***Appearance Upon a Summons.*** When a defendant appears in response to a summons under Rule 4, a magistrate judge must proceed under Rule 5(d) or (e), as applicable.

(b) **Arrest Without a Warrant.** If a defendant is arrested without a warrant, a complaint meeting Rule 4(a)'s requirement of probable cause must be promptly filed in the district where the offense was allegedly committed.

(c) **Place of Initial Appearance; Transfer to Another District.**

(1) ***Arrest in the District Where the Offense Was Allegedly Committed.*** If the defendant is arrested in

the district where the offense was allegedly committed:

(A) the initial appearance must be in that district; and

(B) if a magistrate judge is not reasonably available, the initial appearance may be before a state or local judicial officer.

(2) ***Arrest in a District Other Than Where the Offense Was Allegedly Committed.*** If the defendant was arrested in a district other than where the offense was allegedly committed, the initial appearance must be:

(A) in the district of arrest; or

(B) in an adjacent district if:

(i) the appearance can occur more promptly there; or

(ii) the offense was allegedly committed there and the initial appearance will occur on the day of arrest.

(3) ***Procedures in a District Other Than Where the Offense Was Allegedly Committed.*** If the initial appearance occurs in a district other than where the offense was allegedly committed, the following procedures apply:

(A) the magistrate judge must inform the defendant about the provisions of Rule 20;

(B) if the defendant was arrested without a warrant, the district court where the offense was allegedly committed must first issue a warrant before the magistrate judge transfers the defendant to that district;

(C) the magistrate judge must conduct a preliminary hearing if required by Rule 5.1 or Rule 58(b)(2)(G);

(D) the magistrate judge must transfer the defendant to the district where the offense was allegedly committed if:

(i) the government produces the warrant, a certified copy of the warrant, a facsimile of either, or other appropriate form of either; and

(ii) the judge finds that the defendant is the same person named in the indictment, information, or warrant; and

(E) when a defendant is transferred and discharged, the clerk must promptly transmit the papers and any bail to the clerk in the district where the offense was allegedly committed.

(d) Procedure in a Felony Case.

(1) ***Advice.*** If the defendant is charged with a felony, the judge must inform the defendant of the following:

(A) the complaint against the defendant, and any affidavit filed with it;

(B) the defendant's right to retain counsel or to request that counsel be appointed if the defendant cannot obtain counsel;

(C) the circumstances, if any, under which the defendant may secure pretrial release;

(D) any right to a preliminary hearing; and

(E) the defendant's right not to make a statement, and that any statement made may be used against the defendant.

(2) ***Consulting with Counsel.*** The judge must allow the defendant reasonable opportunity to consult with counsel.

(3) ***Detention or Release.*** The judge must detain or release the defendant as provided by statute or these rules.

(4) ***Plea.*** A defendant may be asked to plead only under Rule 10.

(e) **Procedure in a Misdemeanor Case.** If the defendant is charged with a misdemeanor only, the judge must inform the defendant in accordance with Rule 58(b)(2).

(f) **Video Teleconferencing.** Video teleconferencing may be used to conduct an appearance under this rule if the defendant consents.

COMMITTEE NOTE

The language of Rule 5 has been amended as part of the general restyling of the Criminal Rules to make them more easily understood

and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic, except as noted below.

Rule 5 has been completely revised to more clearly set out the procedures for initial appearances and to recognize that such appearances may be required at various stages of a criminal proceeding, for example, where a defendant has been arrested for violating the terms of probation.

Rule 5(a), which governs initial appearances by an arrested defendant before a magistrate judge, includes several changes. The first is a clarifying change; revised Rule 5(a)(1) provides that a person making the arrest must bring the defendant "without unnecessary delay" before a magistrate judge, instead of the current reference to "nearest available" magistrate judge. This language parallels changes in Rule 4 and reflects the view that time is of the essence. The Committee intends no change in practice. In using the term, the Committee recognizes that on occasion there may be necessary delay in presenting the defendant, for example, due to weather conditions or other natural causes. A second change is non-stylistic, and reflects the stated preference (as in other provisions throughout the rules) that the defendant be brought before a federal judicial officer. Only if a magistrate judge is not available should the defendant be taken before a state or local officer.

The third sentence in current Rule 5(a), which states that a magistrate judge must proceed in accordance with the rule where a defendant is arrested without a warrant or given a summons, has been deleted because it is unnecessary.

Rule 5(a)(1)(B) codifies the caselaw reflecting that the right to an initial appearance applies not only when a person is arrested within the United States but also when an arrest occurs outside the United

States. *See, e.g., United States v. Purvis*, 768 F.2d 1237 (11th Cir. 1985); *United States v. Yunis*, 859 F.2d 953 (D.C. Cir. 1988). In these circumstances, the Committee believes — and the rule so provides — that the initial appearance should be before a federal magistrate judge rather than a state or local judicial officer. Rule 5(a)(1)(B) has also been amended by adding the words, "unless a federal statute provides otherwise," to reflect recent enactment of the Military Extraterritorial Jurisdiction Act (Pub. L. No. 106-523, 114 Stat. 2488) that permits certain persons overseas to appear before a magistrate judge by telephonic communication.

Rule 5(a)(2)(A) consists of language currently located in Rule 5 that addresses the procedure to be followed where a defendant has been arrested under a warrant issued on a complaint charging solely a violation of 18 U.S.C. § 1073 (unlawful flight to avoid prosecution). Rule 5(a)(2)(B) and 5(a)(2)(C) are new provisions. They are intended to make it clear that when a defendant is arrested for violating probation or supervised release, or for failing to appear in another district, Rules 32.1 or 40 apply. No change in practice is intended.

Rule 5(a)(3) is new and fills a perceived gap in the rules. It recognizes that a defendant may be subjected to an initial appearance under this rule if a summons was issued under Rule 4, instead of an arrest warrant. If the defendant is appearing pursuant to a summons in a felony case, Rule 5(d) applies, and if the defendant is appearing in a misdemeanor case, Rule 5(e) applies.

Rule 5(b) carries forward the requirement in former Rule 5(a) that if the defendant is arrested without a warrant, a complaint must be promptly filed.

Rule 5(c) is a new provision and sets out where an initial appearance is to take place. If the defendant is arrested in the district where the offense was allegedly committed, under Rule 5(c)(1) the defendant must be taken to a magistrate judge in that district. If no magistrate judge is reasonably available, a state or local judicial officer may conduct the initial appearance. On the other hand, if the defendant is arrested in a district other than the district where the offense was allegedly committed, Rule 5(c)(2) governs. In those instances, the defendant must be taken to a magistrate judge within the district of arrest, unless the appearance can take place more promptly in an adjacent district. The Committee recognized that in some cases, the nearest magistrate judge may actually be across a district's lines. The remainder of Rule 5(c)(2) includes material formerly located in Rule 40.

Rule 5(d), derived from current Rule 5(c), has been retitled to more clearly reflect the subject of that subdivision and the procedure to be used if the defendant is charged with a felony. Rule 5(d)(4) has been added to make clear that a defendant may only be called upon to enter a plea under the provisions of Rule 10. That language is intended to reflect and reaffirm current practice.

The remaining portions of current Rule 5(c) have been moved to Rule 5.1, which deals with preliminary hearings in felony cases.

The major substantive change is in new Rule 5(e), which permits video teleconferencing for an appearance under this rule if the defendant consents. This change reflects the growing practice among state courts to use video teleconferencing to conduct initial proceedings. A similar amendment has been made to Rule 10 concerning arraignments.

In amending Rules 5, 10, and 43 (which generally requires the defendant's presence at all proceedings), the Committee carefully considered the argument that permitting a defendant to appear by video teleconferencing might be considered an erosion of an important element of the judicial process. Much can be lost when video teleconferencing occurs. First, the setting itself may not promote the public's confidence in the integrity and solemnity of a federal criminal proceeding; that is the view of some who have witnessed the use of such proceedings in some state jurisdictions. While it is difficult to quantify the intangible benefits and impact of requiring a defendant to be brought before a federal judicial officer in a federal courtroom, the Committee realizes that something is lost when a defendant is not required to make a personal appearance. A related consideration is that the defendant may be located in a room that bears no resemblance whatsoever to a judicial forum and the equipment may be inadequate for high-quality transmissions. Second, using video teleconferencing can interfere with counsel's ability to meet personally with his or her client at what, at least in that jurisdiction, might be an important appearance before a magistrate judge. Third, the defendant may miss an opportunity to meet with family or friends, and others who might be able to assist the defendant, especially in any attempts to obtain bail. Finally, the magistrate judge may miss an opportunity to accurately assess the physical, emotional, and mental condition of a defendant—a factor that may weigh on pretrial decisions, such as release from detention.

On the other hand, the Committee considered that in some jurisdictions, the court systems face a high volume of criminal proceedings. In other jurisdictions, counsel may not be appointed until after the initial appearance and thus there is no real problem with a defendant being able to consult with counsel before or during that proceeding. The Committee was also persuaded to adopt the amendment because in some jurisdictions delays may occur in travel

time from one location to another—in some cases requiring either the magistrate judge or the participants to travel long distances. In those instances, it is not unusual for a defense counsel to recognize the benefit of conducting a video teleconferenced proceeding, which will eliminate lengthy and sometimes expensive travel or permit the initial appearance to be conducted much sooner. Finally, the Committee was aware that in some jurisdictions, courtrooms now contain high quality technology for conducting such procedures, and that some courts are already using video teleconferencing—with the consent of the parties.

The Committee believed that, on balance and in appropriate circumstances, the court and the defendant should have the option of using video teleconferencing, as long as the defendant consents to that procedure. The question of when it would be appropriate for a defendant to consent is not spelled out in the rule. That is left to the defendant and the court in each case. Although the rule does not specify any particular technical requirements regarding the system to be used, if the equipment or technology is deficient, the public may lose confidence in the integrity and dignity of the proceedings.

The amendment does not require a court to adopt or use video teleconferencing. In deciding whether to use such procedures, a court may wish to consider establishing clearly articulated standards and procedures. For example, the court would normally want to insure that the location used for televising the video teleconferencing is conducive to the solemnity of a federal criminal proceeding. That might require additional coordination, for example, with the detention facility to insure that the room, furniture, and furnishings reflect the dignity associated with a federal courtroom. Provision should also be made to insure that the judge, or a surrogate, is in a position to carefully assess the defendant's condition. And the court should also consider establishing procedures for insuring that counsel and the

defendant (and even the defendant's immediate family) are provided an ample opportunity to confer in private.

REPORTER'S NOTES

In publishing the "style" changes to the Federal Rules of Criminal Procedure, the Committee decided to publish separately any rule that includes what it considered at least one major substantive change. The purpose for this separate publication was to highlight for the bench and the bar any proposed amendments that the Committee believes will result in significant changes in current practice. Rule 5 was one of those rules. In revising Rule 5, the Committee decided to also propose a substantive change that would permit video teleconferencing of initial appearances. Another version of Rule 5, which does not include proposed Rule 5(f) is included in what has been referred to as the "style" package.

~~**Rule 5.1. Preliminary Examination**~~

~~**(a) Probable Cause Finding.** If from the evidence it appears that there is probable cause to believe that an offense has been committed and that the defendant committed it, the federal magistrate judge shall forthwith hold the defendant to answer in district court. The finding of probable cause may be based upon hearsay~~

~~evidence in whole or in part. The defendant may cross-examine adverse witnesses and may introduce evidence. Objections to evidence on the ground that it was acquired by unlawful means are not properly made at the preliminary examination. Motions to suppress must be made to the trial court as provided in Rule 12.~~

~~**(b) Discharge of Defendant.** If from the evidence it appears that there is no probable cause to believe that an offense has been committed or that the defendant committed it, the federal magistrate judge shall dismiss the complaint and discharge the defendant. The discharge of the defendant shall not preclude the government from instituting a subsequent prosecution for the same offense.~~

~~**(c) Records.** After concluding the proceeding the federal magistrate judge shall transmit forthwith to the clerk of the district court all papers in the proceeding. The~~

~~magistrate judge shall promptly make or cause to be made a record or summary of such proceeding.~~

~~(1) On timely application to a federal magistrate judge, the attorney for a defendant in a criminal case may be given the opportunity to have the recording of the hearing on preliminary examination made available to that attorney in connection with any further hearing or preparation for trial. The court may, by local rule, appoint the place for and define the conditions under which such opportunity may be afforded counsel.~~

~~(2) On application of a defendant addressed to the court or any judge thereof, an order may issue that the federal magistrate judge make available a copy of the transcript, or of a portion thereof, to defense counsel. Such order shall provide for prepayment of costs of such transcript by the defendant unless the~~

~~defendant makes a sufficient affidavit that the defendant is unable to pay or to give security therefor, in which case the expense shall be paid by the Director of the Administrative Office of the United States Courts from available appropriated funds. Counsel for the government may move also that a copy of the transcript, in whole or in part, be made available to it, for good cause shown, and an order may be entered granting such motion in whole or in part, on appropriate terms, except that the government need not prepay costs nor furnish security therefor.~~

~~**(d) Production of Statements.**~~

~~**(1) In General.** Rule 26.2(a)-(d) and (f) applies at any hearing under this rule, unless the court, for good cause shown, rules otherwise in a particular case.~~

~~**(2) Sanctions for Failure to Produce Statement.** If a party elects not to comply with an order under Rule 26.2(a) to deliver a statement to the moving party, the court may not consider the testimony of a witness whose statement is withheld.~~

Rule 5.1. Preliminary Hearing

(a) In General. If a defendant is charged with an offense other than a petty offense, a magistrate judge must conduct a preliminary hearing unless:

(1) the defendant waives the hearing;

(2) the defendant is indicted;

(3) the government files an information under Rule 7(b) charging the defendant with a felony;

(4) the government files an information charging the defendant with a misdemeanor; or

(5) the defendant is charged with a misdemeanor and consents to trial before a magistrate judge.

(b) **Selecting a District.** A defendant arrested in a district other than where the offense was allegedly committed may elect to have the preliminary hearing conducted in the district where the prosecution is pending.

(c) **Scheduling.** The magistrate judge must hold the preliminary hearing within a reasonable time, but no later than 10 days after the initial appearance if the defendant is in custody and no later than 20 days if not in custody.

(d) **Extending the Time.** With the defendant's consent and upon a showing of good cause — taking into account the public interest in the prompt disposition of criminal cases — a magistrate judge may extend the time limits in Rule 5.1(c) one or more times. If the defendant does not consent, the magistrate judge may extend the time limits only on a showing that extraordinary circumstances exist and justice requires the delay.

(e) **Hearing and Finding.** At the preliminary hearing, the defendant may cross-examine adverse witnesses and may introduce evidence but may not object to evidence on the ground that it was unlawfully acquired. If the magistrate judge finds probable cause to believe an offense has been committed and the defendant committed it, the magistrate judge must promptly require the defendant to appear for further proceedings.

(f) **Discharging the Defendant.** If the magistrate judge finds no probable cause to believe an offense has been committed or the defendant committed it, the magistrate judge must dismiss the complaint and discharge the defendant. A discharge does not preclude the government from later prosecuting the defendant for the same offense.

(g) **Recording the Proceedings.** The preliminary hearing must be recorded by a court reporter or by a suitable

recording device. A recording of the proceeding may be made available to any party upon request. A copy of the recording and a transcript may be provided to any party upon request and upon any payment required by applicable Judicial Conference regulations.

(h) Producing a Statement.

(1) ***In General.*** Rule 26.2(a)-(d) and (f) applies at any hearing under this rule, unless the magistrate judge for good cause rules otherwise in a particular case.

(2) ***Sanctions for Not Producing a Statement.*** If a party disobeys a Rule 26.2 order to deliver a statement to the moving party, the magistrate judge must not consider the testimony of a witness whose statement is withheld.

COMMITTEE NOTE

The language of Rule 5.1 has been amended as part of the general restyling of the Criminal Rules to make them more easily understood and to make style and terminology consistent throughout

the rules. These changes are intended to be stylistic, except as noted below.

First, the title of the rule has been changed. Although the underlying statute, 18 U.S.C. § 3060, uses the phrase *preliminary examination*, the Committee believes that the phrase *preliminary hearing* is more accurate. What happens at this proceeding is more than just an examination; it includes an evidentiary hearing, argument, and a judicial ruling. Further, the phrase *preliminary hearing* predominates in actual usage.

Rule 5.1(a) is composed of the first sentence of the second paragraph of current Rule 5(c). Rule 5.1(b) addresses the ability of a defendant to elect where a preliminary hearing will be held. That provision is taken from current Rule 40(a).

Rule 5.1(c) and (d) include material currently located in Rule 5(c): scheduling and extending the time limits for the hearing. The Committee is aware that in most districts, magistrate judges perform these functions. That point is also reflected in the definition of "court" in Rule 1(b), which in turn recognizes that magistrate judges may be authorized to act.

Rule 5.1(d) contains a significant change in practice. The revised rule includes language that expands the authority of a United States magistrate judge to grant a continuance for a preliminary hearing conducted under the rule. Currently, the rule authorizes a magistrate judge to grant a continuance only in those cases in which the defendant has consented to the continuance. If the defendant does not consent, then the government must present the matter to a district judge, usually on the same day. The proposed amendment conflicts with 18 U.S.C. § 3060, which tracks the original language of the rule and permits only district judges to grant continuances when the

defendant objects. The Committee believes that this restriction is an anomaly and that it can lead to needless consumption of judicial and other resources. Magistrate judges are routinely required to make probable cause determinations and other difficult decisions regarding the defendant's liberty interests, reflecting that the magistrate judge's role has developed toward a higher level of responsibility for pre-indictment matters. The Committee believes that the change in the rule will provide greater judicial economy and that it is entirely appropriate to seek this change to the rule through the Rules Enabling Act procedures. *See* 28 U.S.C. § 2072(b). Under those procedures, approval by Congress of this rule change would supersede the parallel provisions in 18 U.S.C. § 3060.

Rule 5.1(e), addressing the issue of probable cause, contains the language currently located in Rule 5.1(a), with the exception of the sentence, "The finding of probable cause may be based upon hearsay evidence in whole or in part." That language was included in the original promulgation of the rule in 1972. Similar language was added to Rule 4 in 1974. In the Committee Note on the 1974 amendment, the Advisory Committee explained that the language was included to make it clear that a finding of probable cause may be based upon hearsay, noting that there had been some uncertainty in the federal system about the propriety of relying upon hearsay at the preliminary hearing. *See* Advisory Committee Note to Rule 5.1 (citing cases and commentary). Federal law is now clear on that proposition. Thus, the Committee believed that the reference to hearsay was no longer necessary. Further, the Committee believed that the matter was best addressed in Rule 1101(d)(3), Federal Rules of Evidence. That rule explicitly states that the Federal Rules of Evidence do not apply to "preliminary examinations in criminal cases, ... issuance of warrants for arrest, criminal summonses, and search warrants." The Advisory Committee Note accompanying that rule recognizes that: "The nature of the proceedings makes

application of the formal rules of evidence inappropriate and impracticable." The Committee did not intend to make any substantive changes in practice by deleting the reference to hearsay evidence.

Rule 5.1(f), which deals with the discharge of a defendant, consists of former Rule 5.1(b).

Rule 5.1(g) is a revised version of the material in current Rule 5.1(c). Instead of including detailed information in the rule itself concerning records of preliminary hearings, the Committee opted simply to direct the reader to the applicable Judicial Conference regulations governing records. The Committee did not intend to make any substantive changes in the way in which those records are currently made available.

Finally, although the rule speaks in terms of initial appearances being conducted before a magistrate judge, Rule 1(c) makes clear that a district judge may perform any function in these rules that a magistrate judge may perform.

REPORTER'S NOTES

In publishing the "style" changes to the Federal Rules of Criminal Procedure, the Committee decided to publish separately any rule that includes what it considered at least one major substantive change. The purpose for this separate publication is to highlight for the bench and the bar any proposed amendments that the Committee believes will result in significant changes in current practice. Rule 5.1 was one of those rules. In revising Rule 5.1, the Committee decided to also propose a substantive change that would permit a

United States magistrate judge to grant a continuance for a preliminary hearing conducted under the rule where the defendant has not consented to such a continuance. Another version of Rule 5.1 that does not include that proposed change is presented in what has been referred to as the "style" package.

~~**Rule 10. Arraignment**~~

~~Arraignment shall be conducted in open court and shall consist of reading the indictment or information to the defendant or stating to the defendant the substance of the charge and calling on the defendant to plead thereto. The defendant shall be given a copy of the indictment or information before being called upon to plead.~~

Rule 10. Arraignment

(a) In General. An arraignment must be conducted in open court and must consist of:

(1) ensuring that the defendant has a copy of the indictment or information;

(2) reading the indictment or information to the defendant or stating to the defendant the substance of the charge; and then

(3) asking the defendant to plead to the indictment or information.

(b) **Waiving Appearance.** A defendant need not be present for the arraignment if:

(1) the defendant has been charged by indictment or misdemeanor information;

(2) the defendant, in a written waiver signed by both the defendant and defense counsel, has waived appearance and has affirmed that the defendant received a copy of the indictment or information and that the plea is not guilty; and

(3) the court accepts the waiver.

(c) **Video Teleconferencing.** Video teleconferencing may be used to arraign a defendant if the defendant consents.

COMMITTEE NOTE

The language of Rule 10 has been amended as part of the general restyling of the Criminal Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only, except as noted below.

Read together, Rules 10 and 43 require the defendant to be physically present in court for the arraignment. *See, e.g., Valenzuela-Gonzales v. United States*, 915 F.2d 1276, 1280 (9th Cir. 1990) (Rules 10 and 43 are broader in protection than the Constitution). The amendments to Rule 10 create two exceptions to that requirement. The first provides that the court may hold an arraignment in the defendant's absence when the defendant has waived the right to be present in writing and the court consents to that waiver. The second permits the court to hold arraignments by video teleconferencing when the defendant is at a different location. A conforming amendment has also been made to Rule 43.

In amending Rule 10 and Rule 43, the Committee was concerned that permitting a defendant to be absent from the arraignment could be viewed as an erosion of an important element of the judicial process. First, it may be important for a defendant to see and experience first-hand the formal impact of the reading of the charge. Second, it may be necessary for the court to personally see and speak with the defendant at the arraignment, especially when there is a real question whether the defendant actually understands the gravity of the proceedings. And third, there may be difficulties in providing the defendant with effective and confidential assistance of counsel if counsel, but not the defendant, appears at the arraignment.

The Committee nonetheless believed that in appropriate circumstances the court, and the defendant, should have the option of conducting the arraignment in the defendant's absence. The question of when it would be appropriate for a defendant to waive an appearance is not spelled out in the rule. That is left to the defendant and the court in each case.

A critical element to the amendment is that no matter how convenient or cost effective a defendant's absence might be, the defendant's right to be present in court stands unless he or she waives that right in writing. Under the amendment, both the defendant and the defendant's attorney must sign the waiver. Further, the amendment requires that the waiver specifically state that the defendant has received a copy of the charging instrument.

If the trial court has reason to believe that in a particular case the defendant should not be permitted to waive the right, the court may reject the waiver and require that the defendant actually appear in court. That might be particularly appropriate when the court wishes to discuss substantive or procedural matters in conjunction with the arraignment and the court believes that the defendant's presence is important in resolving those matters. It might also be appropriate to reject a requested waiver where an attorney for the government presents reasons for requiring the defendant to appear personally.

The amendment does not permit waiver of an appearance when the defendant is charged with a felony information. In that instance, the defendant is required by Rule 7(b) to be present in court to waive the indictment. Nor does the amendment permit a waiver of appearance when the defendant is standing mute (*see* Rule 11(a)(4)), or entering a conditional plea (*see* Rule 11(a)(2)), a nolo contendere plea (*see* Rule 11(a)(3)), or a guilty plea (*see* Rule 11(a)(1)). In each

of those instances the Committee believed that it was more appropriate for the defendant to appear personally before the court.

It is important to note that the amendment does not permit the defendant to waive the arraignment itself, which may be a triggering mechanism for other rules.

Rule 10(c) addresses the second substantive change in the rule. That provision permits the court to conduct arraignments through video teleconferencing, if the defendant waives the right to be arraigned in court. Although the practice is now used in state courts and in some federal courts, Rules 10 and 43 have generally prevented federal courts from using that method for arraignments in criminal cases. *See, e.g., Valenzuela-Gonzales v. United States, supra* (Rules 10 and 43 mandate physical presence of defendant at arraignment and that arraignment take place in open court). A similar amendment was proposed by the Committee in 1993 and published for public comment. The amendment was later withdrawn from consideration in order to consider the results of several planned pilot programs. Upon further consideration, the Committee believed that the benefits of using video teleconferencing outweighed the costs of doing so. This amendment also parallels an amendment in Rule 5(f) that would permit initial appearances to be conducted by video teleconferencing.

In amending Rules 5, 10, and 43 (which generally requires the defendant's presence at all proceedings), the Committee carefully considered the argument that permitting a defendant to appear by video teleconferencing might be considered an erosion of an important element of the judicial process. Much can be lost when video teleconferencing occurs. First, the setting itself may not promote the public's confidence in the integrity and solemnity of a federal criminal proceeding; that is the view of some who have witnessed the use of such proceedings in some state jurisdictions.

While it is difficult to quantify the intangible benefits and impact of requiring a defendant to be brought before a federal judicial officer in a federal courtroom, the Committee realizes that something is lost when a defendant is not required to make a personal appearance. A related consideration is that the defendant may be located in a room that bears no resemblance whatsoever to a judicial forum and the equipment may be inadequate for high-quality transmissions. Second, using video teleconferencing can interfere with counsel's ability to meet personally with his or her client at what, at least in that jurisdiction, might be an important appearance before a magistrate judge. Third, the defendant may miss an opportunity to meet with family or friends, and others who might be able to assist the defendant, especially in any attempts to obtain bail. Finally, the magistrate judge may miss an opportunity to accurately assess the physical, emotional, and mental condition of a defendant—a factor that may weigh on pretrial decisions, such as release from detention.

On the other hand, the Committee considered that in some jurisdictions, the courts face a high volume of criminal proceedings. The Committee was also persuaded to adopt the amendment because in some jurisdictions delays may occur in travel time from one location to another—in some cases requiring either the magistrate judge or the participants to travel long distances. In those instances, it is not unusual for a defense counsel to recognize the benefit of conducting a video teleconferenced proceeding, which will eliminate lengthy and sometimes expensive travel or permit the arraignment to be conducted much sooner. Finally, the Committee was aware that in some jurisdictions, courtrooms now contain high quality technology for conducting such procedures, and that some courts are already using video teleconferencing—with the consent of the parties.

The Committee believed that, on balance and in appropriate circumstances, the court and the defendant should have the option of

using video teleconferencing for arraignments, as long as the defendant consents to that procedure. The question of when it would be appropriate for a defendant to consent is not spelled out in the rule. That is left to the defendant and the court in each case. Although the rule does not specify any particular technical requirements regarding the system to be used, if the equipment or technology is deficient, the public may lose confidence in the integrity and dignity of the proceedings.

The amendment does not require a court to adopt or use video teleconferencing. In deciding whether to use such procedures, a court may wish to consider establishing clearly articulated standards and procedures. For example, the court would normally want to insure that the location used for televising the video teleconferencing is conducive to the solemnity of a federal criminal proceeding. That might require additional coordination, for example, with the detention facility to insure that the room, furniture, and furnishings reflect the dignity associated with a federal courtroom. Provision should also be made to insure that the judge, or a surrogate, is in a position to carefully assess the condition of the defendant. And the court should also consider establishing procedures for insuring that counsel and the defendant (and even the defendant's immediate family) are provided an ample opportunity to confer in private.

Although the rule requires the defendant to waive a personal appearance for an arraignment, the rule does not require that the waiver for video teleconferencing be in writing. Nor does it require that the defendant waive that appearance in person, in open court. It would normally be sufficient for the defendant to waive an appearance while participating through a video teleconference.

The amendment leaves to the courts the decision first, whether to permit video arraignments, and second, the procedures to be used.

The Committee was satisfied that the technology has progressed to the point that video teleconferencing can address the concerns raised in the past about the ability of the court and the defendant to see each other and for the defendant and counsel to be in contact with each other, either at the same location or by a secure remote connection.

REPORTER'S NOTES

In publishing the "style" changes to the Federal Rules of Criminal Procedure, the Committee decided to publish separately any rule that includes what it considered at least one major substantive change. The purpose for this separate publication was to highlight for the bench and the bar any proposed amendments that the Committee believes will result in significant changes in current practice. Rule 10 was one of those rules. This proposed revision of Rule 10 includes an amendment that would permit the defendant to waive any appearance at an arraignment and a second amendment that would permit use of video teleconferencing for arraignments. Another version of Rule 10, which does not include these significant amendments is presented in what has been referred to as the "style" package.

~~**Rule 12.2. Notice of Insanity Defense or Expert Testimony of Defendant's Mental Condition**~~

~~**(a) Defense of Insanity.** If a defendant intends to rely upon the defense of insanity at the time of the alleged offense, the defendant shall, within the time provided for the~~

~~filing of pretrial motions or at such later time as the court may direct, notify the attorney for the government in writing of such intention and file a copy of such notice with the clerk. If there is a failure to comply with the requirements of this subdivision, insanity may not be raised as a defense. The court may for cause shown allow late filing of the notice or grant additional time to the parties to prepare for trial or make such other order as may be appropriate.~~

~~**(b) Expert Testimony of Defendant's Mental Condition.** If a defendant intends to introduce expert testimony relating to a mental disease or defect or any other mental condition of the defendant bearing upon the issue of guilt, the defendant shall, within the time provided for the filing of pretrial motions or at such later time as the court may direct, notify the attorney for the government in writing of such intention and file a copy of such notice~~

~~with the clerk. The court may for cause shown allow late filing of the notice or grant additional time to the parties to prepare for trial or make such other order as may be appropriate.~~

~~**(c) Mental Examination of Defendant.** In an appropriate case the court may, upon motion of the attorney for the government, order the defendant to submit to an examination pursuant to 18 U.S.C. 4241 or 4242. No statement made by the defendant in the course of any examination provided for by this rule, whether the examination be with or without the consent of the defendant, no testimony by the expert based upon such statement, and no other fruits of the statement shall be admitted in evidence against the defendant in any criminal proceeding except on an issue respecting mental condition on which the defendant has introduced testimony.~~

~~**(d) Failure to Comply.** If there is a failure to give notice when required by subdivision (b) of this rule or to submit to an examination when ordered under subdivision (c) of this rule, the court may exclude the testimony of any expert witness offered by the defendant on the issue of the defendant's guilt.~~

~~**(e) Inadmissibility of Withdrawn Intention.** Evidence of an intention as to which notice was given under subdivision (a) or (b), later withdrawn, is not, in any civil or criminal proceeding, admissible against the person who gave notice of the intention.~~

Rule 12.2. Notice of an Insanity Defense; Mental Examination

(a) Notice of an Insanity Defense. A defendant who intends to assert a defense of insanity at the time of the alleged offense must so notify an attorney for the government in writing within the time provided for filing a pretrial

motion, or at any later time the court sets, and file a copy of the notice with the clerk. A defendant who fails to do so cannot rely on an insanity defense. The court may, for good cause, allow the defendant to file the notice late, grant additional trial-preparation time, or make other appropriate orders.

(b) Notice of Expert Evidence of a Mental Condition. If a defendant intends to introduce expert evidence relating to a mental disease or defect or any other mental condition of the defendant bearing on either (1) the issue of guilt or (2) the issue of punishment in a capital case, the defendant must — within the time provided for filing a pretrial motion or at any later time the court sets — notify an attorney for the government in writing of this intention and file a copy of the notice with the clerk. The court may, for good cause, allow the defendant to file the

notice late, grant the parties additional trial-preparation time, or make other appropriate orders.

(c) Mental Examination.

(1) Authority to Order an Examination; Procedures.

(A) The court may order the defendant to submit to a competency examination under 18 U.S.C. § 4241.

(B) If the defendant provides notice under Rule 12.2(a), the court must, upon the government's motion, order the defendant to be examined under 18 U.S.C. § 4242. If the defendant provides notice under Rule 12.2(b) the court may, upon the government's motion, order the defendant to be examined under procedures ordered by the court.

(2) Disclosing Results and Reports of Capital Sentencing Examination. The results and reports

of any examination conducted solely under Rule 12.2 (c)(1) after notice under Rule 12.2(b)(2) must be sealed and must not be disclosed to any attorney for the government or the defendant unless the defendant is found guilty of one or more capital crimes and the defendant confirms an intent to offer during sentencing proceedings expert evidence on mental condition.

(3) ***Disclosing Results and Reports of the Defendant's Expert Examination.*** After disclosure under Rule 12.2(c)(2) of the results and reports of the government's examination, the defendant must disclose to the government the results and reports of any examination on mental condition conducted by the defendant's expert about which the defendant intends to introduce expert evidence.

(4) ***Inadmissibility of a Defendant's Statements.*** No statement made by a defendant in the course of any examination conducted under this rule (whether conducted with or without the defendant's consent), no testimony by the expert based on the statement, and no other fruits of the statement may be admitted into evidence against the defendant in any criminal proceeding except on an issue regarding mental condition on which the defendant:

(A) has introduced evidence of incompetency or evidence requiring notice under Rule 12.2(a) or (b)(1), or

(B) has introduced expert evidence in a capital sentencing proceeding requiring notice under Rule 12.2(b)(2).

(d) Failure to Comply. If the defendant fails to give notice under Rule 12.2(b) or does not submit to an examination

when ordered under Rule 12.2(c), the court may exclude any expert evidence from the defendant on the issue of the defendant's mental disease, mental defect, or any other mental condition bearing on the defendant's guilt or the issue of punishment in a capital case.

(e) **Inadmissibility of Withdrawn Intention.** Evidence of an intention as to which notice was given under Rule 12.2(a) or (b), later withdrawn, is not, in any civil or criminal proceeding, admissible against the person who gave notice of the intention.

COMMITTEE NOTE

The language of Rule 12.2 has been amended as part of the general restyling of the Criminal Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only, except as noted below.

The substantive changes to Rule 12.2 are designed to address five issues. First, the amendment clarifies that a court may order a mental examination for a defendant who has indicated an intention to raise a defense of mental condition bearing on the issue of guilt. Second, the defendant is required to give notice of an intent to present expert

evidence of the defendant's mental condition during a capital sentencing proceeding. Third, the amendment addresses the ability of the trial court to order a mental examination for a defendant who has given notice of an intent to present evidence of mental condition during capital sentencing proceedings and when the results of that examination may be disclosed. Fourth, the amendment addresses the timing of disclosure of the results and reports of the defendant's expert examination. Finally, the amendment extends the sanctions for failure to comply with the rule's requirements to the punishment phase of a capital case.

Under current Rule 12.2(b), a defendant who intends to offer expert testimony on the issue of his or her mental condition on the question of guilt must provide a pretrial notice of that intent. The amendment extends that notice requirement to a defendant who intends to offer expert evidence, testimonial or otherwise, on his or her mental condition during a capital sentencing proceeding. As several courts have recognized, the better practice is to require pretrial notice of that intent so that any mental examinations can be conducted without unnecessarily delaying capital sentencing proceedings. *See, e.g., United States v. Beckford*, 962 F. Supp. 748, 754-64 (E.D. Va. 1997); *United States v. Haworth*, 942 F. Supp. 1406, 1409 (D.N.M. 1996). The amendment adopts that view.

Revised Rule 12.2(c)(1) addresses and clarifies the authority of the court to order mental examinations for a defendant — to determine competency of a defendant to stand trial under 18 U.S.C. § 4241; to determine the defendant's sanity at the time of the alleged offense under 18 U.S.C. § 4242; or in those cases where the defendant intends to present expert testimony on his or her mental condition. Rule 12.2(c)(1)(A) reflects the traditional authority of the court to order competency examinations. With regard to examinations to determine insanity at the time of the offense, current

Rule 12.2(c) implies that the trial court *may* grant a government motion for a mental examination of a defendant who has indicated under Rule 12.2(a) an intent to raise the defense of insanity. But the corresponding statute, 18 U.S.C. § 4242, *requires* the court to order an examination if the defendant has provided notice of an intent to raise that defense and the government moves for the examination. Revised Rule 12.2(c)(1)(B) now conforms the rule to § 4242. Any examination conducted on the issue of the insanity defense would thus be conducted in accordance with the procedures set out in that statutory provision.

Revised Rule 12.2(c)(1)(B) also addresses those cases where the defendant is not relying on an insanity defense, but intends to offer expert testimony on the issue of mental condition. While the authority of a trial court to order a mental examination of a defendant who has registered an intent to raise the insanity defense seems clear, the authority under the rule to order an examination of a defendant who intends only to present expert testimony on his or her mental condition on the issue of guilt is not as clear. Some courts have concluded that a court may order such an examination. *See, e.g., United States v. Stackpole*, 811 F.2d 689, 697 (1st Cir. 1987); *United States v. Buchbinder*, 796 F.2d 910, 915 (1st Cir. 1986); and *United States v. Halbert*, 712 F.2d 388 (9th Cir. 1983). In *United States v. Davis*, 93 F.3d 1286 (6th Cir. 1996), however, the court in a detailed analysis of the issue concluded that the district court lacked the authority under the rule to order a mental examination of a defendant who had provided notice of an intent to offer evidence on a defense of diminished capacity. The court noted first that the defendant could not be ordered to undergo commitment and examination under 18 U.S.C. § 4242, because that provision relates to situations when the defendant intends to rely on the defense of insanity. The court also rejected the argument that the examination could be ordered under Rule 12.2(c) because this was, in the words of the rule, an

"appropriate case." The court concluded, however, that the trial court had the inherent authority to order such an examination.

The amendment clarifies that the authority of a court to order a mental examination under Rule 12.2(c)(1)(B) extends to those cases when the defendant has provided notice, under Rule 12.2(b), of an intent to present expert testimony on the defendant's mental condition, either on the merits or at capital sentencing. *See, e.g., United States v. Hall*, 152 F.3d 381 (5th Cir. 1998), *cert. denied*, 119 S. Ct. 1767 (1999).

The amendment to Rule 12.2(c)(1) is not intended to affect any statutory or inherent authority a court may have to order other mental examinations.

The amendment leaves to the court the determination of what procedures should be used for a court-ordered examination on the defendant's mental condition (apart from insanity). As currently provided in the rule, if the examination is being ordered in connection with the defendant's stated intent to present an insanity defense, the procedures are dictated by 18 U.S.C. § 4242. On the other hand, if the examination is being ordered in conjunction with a stated intent to present expert testimony on the defendant's mental condition (not amounting to a defense of insanity) either at the guilt or sentencing phases, no specific statutory counterpart is available. Accordingly, the court is given the discretion to specify the procedures to be used. In so doing, the court may certainly be informed by other provisions, which address hearings on a defendant's mental condition. *See, e.g.*, 18 U.S.C. § 4241, et seq.

Additional changes address the question when the results of an examination ordered under Rule 12.2(b)(2) may, or must, be disclosed. The Supreme Court has recognized that use of a

defendant's statements during a court-ordered examination may compromise the defendant's right against self-incrimination. *See Estelle v. Smith*, 451 U.S. 454 (1981) (defendant's privilege against self-incrimination violated when he was not advised of right to remain silent during court-ordered examination and prosecution introduced statements during capital sentencing hearing). But subsequent cases have indicated that the defendant waives the privilege if the defendant introduces expert testimony on his or her mental condition. *See, e.g., Powell v. Texas*, 492 U.S. 680, 683-84 (1989); *Buchanan v. Kentucky*, 483 U.S. 402, 421-24 (1987); *Presnell v. Zant*, 959 F.2d 1524, 1533 (11th Cir. 1992); *Williams v. Lynaugh*, 809 F.2d 1063, 1068 (5th Cir. 1987); *United States v. Madrid*, 673 F.2d 1114, 1119-21 (10th Cir. 1982). That view is reflected in Rule 12.2(c), which indicates that the statements of the defendant may be used against the defendant only after the defendant has introduced testimony on his or her mental condition. What the current rule does not address is if, and to what extent, the prosecution may see the results of the examination, which may include the defendant's statements, when evidence of the defendant's mental condition is being presented solely at a capital sentencing proceeding.

The proposed change in Rule 12.2(c)(2) adopts the procedure used by some courts to seal or otherwise insulate the results of the examination until it is clear that the defendant will introduce expert evidence about his or her mental condition at a capital sentencing hearing; i.e., after a verdict of guilty on one or more capital crimes, and a reaffirmation by the defendant of an intent to introduce expert mental-condition evidence in the sentencing phase. *See, e.g., United States v. Beckford*, 962 F. Supp. 748 (E.D. Va. 1997). Most courts that have addressed the issue have recognized that if the government obtains early access to the accused's statements, it will be required to show that it has not made any derivative use of that evidence. Doing so can consume time and resources. *See, e.g., United States v. Hall*,

supra, 152 F.3d at 398 (noting that sealing of record, although not constitutionally required, "likely advances interests of judicial economy by avoiding litigation over [derivative use issue]").

Except as provided in Rule 12.2(c)(3), the rule does not address the time for disclosing results and reports of any expert examination conducted by the defendant. New Rule 12.2(c)(3) provides that upon disclosure under subdivision (c)(2) of the results and reports of the government's examination, disclosure of the results and reports of the defendant's expert examination is mandatory, if the defendant intends to introduce expert evidence relating to the examination.

Rule 12.2(c), as previously written, restricted admissibility of the defendant's statements during the course of an examination conducted under the rule to an issue respecting mental condition on which the defendant "has introduced testimony" — expert or otherwise. As amended, Rule 12.2(c)(4) provides that the admissibility of such evidence in a capital sentencing proceeding is triggered only by the defendant's introduction of expert evidence. The Committee believed that, in this context, it was appropriate to limit the government's ability to use the results of its expert mental examination to instances in which the defendant has first introduced expert evidence on the issue.

Rule 12.2(d) has been amended to extend sanctions for failure to comply with the rule to the penalty phase of a capital case. The selection of an appropriate remedy for the failure of a defendant to provide notice or submit to an examination under subdivisions (b) and (c) is entrusted to the discretion of the court. While subdivision (d) recognizes that the court may exclude the evidence of the defendant's own expert in such a situation, the court should also consider "the effectiveness of less severe sanctions, the impact of preclusion on the evidence at trial and the outcome of the case, the

extent of prosecutorial surprise or prejudice, and whether the violation was willful." *Taylor v. Illinois*, 484 U.S. 400, 414 n.19 (1988) (citing *Fendler v. Goldsmith*, 728 F.2d 1181 (9th Cir. 1983)).

REPORTER'S NOTES

In publishing the "style" changes to the Federal Rules of Criminal Procedure, the Committee decided to publish separately any rule that includes what it considered at least one major substantive change. The purpose for this separate publication was to highlight for the bench and the bar any proposed amendments that the Committee believes will result in significant changes in current practice. Rule 12.2 was one of those rules. As outlined in the Committee Note, this proposed revision of Rule 12.2 includes five substantive amendments. Another version of Rule 12.2, which does not include these significant amendments, appears in what has been referred to as the "style" package.

Rule 12.4. Disclosure Statement

(a) Who Must File.

(1) ***Nongovernmental Corporate Party.*** Any nongovernmental corporate party to a proceeding in a district court must file a statement that identifies any parent corporation and any publicly held

corporation that owns 10% or more of its stock or states that there is no such corporation.

(2) ***Organizational Victim.*** If an organization is a victim of the alleged criminal activity, the government must file a statement identifying the victim. If the organizational victim is a corporation, the statement must also disclose the information required by Rule 12.4(a)(1) to the extent it can be obtained through due diligence.

(b) Time for Filing; Supplemental Filing. A party must:

(1) file the Rule 12.4(a) statement upon the defendant's initial appearance; and

(2) promptly file a supplemental statement upon any change in the information that the statement requires.

COMMITTEE NOTE

Rule 12.4 is a new rule modeled after Federal Rule of Appellate Procedure 26.1 and parallels similar provisions being proposed in new Federal Rule of Civil Procedure 7.1. The purpose of the rule is to assist judges in determining whether they must recuse themselves because of a "financial interest in the subject matter in controversy." Code of Judicial Conduct, Canon 3C(1)(c)(1972). It does not, however, deal with other circumstances that might lead to disqualification for other reasons.

Under Rule 12.4(a)(1), any nongovernmental corporate party must file a statement that indicates whether it has any parent corporation that owns 10% or more of its stock or indicates that there is no such corporation. Although the term "nongovernmental corporate party" will almost always involve organizational defendants, it might also cover any third party that asserts an interest in property to be forfeited under new Rule 32.2.

Rule 12.4(a)(2) requires an attorney for the government to file a statement that lists any organizational victims of the alleged criminal activity; the purpose of this disclosure is to alert the court to the fact that a possible ground for disqualification might exist. Further, if the organizational victim is a corporation, the statement must include the same information required of any nongovernmental corporate party. The rule requires an attorney for the government to use due diligence in obtaining that information from a corporate organizational victim, recognizing that the timing requirements of Rule 12.4(b) might make it difficult to obtain the necessary information by the time the initial appearance is conducted.

Although the disclosures required by Rule 12.4 may seem limited, they are calculated to reach the majority of circumstances that

are likely to call for disqualification on the basis of information that a judge may not know or recollect. Framing a rule that calls for more detailed disclosure is problematic and will inevitably require more information than is necessary for purposes of automatic recusal. Unnecessary disclosure of volumes of information may create the risk that a judge will overlook the one bit of information that might require disqualification, and may also create the risk that courts will experience unnecessary disqualifications rather than attempt to unravel a potentially difficult question.

The same concerns about overbreadth are potentially present in any local rules that might address this topic. Rule 12.4 does not address the promulgation of any local rules that might address the same issue, or supplement the requirements of the rule.

The rule does not cover disclosure of all financial information that could be relevant to a judge's decision whether to recuse himself or herself from a case. The Committee believes that with the various disclosure practices in the federal courts and with the development of technology, more comprehensive disclosure may be desirable and feasible.

Rule 12.4(b)(1) indicates that the time for filing the disclosure statement is at the point when the defendant enters an initial appearance under Rule 5. Although there may be other instances where an earlier appearance of a party in a civil proceeding would raise concerns about whether the presiding judicial officer should be notified of a possible grounds for recusal, the Committee believed that in criminal cases, the most likely time for that to occur is at the initial appearance and that it was important to set a uniform triggering event for disclosures under this rule.

Finally, Rule 12.4(b)(2) requires the parties to file supplemental statements with the court if there are any changes in the information required in the statement.

~~**Rule 26. Taking of Testimony**~~

~~In all trials the testimony of witnesses shall be taken orally in open court, unless otherwise provided by an Act of Congress or by these rules, the Federal Rules of Evidence, or other rules adopted by the Supreme Court.~~

Rule 26. Taking Testimony

(a) In General. In every trial the testimony of witnesses must be taken in open court, unless otherwise provided by a statute or by rules adopted under 28 U.S.C. §§ 2072-2077.

(b) Transmitting Testimony from a Different Location. In the interest of justice, the court may authorize contemporaneous, two-way video presentation in open court of testimony from a witness who is at a different location if:

(1) the requesting party establishes exceptional circumstances for such transmission;

(2) appropriate safeguards for the transmission are used; and

(3) the witness is unavailable within the meaning of Federal Rule of Evidence 804(a)(4)-(5).

COMMITTEE NOTE

The language of Rule 26 has been amended as part of the general restyling of the Criminal Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only, except as noted below.

Rule 26(a) is amended, by deleting the word "orally," to accommodate witnesses who are not able to present oral testimony in open court and may need, for example, a sign language interpreter. The change conforms the rule, in that respect, to Federal Rule of Civil Procedure 43.

A substantive change has been made to Rule 26(b). That amendment permits a court to receive the video transmission of an absent witness if certain conditions are met. As currently written, Rule 26 indicates that normally only testimony given in open court will be considered, unless otherwise provided by these rules, an Act of Congress, or any other rule adopted by the Supreme Court. An example of a rule that provides otherwise is Rule 15. That Rule

recognizes that depositions may be used to preserve testimony if there are exceptional circumstances in the case and it is in the interest of justice to do so. If the person is "unavailable" under Federal Rule of Evidence 804(a), then the deposition may be used at trial as substantive evidence. The amendment to Rule 26(b) extends the logic underlying that exception to contemporaneous video testimony of an unavailable witness. The amendment generally parallels a similar provision in Federal Rule of Civil Procedure 43.

The Committee believed that permitting use of video transmission of testimony only in those instances when deposition testimony could be used is a prudent and measured step. A party against whom a deposition may be introduced at trial will normally have no basis for objecting if contemporaneous testimony is used instead. Indeed, the use of such transmitted testimony is in most regards superior to other means of presenting testimony in the courtroom. The participants in the courtroom can see for themselves the demeanor of the witness and hear any pauses in the testimony, matters that are not normally available in non-video deposition testimony. Although deposition testimony is normally taken with all counsel and parties present with the witness, there may be exceptions. *See, e.g., United States v. Salim*, 855 F.2d 944, 947-48 (2d Cir. 1988) (conviction affirmed where deposition testimony, taken overseas, was used although defendant and her counsel were not permitted in same room with witness, witness's lawyer answered some questions, lawyers were not permitted to question witness directly, and portions of proceedings were not transcribed verbatim).

The revised rule envisions several safeguards to address possible concerns about the Confrontation Clause rights of a defendant. First, under the rule, the court is authorized to use "contemporaneous two-way" video transmission of testimony. Thus, this rule envisions procedures and techniques very different from those used in

Maryland v. Craig, 497 U.S. 836 (1990) (transmission of one-way closed circuit television of child's testimony). Two-way transmission ensures that the witness and the persons present in the courtroom will be able to see and hear each other. Second, the court must first find that there are "exceptional circumstances" for using video transmissions, a standard used in *United States v. Gigante*, 166 F.3d 75, 81 (2d Cir.), *cert. denied*, 528 U.S. 1114 (1999). While it is difficult to catalog examples of circumstances considered to be "exceptional," the inability of the defendant and the defense counsel to be at the witness's location would normally be an exceptional circumstance. Third, arguably the exceptional circumstances test, when combined with the requirement in Rule 26(b)(3) that the witness be unavailable, is at least as stringent as the standard set out in *Maryland v. Craig*, 497 U.S. 836 (1990). In that case the Court indicated that a defendant's confrontation rights "may be satisfied absent a physical, face-to-face confrontation at trial only where denial of such confrontation is necessary to further an important government public policy and only where the reliability of the testimony is otherwise assured." *Craig*, 497 U.S. at 850. In *Gigante*, the court noted that because the video system in *Craig* was a one-way closed circuit transmission, the use of a two-way transmission made it unnecessary to apply the *Craig* standard.

The Committee recognized that there is a need for the trial court to impose appropriate safeguards and procedures to insure the accuracy and quality of the transmission, the ability of the jurors to hear and view the testimony, and the ability of the judge, counsel, and the witness to hear and understand each other during questioning. *See, e.g., United States v. Gigante*, 166 F.3d 75 (2d Cir. 1999).

Deciding what safeguards are appropriate is left to the sound discretion of the trial court. The Committee envisions that in establishing those safeguards the court will be sensitive to a number

of key issues. First, it is important that the procedure maintain the dignity and decorum normally associated with a federal judicial proceeding. That would normally include ensuring that the witness's testimony is transmitted from a location where there are no, or minimal, background distractions, such as persons leaving or entering the room. Second, it is important to insure the quality and integrity of the two-way transmission itself. That will usually mean employment of technologies and equipment that are proven and reliable. Third, the court may wish to use a surrogate, such as an assigned marshal or special master, as used in *Gigante*, *supra,* to appear at the witness's location to ensure that the witness is not being influenced from an off-camera source and that the equipment is working properly at the witness's end of the transmission. Fourth, the court should ensure that the court, counsel, and jurors can clearly see and hear the witness during the transmission. And it is equally important that the witness can clearly see and hear counsel, the court, and the defendant. Fifth, the court should ensure that the record reflects the persons who are present at the witness's location. Sixth, the court may wish to require that representatives of the parties be present at the witness's location. Seventh, the court may inquire of counsel, on the record, whether additional safeguards might be employed. Eighth, the court should probably preserve any recording of the testimony, should a question arise about the quality of the transmission. Finally, the court may consider issuing a pretrial order setting out the appropriate safeguards employed under the rule. *See United States v. Gigante*, 971 F. Supp. 755, 759-60 (E.D.N.Y. 1997) (court order setting out safeguards and procedures).

The Committee believed that including the requirement of "unavailability" as that term is defined in Federal Rule of Evidence 804(a)(4) and (5) will insure that the defendant's Confrontation Clause rights are not infringed. In deciding whether to permit contemporaneous transmission of the testimony of a government

witness, the Supreme Court's decision in *Maryland v. Craig*, 497 U.S. 836 (1990) is instructive. In that case, the prosecution presented the testimony of a child sexual assault victim from another room by one-way closed circuit television. The Court outlined four elements that underlie Confrontation Clause issues: (1) physical presence; (2) the oath; (3) cross-examination; and (4) the opportunity for the trier-of-fact to observe the witness's demeanor. *Id.* at 847. The Court rejected the notion that a defendant's Confrontation Clause rights could be protected only if all four elements were present. The trial court had explicitly concluded that the procedure was necessary to protect the child witness, i.e., the witness was psychologically unavailable to testify in open court. The Supreme Court noted that any harm to the defendant resulting from the transmitted testimony was minimal because the defendant received most of the protections contemplated by the Confrontation Clause, i.e., the witness was under oath, counsel could cross-examine the absent witness, and the jury could observe the demeanor of the witness. *See also United States v. Gigante, supra* (use of remote transmission of unavailable witness's testimony did not violate confrontation clause); *Harrell v. Butterworth*, ___ F.3d ___ (11th Cir. 2001) (remote transmission of unavailable witnesses' testimony in state criminal trial did not violate confrontation clause).

Although the amendment is not limited to instances such as those encountered in *Craig*, it is limited to situations when the witness is unavailable for any of the reasons set out in Federal Rule of Evidence 804(a)(4) and (5). Whether under particular circumstances a proposed transmission will satisfy some, or all, of the four protective factors identified by the Supreme Court in *Craig* is a decision left to the trial court.

The amendment provides an alternative to the use of depositions, which are permitted under Rule 15. The choice between these two

alternatives for presenting the testimony of an otherwise unavailable witness will be influenced by the individual circumstances of each case, the available technology, and the extent to which each alternative serves the values protected by the Confrontation Clause. *See Maryland v. Craig, supra.*

REPORTER'S NOTES

In publishing the "style" changes to the Federal Rules of Criminal Procedure, the Committee decided to publish separately any rule that includes what it considered at least one major substantive change. The purpose for this separate publication was to highlight for the bench and the bar any proposed amendments that the Committee believes will result in significant changes in current practice. Rule 26 was one of those rules. This proposed revision of Rule 26 includes an amendment that would authorize a court to receive testimony from a remote location. Another version of Rule 26, which does not include this significant amendment, is presented in what has been referred to as the "style" package.

~~**Rule 30. Instructions**~~

~~At the close of the evidence or at such earlier time during the trial as the court reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth in the requests. At the same time copies of such requests shall be furnished to all parties. The court shall~~

~~inform counsel of its proposed action upon the requests prior to their arguments to the jury. The court may instruct the jury before or after the arguments are completed or at both times. No party may assign as error any portion of the charge or omission therefrom unless that party objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which that party objects and the grounds of the objection. Opportunity shall be given to make the objection out of the hearing of the jury and, on request of any party, out of the presence of the jury.~~

Rule 30. Jury Instructions

(a) In General. Any party may request in writing that the court instruct the jury on the law as specified in the request. The request must be made at the close of the evidence or at any earlier time that the court reasonably sets. When the request is made, the requesting party must furnish a copy to every other party.

(b) Ruling on a Request. The court must inform the parties before closing arguments how it intends to rule on the requested instructions.

(c) Time for Giving Instructions. The court may instruct the jury before or after the arguments are completed, or at both times.

(d) Objections to Instructions. A party who objects to any portion of the instructions or to a failure to give a requested instruction must inform the court of the specific objection and the grounds for the objection before the jury retires to deliberate. An opportunity must be given to object out of the jury's hearing and, on request, out of the jury's presence. Failure to object in accordance with this rule precludes appellate review, except as permitted under Rule 52(b).

COMMITTEE NOTE

The language of Rule 30 has been amended as part of the general restyling of the Criminal Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only, except as noted below.

Rule 30(a) reflects a change in the timing of requests for instructions. As currently written, the trial court may not direct the parties to file such requests before trial without violating Rules 30 and 57. While the amendment falls short of requiring all requests to be made before trial in all cases, the amendment permits a court to do so in a particular case or as a matter of local practice under local rules promulgated under Rule 57. The rule does not preclude the practice of permitting the parties to supplement their requested instructions during the trial.

Rule 30(d) clarifies what, if anything, counsel must do to preserve a claim of error regarding an instruction or failure to instruct. The rule retains the requirement of a contemporaneous and specific objection (before the jury retires to deliberate). As the Supreme Court recognized in *Jones v. United States*, 527 U.S. 373 (1999), read literally, current Rule 30 could be construed to bar any appellate review absent a timely objection when in fact a court may conduct a limited review under a plain error standard. The amendment does not address the issue of whether objections to the instructions must be renewed after the instructions are given, in order to preserve a claim of error. No change in practice is intended by the amendment.

REPORTER'S NOTES

In publishing the "style" changes to the Federal Rules of Criminal Procedure, the Committee decided to publish separately any rule that includes what it considered at least one major substantive change. The purpose for this separate publication was to highlight for the bench and the bar any proposed amendments that the Committee believes will result in significant changes in current practice. Rule 30 was one of those rules. This proposed revision of Rule 30 includes an amendment that would authorize a court to require the parties to file requests for instructions before trial. Another version of Rule 30, which does not include this substantive amendment, is presented in what has been referred to as the "style" package.

~~**Rule 35. Correction or Reduction of Sentence**~~

~~**(a) Correction of a Sentence on Remand.** The court shall correct a sentence that is determined on appeal under 18 U.S.C. 3742 to have been imposed in violation of law, to have been imposed as a result of an incorrect application of the sentencing guidelines, or to be unreasonable, upon remand of the case to the court=~~

~~(1) for imposition of a sentence in accord with the findings of the court of appeals; or~~

~~(2) for further sentencing proceedings if, after such proceedings, the court determines that the original sentence was incorrect.~~

~~**(b) Reduction of Sentence for Substantial Assistance.** If the Government so moves within one year after the sentence is imposed, the court may reduce a sentence to reflect a defendant's subsequent substantial assistance in investigating or prosecuting another person, in accordance with the guidelines and policy statements issued by the Sentencing Commission under 28 U.S.C. § 994. The court may consider a government motion to reduce a sentence made one year or more after the sentence is imposed if the defendant's substantial assistance involves information or evidence not known by the defendant until one year or more after sentence is imposed. In evaluating whether substantial assistance has been rendered, the court may consider the defendant's~~

~~pre-sentence assistance. In applying this subdivision, the court may reduce the sentence to a level below that established by statute as a minimum sentence.~~

~~**(c) Correction of Sentence by Sentencing Court.** The court, acting within 7 days after the imposition of sentence, may correct a sentence that was imposed as a result of arithmetical, technical, or other clear error.~~

Rule 35. Correcting or Reducing a Sentence

(a) Correcting Clear Error. Within 7 days after sentencing, the court may correct a sentence that resulted from arithmetical, technical, or other clear error.

(b) Reducing a Sentence for Substantial Assistance.

(1) ***In General.*** Upon the government's motion made within one year of sentencing, the court may reduce a sentence if:

(A) the defendant, after sentencing, provided substantial assistance in investigating or prosecuting another person; and

(B) reducing the sentence accords with the Sentencing Commission's guidelines and policy statements.

(2) ***Later Motion.*** Upon the government's motion made more than one year after sentencing, the court may reduce a sentence if the defendant's substantial assistance involved:

(A) information not known to the defendant until one year or more after sentencing;

(B) information provided by the defendant to the government within one year of sentencing, but which did not become useful to the government until more than one year after sentencing; or

(C) information the usefulness of which could not reasonably have been anticipated by the defendant until more than one year after sentencing and which was promptly provided to the government after its usefulness was reasonably apparent to the defendant.

(3) ***Evaluating Substantial Assistance.*** In evaluating whether the defendant has provided substantial assistance, the court may consider the defendant's presentence assistance.

(4) ***Below Statutory Minimum.*** When acting under Rule 35(b), the court may reduce the sentence to a level below the minimum sentence established by statute.

COMMITTEE NOTE

The language of Rule 35 has been amended as part of the general restyling of the Criminal Rules to make them more easily understood and to make style and terminology consistent throughout the rules.

These changes are intended to be stylistic only, except as noted below.

The Committee deleted current Rule 35(a) (Correction on Remand). Congress added that rule, which currently addresses the issue of the district court's actions following a remand on the issue of sentencing, in the Sentencing Reform Act of 1984. Pub. L. No. 98-473. The rule cross-references 18 U.S.C. § 3742, also enacted in 1984, which provides detailed guidance on the various options available to the appellate courts in addressing sentencing errors. In reviewing both provisions, the Committee concluded that Rule 35(a) was no longer needed. First, the statute clearly covers the subject matter and second, it is not necessary to address an issue that would be very clear to a district court following a decision by a court of appeals.

Former Rule 35(c), which addressed the authority of the court to correct certain errors in the sentence, is now located in Rule 35(a). In the current version of Rule 35(c), the sentencing court is authorized to correct errors in the sentence if the correction is made within seven days of the imposition of the sentence. The revised rule uses the term "sentencing." No change in practice is intended by using that term.

A substantive change has been made in revised Rule 35(b). Under current Rule 35(b), if the government believes that a sentenced defendant has provided substantial assistance in investigating or prosecuting another person, it may move the court to reduce the original sentence; ordinarily, the motion must be filed within one year of sentencing. In 1991, the rule was amended to permit the government to file such motions after more than one year had elapsed if the government could show that the defendant's substantial assistance involved "information or evidence not known by the defendant" until more than one year had elapsed. The current rule,

however, did not address the question whether a motion to reduce a sentence could be filed and granted in those instances when the defendant's substantial assistance involved information provided by the defendant within one year of sentence but that did not become useful to the government until more than one year after sentencing (e.g., when the government starts an investigation to which the information is pertinent). The courts were split on the issue. *Compare United States v. Morales*, 52 F.3d 7 (1st Cir. 1995) (permitting filing and granting of motion) *with United States v. Orozco*, 160 F.3d 1309 (11th Cir. 1998) (denying relief and citing cases). Although the court in *Orozco* felt constrained to deny relief under Rule 35(b), the court urged an amendment of the rule to:

> address the apparent unforeseen situation presented in this case where a convicted defendant provides information to the government prior to the expiration of the jurisdictional, one-year period from sentence imposition, but that information does not become useful to the government until more than one year after sentence imposition. *Id.* at 1316, n. 13.

Nor does the existing rule appear to allow a substantial assistance motion under equally deserving circumstances where a defendant, who fails to provide information within one year of sentencing because its usefulness could not reasonably have been anticipated, later provides the information to the government promptly upon its usefulness becoming apparent.

Revised Rule 35(b) is intended to address both of those situations. First, Rule 35(b)(2)(B) makes clear that a sentence reduction motion is permitted in those instances identified by the court in *Orozco*. Second, Rule 35(b)(2)(C) recognizes that a post-sentence motion is also appropriate in those instances where the

defendant did not provide any information within one year of sentencing, because its usefulness was not reasonably apparent to the defendant during that period. But the rule requires that once the defendant realizes the importance of the information the defendant promptly provide the information to the government. What constitutes "prompt" notification will depend on the circumstances of the case.

The rule's one-year restriction generally serves the important interests of finality and of creating an incentive for defendants to provide promptly what useful information they might have. Thus, the proposed amendment would not eliminate the one-year requirement as a generally operative element. But where the usefulness of the information is not reasonably apparent until a year or more after sentencing, no sound purpose is served by the current rule's removal of any incentive to provide that information to the government one year or more after the sentence (or if previously provided, for the government to seek to reward the defendant) when its relevance and substantiality become evident.

By using the term "involves" in Rule 35(b)(2) in describing the sort of information that may result in substantial assistance, the Committee recognizes that a court does not lose jurisdiction to consider a Rule 35(b)(2) motion simply because other information, not covered by any of the three provisions in Rule 35(b)(2), is presented in the motion.

REPORTER'S NOTES

In publishing the "style" changes to the Federal Rules of Criminal Procedure, the Committee decided to publish separately any

rule that includes what it considered at least one major substantive change. The purpose for this separate publication is to highlight for the bench and the bar any proposed amendments that the Committee believes will result in significant changes in current practice. Rule 35 was one of those rules. This proposed revision of Rule 35 includes an amendment that would authorize a court to hear a motion to reduce a sentence, more than one year after sentence was imposed, when the defendant's substantial assistance involved information known to the defendant within one year after sentencing, but no motion was filed because the significance or usefulness of the information was not apparent until after the one-year period had elapsed. Another version of Rule 35, which does not include this amendment, is presented in what has been referred to as the "style" package.

~~**Rule 43. Presence of the Defendant**~~

~~**(a) Presence Required.** The defendant shall be present at the arraignment, at the time of the plea, at every stage of the trial including the impaneling of the jury and the return of the verdict, and at the imposition of sentence, except as otherwise provided by this rule.~~

~~**(b) Continued Presence Not Required.** The further progress of the trial to and including the return of the verdict, and the imposition of sentence, will not be prevented and the defendant will be considered to have~~

~~waived the right to be present whenever a defendant, initially present at trial, or having pleaded guilty or nolo contendere,~~

~~(1) is voluntarily absent after the trial has commenced (whether or not the defendant has been informed by the court of the obligation to remain during the trial),~~

~~(2) in a noncapital case, is voluntarily absent at the imposition of sentence, or~~

~~(3) after being warned by the court that disruptive conduct will cause the removal of the defendant from the courtroom, persists in conduct which is such as to justify exclusion from the courtroom.~~

~~**(c) Presence Not Required.** A defendant need not be present:~~

~~(1) when represented by counsel and the defendant is an organization, as defined in 18 U.S.C. § 18;~~

~~(2) when the offense is punishable by fine or by imprisonment for not more than one year or both, and the court, with the written consent of the defendant, permits arraignment, plea, trial, and imposition of sentence in the defendant's absence;~~

~~(3) when the proceeding involves only a conference or hearing upon a question of law; or~~

~~(4) when the proceeding involves a reduction or correction of sentence under Rule 35(b) or (c) or 18 U.S.C. § 3582(c).~~

Rule 43. Defendant's Presence

(a) When Required. Unless this rule, Rule 5, or Rule 10 provides otherwise, the defendant must be present at:

(1) the initial appearance, the initial arraignment, and the plea;

(2) every trial stage, including jury impanelment and the return of the verdict; and

(3) sentencing.

(b) **When Not Required.** A defendant need not be present under any of the following circumstances:

(1) ***Organizational Defendant.*** The defendant is an organization represented by counsel who is present.

(2) ***Misdemeanor Offense.*** The offense is punishable by fine or by imprisonment for not more than one year, or both, and with the defendant's written consent, the court permits arraignment, plea, trial, and sentencing to occur in the defendant's absence.

(3) ***Conference or Hearing on a Legal Question.*** The proceeding involves only a conference or hearing on a question of law.

(4) ***Sentence Correction.*** The proceeding involves the correction or reduction of sentence under Rule 35 or 18 U.S.C. § 3582(c).

(c) **Waiving Continued Presence.**

(1) ***In General.*** A defendant who was initially present at trial, or who had pleaded guilty or nolo contendere, waives the right to be present under the following circumstances:

(A) when the defendant is voluntarily absent after the trial has begun, regardless of whether the court informed the defendant of an obligation to remain during trial;

(B) in a noncapital case, when the defendant is voluntarily absent during sentencing; or

(C) when the court warns the defendant that it will remove the defendant from the courtroom for disruptive behavior, but the defendant persists in conduct that justifies removal from the courtroom.

(2) ***Waiver's Effect.*** If the defendant waives the right to be present, the trial may proceed to completion, including the verdict's return and sentencing, during the defendant's absence.

COMMITTEE NOTE

The language of Rule 43 has been amended as part of the general restyling of the Criminal Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only, except as noted below.

The first substantive change is reflected in Rule 43(a), which recognizes several exceptions to the requirement that a defendant must be present in court for all proceedings. In addition to referring to exceptions that might exist in Rule 43 itself, the amendment recognizes that a defendant need not be present when the court has permitted video teleconferencing procedures under Rules 5 and 10 or when the defendant has waived the right to be present for the arraignment under Rule 10. Second, by inserting the word "initial" before "arraignment," revised Rule 43(a)(1) reflects the view that a defendant need not be present for subsequent arraignments based upon a superseding indictment.

The Rule has been reorganized to make it easier to read and apply; revised Rule 43(b) is former Rule 43(c).

REPORTER'S NOTES

In publishing the "style" changes to the Federal Rules of Criminal Procedure, the Committee decided to publish separately any rule that includes what it considered at least one major substantive change. The purpose for this separate publication is to highlight for the bench and the bar any proposed amendments that the Committee believes will result in significant changes in current practice. Rule 43 was one of those rules. This version of Rule 43 recognizes substantive amendments to Rules 5 and 10, which in turn permit video teleconferencing of proceedings, where the defendant would not be personally present in the courtroom. Another version of Rule 43, which includes only style changes is presented in what has been referred to as the "style' package.

SUMMARY OF PUBLIC COMMENTS

RECEIVED ON

PROPOSED SUBSTANTIVE AMENDMENTS

TO

THE FEDERAL RULES OF CRIMINAL PROCEDURE

MAY 2001

ADVISORY COMMITTEE ON FEDERAL RULES OF CRIMINAL PROCEDURE

PROPOSED AMENDMENTS TO RULE 4

I. SUMMARY OF COMMENTS: Rule 4

One commentator expressed his views on the proposed amendment to Rule 4; he urged the Committee to consider amending the rule to make provision for a magistrate judge to issue a warrant via fax.

II. LIST OF COMMENTATORS: Rule 4

CR-015 Judge Bernard Zimmerman, United States Magistrate Judge, United States District Court, ND California, January 26, 2001

III. COMMENTS: Rule 4

Judge Bernard Zimmerman (CR-015)
United States Magistrate Judge
United States District Court, ND California
January 26, 2001

In a short comment, Judge Zimmerman urges the Committee to consider amending Rule 4 to clarify the ability of the judge to issue warrants via facsimile transmission.

ADVISORY COMMITTEE ON FEDERAL RULES OF CRIMINAL PROCEDURE

PROPOSED AMENDMENTS TO RULE 5

I. SUMMARY OF COMMENTS: Rule 5

Thirty-nine (39) commentators presented written comments on proposed amendments to Rule 5, most of them addressing the proposal regarding video teleconferencing. Of those commenting on the issue, twenty-five (25) expressed general approval of the amendment, especially if video teleconferencing was conducted with the defendant's consent. Federal judges and magistrate judges, including the Magistrate Judges Association, submitted most of the positive comments. Twelve (12) commentators objected to the proposal to permit video teleconferencing, for a variety of reasons. Of those expressing a negative response, several represented organizations, such as the National Association of Criminal Defense Lawyers. At least one federal judge expressed the view that permitting a court to use video teleconferencing with the consent of the defendant was a reasonable step. Judge Cauthron, Chair of the Committee on Defender Services recommends deferral of the amendment, pending discussion on the impact of the amendment.

At a hearing held in Washington, D.C., four witnesses testified in opposition to the amendment. Of those, three objected to any form of video teleconferencing. The fourth would agree with the change if it the video teleconferencing was conducted with the defendant's consent.

II. LIST OF COMMENTATORS: Rule 5

CR-003	Guy Miller Struve (Committee on Fed. Courts, NY Bar Assn.), New York, N.Y., September 28, 2000
CR-004	Judge Alan B. Johnson, D. Wyoming, Cheyenne, WY, October 4, 2000
CR-007	Jack E. Horsley, Esq., Matoon, Illinois, October 13, 2000
CR-009	Andrew M. Franck, Esq., Williamsburg, VA, November 8, 2000
CR-011	Judge Paul D. Borman, United States District Judge, Detroit, Michigan, January 2, 2001
CR-013	Elizabeth Phillips Marsh, Professor of Law, ABA, Criminal Justice Section, January 10, 2001
CR-015	Judge Bernard Zimmerman, United States Magistrate Judge, United States

District Court, ND California, January 26, 2001

CR-017 Judge Robin J. Cauthron, Chair, Committee on Defender Services, Judicial Conference, January 30, 2001

CR-018 Judge Robert P. Murrian, United States Magistrate Judge, ED Tenn., February 5, 2001

CR-019 Judge Thomas W. Phillips, United States Magistrate Judge, ED Tenn., February 5, 2001

CR-022 Judge James E. Seibert, United States Magistrate Judge, Wheeling West Virginia, February 7, 2001

CR-023 Judge William G. Hussmann, United States Magistrate Judge, Indianapolis, Indiana, February 5, 2001

CR-024 Judge Robert Collings, United States Magistrate Judge, Boston, Mass.' February 14, 2001.

CR-025 Dean A. Stang, Federal Defender, Eastern District of Wisconsin, Milwaukee, Wisc., February 12, 2001.

CR-026 Judge Michael J. Watanabe, United States Magistrate Judge, Denver, Colorado, February 13, 2001

CR-027 Thomas W. Hillier, II, Federal Public Defender, Western District of Washington, February 12, 2001

CR-029 Judge Cynthia Imbrogno, United States Magistrate Judge, Eastern District of Washington, February 12, 2001

CR-030 Judge William A. Knox, United States Judge, February 13, 2001

CR-031 Judge Leslie G. Foschio, United States Magistrate Judge, Buffalo, New York, February 13, 2001

CR-033 Larry Propes, Clerk of Court, United States District Court, South Carolina, February 13, 2001

CR-034 Judge Lorenzo F. Garcia, United States Magistrate Judge, United States District Court, Albuquerque, New Mexico, February 13, 2001

CR-035 Judge George P. Kazen, United States District Judge, Southern District of

Texas, February 13, 2001

CR-036 Donna A. Bucella, United States Attorney, Middle District of Florida, Tampa, Florida, February 14, 2001

CR-037 Judge James E. Bredar, United States Magistrate Judge, United States District Court for Maryland, February 13, 2001

CR-038 Judge John C. Coughenour, Chief Judge, United States District Court, Western District of Washington, Seattle, Wash., February 6, 2001

CR-039 Judge Jerry A. Davis, United States Magistrate Judge, ND of Mississippi, February 12, 2001

CR-040 Judge Janice M. Stewart, United States Magistrate Judge, Portland, Oregon, February 12, 2001

CR-041 Judge David Nuffer, United States Magistrate Judge, St George, Utah, February 13, 2001

CR-042 Judge William Beaman, February 12, 2001

CR-043 Judge Susan K. Gauvey, United States Magistrate Judge, D. Maryland, February 15, 2001

CR-044 Federal Magistrate Judges Association (Draft Report—Subject to Board Ratification), February 15, 2001

CR-045 Judge Tommy Miller, United States Magistrate Judge, Eastern District of Virginia (Law Student Comments from William and Mary Law School, Williamsburg, Virginia), February 12, 2001

CR-046 Judge Ronald E. Longstaff, Chief Judge, Southern District of Iowa, February 15, 2001

CR-047 Judge Catherine A. Walter, United States Magistrate Judge, Topeka, Kansas, February 15, 2001

CR-048 Judge Mikel h. Williams, February 15, 2001

CR-049 Judge Richard A, Schell, Chief Judge, Eastern District of Texas, Beaumont, Texas, February 12, 2001

CR-050 Fredric F. Kay, Federal Public Defender, District of Arizona, Tucson,

Arizona, February 15, 2001

CR-055 William J. Genego & Peter Goldberger, National Assn' of Criminal Defense Lawyers, Washington, D.C., February 28, 2001.

CR-056 Mr. Ralph Martin, ABA Criminal Justice Section, Washington, DC, March 2, 2001.

III. LIST OF WITNESSES: Rule 5

Judge Paul D. Borman, United States District Judge, Detroit, Michigan

Mr. Peter Goldberger & Mr. Greg Smith, National Assn. of Criminal Defense Lawyers.

Professor Elizabeth Marsh, Quinnipiac University School of Law, on behalf of the American Bar Association (Criminal Justice Section)

Ms. Shelley Stark, On behalf of the Federal Public Defenders

IV. COMMENTS: Rule 5

Guy Miller Struve CR-003
On behalf of the Committee on Federal Courts, NY Bar Assn.
New York, N.Y.
September 28, 2000

Writing on behalf of the Federal Courts Committee of the New York City Bar Association, Mr. Struve indicates that the Committee has a favorable impression of the amendments generally. But it opposes the amendment to Rule 5 that would permit video teleconferencing of initial appearances. He provides a long list of concerns, focusing primarily on the important need for the defense counsel and defendant to meet in person and conduct critical business. The Committee does not object to using video teleconferencing for arraignments under Rule 10. That procedure, he notes, is often a formality. A rule 5 proceeding, on the other hand, is not a simple formality.

Judge Alan B. Johnson, CR-004
United States District Judge
D.Wyoming
Cheyenne, WY
October 4, 2000

Judge Johnson favors the proposed amendments to Rules 5, 5.1, 10, and 26 that would permit greater use of video teleconferencing and transmission of live testimony. He notes that in Wyoming the courts face problems with requiring prisoners and security personnel to travel great distances for relatively short appearances. That process is expensive and inefficient, given that at least two persons are detailed to transport prisoners. He adds that such movements are usually on short notice and do not provide an adequate opportunity for United States Marshals to screen and develop information on the general health of the individual. This presents special problems in light of exposure to resistant strains of tuberculosis. He notes that the Wyoming courts are equipped with excellent technology to use video teleconferencing.

Jack E. Horsley, Esq. (CR-007)
Matoon, Illinois
October 13, 2000

Mr. Horsley recommends that Rule 5(d) be amended by adding the words "or any other document," before the words "filed with it."

Andrew M. Franck, Esq. (CR-009)
Williamsburg, VA
November 8, 2000

Mr. Franck opposes the amendments to Rules 5, 10 and 43 that would permit video teleconferencing—even if the defendant consents. First, he notes, because the preliminary hearing and arraignment are administrative in nature, there is no practical problem of permitting video teleconferencing. But it is important for the defendant to be subjected to a personal appearance before the judge and realize the full impact of what he is facing. Also, is important for the judge to observe the defendant personally. He observes that there are always nuances involved in such proceedings and that it is critical that both parties are in each other's presence.

Judge Paul D. Borman (CR-011)
United States District Judge
Detroit, Michigan
January 2, 2001

Judge Borman has requested the opportunity to present testimony to the Committee, noted below.

Elizabeth Phillips Marsh (CR-013)
Professor of Law
ABA, Criminal Justice Section
January 10, 2001

Professor Marsh has requested the opportunity to present testimony to the Committee, noted below.

Judge Bernard Zimmerman (CR-015)
United States Magistrate Judge
United States District Court, ND California
January 26, 2001

Judge Zimmerman supports the amendments that would permit video teleconferencing. In his view, the amendments are long overdue. He also urges the Committee to consider amending Rule 4 to clarify the ability of the judge to issue warrants via facsimile transmission.

Judge Robin J. Cauthron (CR-017)
Chair, Committee on Defender Services
Judicial Conference of the United States
January 30, 2001

Judge Cauthron notes that her predecessor, Judge Diamond, had expressed concern in 1994 (when the Committee had last proposed video teleconferencing) that costs would not be saved by implementing video teleconferencing. Although the Committee's proposals were withdrawn pending the results of pilot programs, to date there has not been an analysis of cost or quality concerns. She requests that the Committee defer action on the video teleconferencing amendments until the Committee on Defender Services can discuss the impact of those amendments.

Judge Robert P. Murrian (CR-018)
United States Magistrate Judge
Eastern District of Tennessee
February 5, 2001

Judge Murrian supports the amendments that would provide for video teleconferencing—with or without the defendant's consent. He believes, however, that the judge should have the prerogative to require the defendant to appear in court. In his division, considerable time and resources are spent transporting defendants eighteen miles to the court for routine initial appearances and arraignments that are little more than scheduling conferences.

Judge Thomas W. Phillips (CR-019)
United States Magistrate Judge
Eastern District of Tennessee
February 5, 2001

Judge Phillips writes that he agrees with the views of Judge Murrian, *supra*.

Judge James E. Seibert (CR-022)
United States Magistrate Judge
Northern District of West Virginia
Wheeling West Virginia
February 7, 2001

Judge Seibert strongly disagrees that the defendant should be allowed to determine whether video teleconferencing is used. He notes that it is a two, three, or four hour drive to the three other cities covered by the court and that it is often not possible to plan far enough in advance to have all of the defendants at a particular location ready to appear before the court. He notes that every lawyer and defendant who has appeared before him by video conference has been "extremely grateful for the prompt hearing that wastes neither time nor money of anyone." He states that he has never had any objection to appearance by video conference. On another matter, he strongly agrees that portions of Rules 32.1 and 40 belong in Rule 5.

Judge William G. Hussmann (CR-023)
United States Magistrate Judge
Indianapolis, Indiana
February 5, 2001

Judge Hussmann believes that video teleconferencing should occur only with the consent of the defendant. Although initial proceedings, etc have limited importance, they can have great impact on some practical issues. Because of increased caseloads and crowded jails, it is common to hear complaints from defendants that they are unable to talk to their lawyer or to talk to family members about bail or other pressing family matters. Appearing in person often presents an opportunity for communication. Although video technology has improved, in his view, it does not provide an appropriate venue for communications between counsel and family.

Judge Robert Collings(CR-024)
United States Magistrate Judge
Boston, Mass.
February 14, 2001.

Writing on behalf of Magistrate Judges Lawrence P. Cohen and Judith G. Dein, Judge Collings offers a revision to proposed Rule 5(c)(2)(A). They suggest that that provision be divided into two parts to deal with different situations. They approve of the proposed revision that allows a person arrested in one district to be brought before a magistrate judge in an adjacent district if the initial appearance can be held more promptly in that district. They believe, however, that provision should be made to allow a defendant arrested in one district to be brought before a magistrate in an adjacent

district "if the adjacent district is the district in which the prosecution is pending and if the initial appearance will be held in that district on the same day as the arrest." In summary, they suggest carving out a different rule when the adjacent district is the district of prosecution.

Dean A. Stang (CR-025)
Federal Defender
Eastern District of Wisconsin
Milwaukee, Wisconsin
February 12, 2001.

Mr. Stang opposes the proposed amendments involving video teleconferencing. He indicates that initial appearances and arraignments are not pro forma events and that those proceedings provide both parties with an opportunity to discuss very important matters. Using teleconferencing will result in lost plea bargains, early cooperation, and prompt release decisions. He notes a number of practical problems that will arise and that teleconferencing makes no practical accommodation for interpreters. Mr. Hillier notes that he is not aware of any special danger to law enforcement officers or court personnel by requiring in-court appearances. Further, teleconferencing will interfere with the critical stages of forming an attorney-client relationship. Finally, teleconferencing will undermine both the dignity of the federal courts and Sixth Amendment values.

Judge Michael J. Watanabe(CR-026)
United States Magistrate Judge
Denver, Colorado
February 13, 2001

Judge Watanabe briefly writes that he strongly favors use of video teleconferencing. He states that he has used it in civil cases and that it works very well.

Thomas W. Hillier, II (CR-027)
Federal Public Defender
Western District of Washington
February 12, 2001

Mr. Hillier presents a detailed objection to the video teleconferencing amendments, on behalf or the Federal Public and Community Defenders. He notes that the current practice works well and that the initial appearance is not a pro forma proceeding. He presents a careful overview of the important decisions that are made in the face-to-face meetings between the defendant, the defense counsel, and the prosecutor. Those meetings, he asserts, assure prompt processing the case. Mr. Hillier believes that video teleconferencing is impractical and presents difficult situations for both the defendant and the defense counsel who must decide whether to remain at the courthouse, with the judge and the prosecutor or travel to where the defendant is located. He notes

that the system is likely to result in increased costs and that no in-depth study has been conducted. Further, he observes that in Rule 10, the ability of the defendant to waive presence at the arraignment negates the need for teleconferencing in that rule. Finally, he identifies a list of unresolved issues and urges the Committee to table its proposals pending further study.

Judge Cynthia Imbrogno (CR-029)
United States Magistrate Judge
Eastern District of Washington
February 12, 2001

Judge Imbrogno enthusiastically supports the video teleconferencing amendments. She writes that there are only two magistrate judges covering the Eastern District of Washington and that they often drive over three hours (one way) to conduct proceedings in other cities within the district. As a result, some duty stations are not covered because of the need to spend time traveling. She notes that the technology is sufficiently advanced to maintain the integrity of the proceedings. Defense counsel, she writes, are very supportive of teleconferencing because it gives them greater flexibility in scheduling. She would support video teleconferencing without requiring the defendant's consent.

Judge William A. Knox (CR-030)
United States Judge
February 13, 2001

Judge Knox favors video teleconferencing. He says that he has used it in civil proceedings, including trials, and finds it to be "reliable, practical, efficient, and [has had] no difficulty protecting the rights of the parties. Judge Knox states that if the equipment is poor it is a waste of time to use it.

Judge Leslie G. Foschio (CR-031)
United States Magistrate Judge
Buffalo, New York
February 13, 2001

Judge Foschio favors video teleconferencing for arraignments, especially for superseding arraignments, where the defendant has been already arraigned and bail has been set.

Larry Propes (CR-033)
Clerk of Court
United States District Court, South Carolina
February 13, 2001

Mr. Propes indicates that the judges in both the Greenville and Florence divisions are interested in using video teleconferencing for initial appearances because the courthouses are not in convenient or close proximity to the county jails being used by the US Marshals Service. He observes that if the rule requires the consent of the defendant, few, if any, will consent. He therefore recommends that video teleconferencing not be contingent on the defendant's consent.

Judge Lorenzo F. Garcia (CR-034)
United States Magistrate Judge
United States District Court
Albuquerque, New Mexico
February 13, 2001

Judge Garcia favors using video teleconferencing, especially for arraignments. He notes that in New Mexico, a number of defendants are simply passing through the state when they are arrested and bringing them back to court simply for an arraignment can result in unnecessary costs; where the defendant is indigent, the court must direct advancement of travel costs for the defendant. Judge Garcia also writes that he has had experience with arraignment waivers in state court and that the system worked well.

Judge George P. Kazen (CR-035)
United States District Judge
Southern District of Texas
February 13, 2001

Judge Kazen believes that it is very important to provide for waiver of personal appearance at initial proceedings (Rules 5, 10 and 43), either by written waiver or video appearance. Citing his experience in a border court, in one of five districts they hear almost 30 percent of the criminal cases for the entire nation. The initial arraignment is largely perfunctory used to set a motions schedule. Most of the defendants plead not guilty and are housed as many as 60 to 300 miles away from a courthouse. He notes that frequently the defendants reside at a distant location and if they are released, there are problems in bringing them back for those proceedings. Judge Kazen observes that given the considerable apprehension about this proposal, it would be prudent to adopt a proposal that requires the defendant's consent.

Donna A. Bucella (CR-036)
United States Attorney
Middle District of Florida,
Tampa, Florida
February 14, 2001

Ms. Bucella observes that if the defendant is allowed to waive appearances at an arraignment, the government's consent should be required. She also notes that the Committee Note is ambiguous on just how video teleconferencing will be accomplished for initial appearances. She adds that if the purpose of the amendments is to save money, that the Committee ought to say so explicitly.

Judge James E. Bredar (CR-037)
United States Magistrate Judge
United States District Court for Maryland
February 13, 2001

Judge Bredar opposes the use of video teleconferencing. He believes that there is much at stake in federal criminal cases and that the sooner the defendant understands the gravity of his situation, the better. He adds that from his time as a public defender, there nothing that helps to focus the mind than to walk into a federal courtroom. He believes that the overall process will be "denigrated" by reducing those appearances to a television experience.

Judge John C. Coughenour (CR-038)
Chief Judge, United States District Court
Western District of Washington
Seattle, Washington
February 6, 2001

Judge Coughenour opposes video teleconferencing in proposed Rules 5 and 10. In his view, the solemnity and fairness of the defendant's appearance in court in the presence of counsel and the judge far outweigh the security problems. The solution, he notes, is heightened vigilance and not the sacrifice of cherished traditions. His views, he notes, are based on his research into the issue: in 1990 he was a member of the Court Administration and Case Management Committee which had supervised a pilot program. As a result of that study, the Committee had believed strongly that video teleconferencing seriously eroded the full and fair examination of facts and witnesses. He urges the Committee to reject the amendments.

Judge Jerry A. Davis (CR-039)
United States Magistrate Judge
ND of Mississippi
February 12, 2001

Judge Davis endorses video teleconferencing. He notes that state courts have been using it for years and that he has been using it for prisoner cases for several years and that there are no "downsides." He observed that it is useful for security purposes and in rural areas. He concludes by noting that any perceived constitutional problems are imagined, not real.

Judge Janice M. Stewart (CR-040)
United States Magistrate Judge
Portland, Oregon
February 12, 2001

Judge Steward favors the proposals for video teleconferencing. But due to concerns about separating the defendant and defense counsel and the problems that that creates, she believes video teleconferencing should be used only where the defendant consents.

Judge David Nuffer (CR-041)
United States Magistrate Judge
St George, Utah
February 13, 2001

Judge Nuffer, a part time magistrate judge, strongly favors video teleconferencing. In Utah he works 300 miles from the courthouse.

Judge William Beaman (CR-042)
February 12, 2001

Judge Beaman strongly approves of video teleconferencing, but would require the defendant's consent.

Judge Susan K. Gauvey (CR-043)
United States Magistrate Judge
District of Maryland
February 15, 2001

Judge Gauvey recounts her experiences in the Maryland state courts with video teleconferencing. She observed what she calls assembly line justice. The proceedings were held in a large room and appeared surreal and chilling. There was no communication between the judge and the defendant. In contrast, in federal courts, all parties are more focused and she is concerned that a judge could not pick up the subtle hesitations or halting speech or odd manner that may be signs of impairment.

Federal Magistrate Judges Association (CR-044)
(Draft Report—Subject to Board Ratification)
February 15, 2001

The Magistrate Judges Association supports the proposed video teleconferencing. The Association recounts the benefits of using such procedures and suggests that some of the concerns about the erosion of the process might be addressed if the judge visits the

detention facility and determines if that facility as a room suitable for conducting teleconferencing, along with a private telephone line and a room where the defendant can consult in private with his or her attorney. The Association favors video conferencing without requiring the defendant's consent.

Judge Tommy Miller (CR-045)
United States Magistrate Judge, Eastern District of Virginia
(Law Student Comments from William and Mary Law School, Williamsburg, Virginia)
February 12, 2001

Judge Miller, a member of the Criminal Rules Committee, submitted ten written comments from the law students in his Criminal Procedure class at William and Mary. One of the students, Kimberly Marinoff, expresses concern about the video conferencing provision. She believes that it "eviscerates the utility" of the proceedings "as a wake-up call by insulating the accused from the physical presence of the judge." She concludes, however, that if the amendment is to remain, she would support the alternate version that requires the defendant's consent.

Another student, Tom Brzozowski, applauds the style changes to the rules, but suggests that the Committee include a provision in Rule 5 that would make clear what the remedy is for failure to comply with the timing requirements of the rule. He provides a summary of the conflicting caselaw and statutory provisions and argues that whatever remedy the Committee chooses would provide predictability to practitioners.

A third student, James Ewing, addresses the video teleconferencing provisions. He cites the historical arguments for the right of the defendant to appear personally in court and believes that even if a defendant consents to video teleconferencing, there may be problems with the perception of fairness. Thus, video conferencing should be the exception rather than the general rule, even where the defendant consents.

Judge Ronald E. Longstaff (CR-046)
Chief Judge, Southern District of Iowa
February 15, 2001

On behalf of the judges of his district, Judge Longstaff indicates that they agree with the comments submitted by Magistrate Judges Cohen, Dien, and Collings, *supra* concerning taking defendants to a magistrate in an adjacent district. They also support the changes for video teleconferencing and would comport to court technology procedures already in place, including both districts in Iowa.

Judge Catherine A. Walter (CR-047)
United States Magistrate Judge

Topeka, Kansas
February 15, 2001

Although she has not used video teleconferencing, Judge Walter supports it use, especially for initial appearances. She notes that the facility used to house pretrial detainees (an hour's drive from her court) has recently installed videoconferencing equipment. In her view the opportunity for the earliest time for the hearing is more important than a face-to-face appearance before a judge. She notes that there have been occasions where the availability of video conferencing would have resulted in an earlier initial appearance.

Judge Mikel H. Williams (CR-048)
February 15, 2001

Judge Williams commends the Committee for its thorough reorganization of the criminal rules and fully endorses the use of video teleconferencing for initial criminal proceedings. He notes that for the last four years his courts have used such procedures for initial criminal proceedings; they adopted the program because of concerns for serious delays in scheduling the various parties for the hearings. The district court for Idaho covers the entire state and the 400 miles distances make automobile transportation impractical and air travel can be delayed by weather. Transporting the defendants presents similar problems. He describes the process used in his district--the defendant is taken to the closest federal courthouse where he meets his CJS counsel and within two or three hours the defendant appears with counsel before the magistrate judge via video. He cannot recall a single instance where the defendant objected to that procedure; he considers the program to be a resounding success. The defendant's rights are immediately addressed and the proceeding is conducted with the same formality as if the defendant were in the judge's court. Although he would prefer to have a rule not requiring the defendant's consent, he believes that obtaining consent is not a burden.

Judge Richard A, Schell (CR-049)
Chief Judge, Eastern District of Texas
Beaumont, Texas
February 12, 2001

Judge Schell supports the proposed amendments for video teleconferencing. Although he would prefer the version that does not require consent, a rule that requires the defendant's consent is imminently reasonable. He urges the Committee to consider extending video conferencing to pleas and sentencing. He notes the long distances involved in his district and the fact that he has been used video teleconferencing for several years for sentencing and for guilty pleas, with the defendant's consent.

Fredric F. Kay (CR-050)
Federal Public Defender, District of Arizona

Tucson, Arizona
February 15, 2001

Mr. Kay writes that in the District of Arizona there are four lawyers in his office and that in FY 2000 they were appointed to represent about 8000 indigent defendants. Many of those were immigration cases. He agrees with the views expressed by Mr. Tom Hillier, *supra*, and strongly urges the Committee to reject the amendments. He knows of no serious cost and security concerns that would support the proposed amendments and that they should not outweigh the important aspects of having the defendant and counsel appear personally before the judge. He has watched video proceedings in the state system and has observed the defendant sitting by himself in a chair answering the judge's questions. The judges he notes, may have questions about the defendant's capacity and they have to ask a guard whether the defendant appears to be sober. Using video conferencing is something that one might expect in a weird third world country where there is no concept of presumption of innocence.

William J. Genego & Peter Goldberger (CR-055)
National Assn' of Criminal Defense Lawyers
Washington, D.C.
February 28, 2001

Mr. Genego and Mr. Goldberger, writing on behalf of the National Association of Criminal Defense Lawyers, strongly object to the proposed amendment to permit video teleconferencing of initial appearances, with or without the consent of the defendant. They observe that the Committee Note does not indicate why the amendment is necessary, other than for administrative convenience. They believe that using video teleconferencing will simply shift the costs to the defense bar and that it would seriously threaten the justice system by reducing the initial appearance to a "rote proceeding on a television screen..." They highlight a number of reasons why the initial appearance is important and state that they believe that using video will have a discriminatory impact on minorities.

Mr. Ralph Martin (CR-056)
ABA, Criminal Justice Section
Washington, DC
March 2, 2001.

Mr. Martin, writing on behalf of the American Bar Association's Criminal Justice Section, expresses opposition to the amendments to Rule 5, 10, and 43 that would permit video teleconferencing. He notes first, that although the rule does not define video teleconferencing, its use is increasing. He details a number of "costs" of requiring a defendant to be physically present, and offers a number of reasons why Rules 5 and 10

should not permit video teleconferencing—at least not without consent of the defendant. The biggest hurdle, he claims, is that use of video teleconferencing will adversely impact on the ability of the defendant to confer with counsel. He indicates that if the Committee is going to proceed with video teleconferencing, that the ABA would recommend that it be done only with the consent of the defendant.

V. TESTIMONY: Rule 5

Judge Paul D. Borman (CR-011)
United States District Judge
Detroit, Michigan
Washington, D.C., April 25, 2001

Judge Borman testified at a hearing in Washington, D.C. and expressed his personal views that no video teleconferencing should be used, either under Rule 5 or Rule 10. He expressed concern that doing so would reduce the criminal justice system to a series of talking heads on a television monitor. Simply because the state courts use video teleconferencing is not a sufficient reason for adopting its use in federal courts, he testified. He noted in particular that the federal courtroom is a "neutral" site and that a detention center—where the defendant is usually located during video teleconferencing—is not a neutral site. He also testified that because white-collar criminals are not normally incarcerated at the time of the initial appearance, using video teleconferencing would create a two-tiered system of criminal justice, between those who are incarcerated and those who are not.

Peter Goldberger & Greg Smith
National Assn' of Criminal Defense Lawyers
Hearing--Washington, D.C., April 25, 2001

Testifying on behalf of the NADCL at a hearing in Washington, D.C., Mr. Goldberger and Mr. Greg Smith expressed strong reservations about the proposed amendments governing video teleconferencing. They noted in particular that the constitutional challenges to video teleconferencing have yet to be addressed and worked out. They believe that the amendment will inhibit justice and that its essential that there be a transition from police custody to the courtroom procedures. The proceedings are cheapened, they testified, if a defendant is not brought to the courtroom. Further, it sends a subtle message that the defendant is not worthy of an in-court proceeding. Finally, they noted that the procedure would simply shift the associated costs to the defense bar.

Elizabeth Phillips Marsh
Professor of Law
ABA, Criminal Justice Section
Washington, D.C., April 25, 2001

Professor Marsh testified before the Committee in Washington, D.C. and expressed deep concerns, on behalf of the ABA, to the proposed amendments concerning video teleconferencing. In particular, she noted that using such a system separates the parties from each other and makes it difficult for the judge to assess the defendant's mental and physical condition. She observed that if the amendment were to go forward, it should require the defendant's consent, perhaps with an affirmative waiver or consent

Ms. Shelley Stark
Federal Public Defender, on behalf of Federal Public Defenders
W.D. of Pennsylvania
Washington, D.C., April 25, 2001

Ms. Stark testified that the Federal Public Defenders were opposed to the proposed amendments that would permit video teleconferencing in Rule 5, but was not opposed to such procedures for Rule 10 arraignments. She observed that the rule would basically shift the costs of conducting initial appearances, from the Marshal's service to the Federal Public Defenders. She noted that in those districts were counsel is not appointed to represent a defendant until after the initial appearance, there may be no legal advice as to what procedures should be consented to. She also testified that a major issue is developing a level of trust with defendants and that using video teleconferencing will simply delay that process and that if counsel do not have the trust of the defendant, it is harder to plea bargain. In effect, she added, there is no real opportunity to conduct private conversations with a client. Finally, she expressed concern that using video teleconferencing would lead to racial and economic disparity in the federal criminal justice system.

ADVISORY COMMITTEE ON FEDERAL RULES OF CRIMINAL PROCEDURE

PROPOSED AMENDMENTS TO RULE 5.1

I. SUMMARY OF COMMENTS: Rule 5.1

Only three commentators presented written statements concerning the proposed amendment to Rule 5.1 that would permit magistrate judges to grant a continuance in a preliminary hearing over the objection of the defendant. All three were generally in support of the amendment. Of particular note were the comments from the Magistrate Judge's Assn., which indicated that it has supported the proposed amendment since 1996.

II. LIST OF COMMENTATORS: Rule 5.1

CR-004	Judge Alan B. Johnson, United States District Judge, D. Wyoming Cheyenne, WY, October 4, 2000
CR-005	Professor Harry I. Subin, New York Univ. of Law, New York, N.Y., October 6, 2000.
CR-044	Federal Magistrate Judges Association (Draft Report—Subject to Board Ratification), February 15, 2001

III. COMMENTS: Rule 5.1

Judge Alan B. Johnson, CR-004
United States District Judge
D. Wyoming
Cheyenne, WY
October 4, 2000

Judge Johnson favors the proposed amendments to Rules 5, 5.1, 10, and 26 that would permit greater use of video teleconferencing and transmission of live testimony. He notes that in Wyoming the courts face problems with requiring prisoners and security personnel to travel great distances for relatively short appearances. That process is expensive and inefficient, given that at least two persons are detailed to transport prisoners. He adds that such movements are usually on short notice and do not provide an adequate opportunity for United States Marshals to screen and develop information on the general health of the individual. This presents special problems in light of exposure to resistant strains of tuberculosis. He notes that the Wyoming courts are equipped with excellent technology to use video teleconferencing.

Professor Harry I. Subin (CR-005)
New York Univ. of Law
New York, N.Y.
October 6, 2000.

Professor Subin has no objection to the language of Rule 5.1, but urges the Committee to confront the fact that the hearing itself is virtually irrelevant in current practice, especially in large urban areas where grand juries are constantly in session. The prosecutor and avoid the need for a Rule 5.1 hearing by simply presenting the case to a grand jury. He suggests that if the Committee agrees that the ability of a defendant to present an adversarial challenge to the government's case, then it should make the hearing available to the defendant.

Federal Magistrate Judges Association (CR-044)
(Draft Report—Subject to Board Ratification)
February 15, 2001

The Association also supports the substantive amendment to Rule 5.1 that would permit magistrate judge to grant a continuance without the consent of the defendant--a change it has supported since 1996.

ADVISORY COMMITTEE ON FEDERAL RULES OF CRIMINAL PROCEDURE

PROPOSED AMENDMENTS TO RULE 6

I. SUMMARY OF COMMENTS: Rule 6

One commentator urged the Committee to gender-neutralize Rule 6

II. LIST OF COMMENTATORS: Rule 6

CR-020 Cathy Stegman, Law Clerk, United States District Court, Nebraska, February 7, 2001

III. COMMENTS: Rule 6

Cathy Stegman (CR-020)
Law Clerk
United States District Court, Nebraska
February 7, 2001

Ms. Stegman states that proposed Rule 6(a) is not gender neutral. The rule, she says, assumes that all judges are male.

ADVISORY COMMITTEE ON FEDERAL RULES OF CRIMINAL PROCEDURE

PROPOSED AMENDMENTS TO RULE 7

I. SUMMARY OF COMMENTS: Rule 7

One commentator, a law student, questions whether the requirement that a defendant waive an indictment in open court is satisfied by video teleconferencing—as proposed in Rules 5 and 10.

II. LIST OF COMMENTATORS: Rule 7

CR-045 Judge Tommy Miller, United States Magistrate Judge, Eastern District of Virginia (Law Student Comments from William and Mary Law School, Williamsburg, Virginia), February 12, 2001

III. COMMENTS: Rule 7

Judge Tommy Miller (CR-045)
United States Magistrate Judge, Eastern District of Virginia
(Law Student Comments from William and Mary Law School, Williamsburg, Virginia)
February 12, 2001

Judge Miller, a member of the Criminal Rules Committee, submitted ten written comments from the law students in his Criminal Procedure class at William and Mary. One of the students, James Ewing, notes a possible inconsistency in Rule 7(b) with the video teleconferencing provisions in Rules 5 and 10. He observes that Rule 7(b) provides that a defendant may be prosecuted for a felony on an information, if the defendant waives the right to an indictment in open court. He questions whether "in open court" could include video teleconferencing. He notes that the Committee Notes are silent on this point.

ADVISORY COMMITTEE ON FEDERAL RULES OF CRIMINAL PROCEDURE

PROPOSED AMENDMENTS TO RULE 9

I. SUMMARY OF COMMENTS: Rule 9

Two magistrate judges provided written comments on the proposed amendment to Rule 9. One opposed the change and one approves of the change.

II. LIST OF COMMENTATORS: Rule 9

CR-022 Judge James E. Seibert, Magistrate Judge, Wheeling West Virginia, February 7, 2001

CR-042 Judge William Beaman, February 12, 2001

III. COMMENTS: Rule 9

Judge James E. Seibert (CR-022)
United States Magistrate Judge
Northern District of West Virginia
Wheeling West Virginia
February 7, 2001

Judge Seibert agrees with the change in Rule 9(b)(1). But he points out that he has "lost" some defendants because other magistrate judges viewed the risk of flight differently.

Judge William Beaman (CR-042)
February 12, 2001

Judge Beaman disagrees with the deletion of the last sentence of Rule 9(b)(1). He notes that if the warrant is executed out of the district, the magistrate should have some indication what the charging district believes the bail should be.

ADVISORY COMMITTEE ON FEDERAL RULES OF CRIMINAL PROCEDURE

PROPOSED AMENDMENTS TO RULE 10

I. SUMMARY OF COMMENTS: Rule 10

Of the thirty-six (36) commentators submitting comments on the proposed amendments to Rule 10, almost all of them addressed the issue of using video teleconferencing for arraignments. Twenty four (24) generally approved of the proposal; some would support an amendment permitting the court to proceed with video teleconferencing even without the defendant's consent. Of the positive comments, many of them were from district and magistrate judges. The Magistrate Judge's Association expressed its approval of the amendment. Twelve (12) commentators were opposed to any use of video teleconferencing, but two would generally approve its use, if the defendant consented. Of the negative comments, several were filed by defense organizations.

In addition, the Committee heard testimony from four witnesses, who expressed opposition or concern about using video teleconferencing for arraignments.

II. LIST OF COMMENTATORS: Rule 10

CR-004 Judge Alan B. Johnson, United States District Judge, D. Wyoming Cheyenne, WY, October 4, 2000

CR-009 Andrew M. Franck, Esq., Williamsburg, VA, November 8, 2000

CR-011 Judge Paul D. Borman, United States District Judge, Detroit, Michigan, January 2, 2001

CR-012 Richard D. Friedman, Professor of Law, Univ. of Michigan, January 8, 2001

CR-013 Elizabeth Phillips Marsh, Professor of Law, ABA, Criminal Justice Section, January 10, 2001

CR-015 Judge Bernard Zimmerman, United States Magistrate Judge, United States District Court, ND California, January 26, 2001

CR-017 Judge Robin J. Cauthron, Chair, Committee on Defender Services, Judicial Conference, January 30, 2001

CR-018 Judge Robert P. Murrian, United States Magistrate Judge, ED Tenn.,

February 5, 2001

CR-019 Judge Thomas W. Phillips, United States Magistrate Judge, ED Tenn., February 5, 2001

CR-022 Judge James E. Seibert, Magistrate Judge, Wheeling West Virginia, February 7, 2001

CR-023 Judge William G. Hussmann, United States Magistrate Judge, Indianapolis, Indiana, February 5, 2001

CR-025 Dean A. Stang, Federal Defender, Eastern District of Wisconsin, Milwaukee, Wisc., February 12, 2001.

CR-026 Judge Michael J. Watanabe, United States Magistrate Judge, Denver, Colorado, February 13, 2001

CR-027 Thomas W. Hillier, II, Federal Public Defender, Western District of Washington, February 12, 2001

CR-029 Judge Cynthia Imbrogno, United States Magistrate Judge, Eastern District of Washington, February 12, 2001

CR-030 Judge William A. Knox, United States Judge, February 13, 2001

CR-031 Judge Leslie G. Foschio, United States Magistrate Judge, Buffalo, New York, February 13, 2001

CR-033 Larry Propes, Clerk of Court, United States District Court, South Carolina, February 13, 2001

CR-034 Judge Lorenzo F. Garcia, United States Magistrate Judge, United States District Court, Albuquerque, New Mexico, February 13, 2001

CR-035 Judge George P. Kazen, United States District Judge, Southern District of Texas, February 13, 2001

CR-036 Donna A. Bucella, United States Attorney, Middle District of Florida, Tampa, Florida, February 14, 2001

CR-037 Judge James E. Bredar, United States Magistrate Judge, United States District Court for Maryland, February 13, 2001

CR-038 Judge John C. Coughenour, Chief Judge, United States District Court,

Western District of Washington, Seattle, Wash., February 6, 2001

CR-039 Judge Jerry A. Davis, United States Magistrate Judge, ND of Mississippi, February 12, 2001

CR-040 Judge Janice M. Stewart, United States Magistrate Judge, Portland, Oregon, February 12, 2001

CR-041 Judge David Nuffer, United States Magistrate Judge, St George, Utah, February 13, 2001

CR-042 Judge William Beaman, February 12, 2001

CR-043 Judge Susan K. Gauvey, United States Magistrate Judge, D. Maryland, February 15, 2001

CR-044 Federal Magistrate Judges Association (Draft Report—Subject to Board Ratification), February 15, 2001

CR-045 Judge Tommy Miller, United States Magistrate Judge, Eastern District of Virginia (Law Student Comments from William and Mary Law School, Williamsburg, Virginia), February 12, 2001

CR-047 Judge Catherine A. Walter, United States Magistrate Judge, Topeka, Kansas, February 15, 2001

CR-048 Judge Mikel H. Williams, February 15, 2001

CR-049 Judge Richard A, Schell, Chief Judge, Eastern District of Texas, Beaumont, Texas, February 12, 2001

CR-050 Fredric F. Kay, Federal Public Defender, District of Arizona, Tucson, Arizona, February 15, 2001

CR-055 William J. Genego & Peter Goldberger, National Assn' of Criminal Defense Lawyers, Washington, D.C., February 28, 2001.

CR-056 Mr. Ralph Martin, ABA Criminal Justice Section, Washington, DC, March 2, 2001.

III. LIST OF WITNESSES: Rule 10

Judge Paul D. Borman, United States District Judge, Detroit, Michigan

Mr. Peter Goldberger & Mr. Greg Smith, National Assn. of Criminal Defense Lawyers.

Professor Elizabeth Marsh, Quinnipiac University School of Law, on behalf of the American Bar Association (Criminal Justice Section)

Ms. Shelley Stark, On behalf of the Federal Public Defenders

IV. COMMENTS: Rule 10

Judge Alan B. Johnson, CR-004
United States District Judge
D. Wyoming
Cheyenne, WY
October 4, 2000

Judge Johnson favors the proposed amendments to Rules 5, 5.1, 10, and 26 that would permit greater use of video teleconferencing and transmission of live testimony. He notes that in Wyoming the courts face problems with requiring prisoners and security personnel to travel great distances for relatively short appearances. That process is expensive and inefficient, given that at least two persons are detailed to transport prisoners. He adds that such movements are usually on short notice and do not provide an adequate opportunity for United States Marshals to screen and develop information on the general health of the individual. This presents special problems in light of exposure to resistant strains of tuberculosis. He notes that the Wyoming courts are equipped with excellent technology to use video teleconferencing.

Andrew M. Franck, Esq.(CR-009)
Williamsburg, VA
November 8, 2000

Mr. Franck opposes the amendments to Rules 5, 10 and 43 that would permit video teleconferencing—even if the defendant consents. First, he notes, because the preliminary hearing and arraignment are administrative in nature, there is no practical problem of permitting video teleconferencing. But it is important for the defendant to be subjected to a personal appearance before the judge and realize the full impact of what he is facing. Also, is important for the judge to observe the defendant personally. He observes that there are always nuances involved in such proceedings and that it is critical that both parties are in each other's presence.

Judge Paul D. Borman (CR-011)
United States District Judge
Detroit, Michigan
January 2, 2001

Judge Borman has requested the opportunity to present testimony to the Committee. See a summary of his testimony, below.

Elizabeth Phillips Marsh (CR-013)
Professor of Law
ABA, Criminal Justice Section
January 10, 2001

Professor Marsh has requested the opportunity to present testimony to the Committee. Her testimony is summarized below.

Judge Bernard Zimmerman (CR-015)
United States Magistrate Judge
United States District Court, ND California
January 26, 2001

Judge Zimmerman supports the amendments that would permit video teleconferencing. In his view, the amendments are long overdue. He also urges the Committee to consider amending Rule 4 to clarify the ability of the judge to issue warrants via facsimile transmission.

Judge Robin J. Cauthron (CR-017)
Chair, Committee on Defender Services
Judicial Conference of the United States
January 30, 2001

Judge Cauthron notes that her predecessor, Judge Diamond, had expressed concern in 1994 (when the Committee had last proposed video teleconferencing) that costs would not be saved by implementing video teleconferencing. Although the Committee's proposals were withdrawn pending the results of pilot programs, to date there has not been an analysis of cost or quality concerns. She requests that the Committee defer action on the video teleconferencing amendments until the Committee on Defender Services can discuss the impact of those amendments.

Judge Robert P. Murrian (CR-018)
United States Magistrate Judge
Eastern District of Tennessee
February 5, 2001

Judge Murrian supports the amendments that would provide for video teleconferencing—with or without the defendant's consent. He believes, however, that the judge should have the prerogative to require the defendant to appear in court. In his division, considerable time and resources are spent transporting defendants eighteen miles to the court for routine initial appearances and arraignments that are little more than scheduling conferences.

Judge Thomas W. Phillips (CR-019)
United States Magistrate Judge
Eastern District of Tennessee
February 5, 2001

Judge Phillips writes that he agrees with the views of Judge Murrian, *supra.*

Judge James E. Seibert (CR-022)
United States Magistrate Judge
Northern District of West Virginia
Wheeling West Virginia
February 7, 2001

Judge Seibert strongly disagrees that the defendant should be allowed to determine whether video teleconferencing is used. He notes that it is a two, three, or four hour drive to the three other cities covered by the court and that it is often not possible to plan far enough in advance to have all of the defendants at a particular location ready to appear before the court. He notes that every lawyer and defendant who has appeared before him by video conference has been "extremely grateful for the prompt hearing that wastes neither time nor money of anyone." He states that he has never had any objection to appearance by video conference.

Judge William G. Hussmann (CR-023)
United States Magistrate Judge
Indianapolis, Indiana
February 5, 2001

Judge Hussmann believes that video teleconferencing should occur only with the consent of the defendant. Although initial proceedings, etc have limited importance, they can have great impact on some practical issues. Because of increased caseloads and crowded jails, it is common to hear complaints from defendants that they are unable to talk to their lawyer or to talk to family members about bail or other pressing family matters. Appearing in person often presents an opportunity for communication. Although video technology has improved, in his view, it does not provide an appropriate venue for communications between counsel and family.

Dean A. Stang (CR-025)
Federal Defender
Eastern District of Wisconsin
Milwaukee, Wisconsin
February 12, 2001.

Mr. Stang opposes the proposed amendments involving video teleconferencing. He indicates that initial appearances and arraignments are not pro forma events and that those proceedings provide both parties with an opportunity to discuss very important matters. Using teleconferencing will result in lost plea bargains, early cooperation, and prompt release decisions. He notes a number of practical problems that will arise and that teleconferencing makes no practical accommodation for interpreters. Mr. Hillier notes that he is not aware of any special danger to law enforcement officers or court personnel by requiring in-court appearances. Further, teleconferencing will interfere with the critical stages of forming an attorney-client relationship. Finally, teleconferencing will undermine both the dignity of the federal courts and Sixth Amendment values.

Judge Michael J. Watanabe(CR-026)
United States Magistrate Judge
Denver, Colorado
February 13, 2001

Judge Watanabe briefly writes that he strongly favors use of video teleconferencing. He states that he has used it in civil cases and that it works very well.

Thomas W. Hillier, II (CR-027)
Federal Public Defender
Western District of Washington
February 12, 2001

Mr. Hillier presents a detailed objection to the video teleconferencing amendments, on behalf or the Federal Public and Community Defenders. He notes that the current practice works well and that the initial appearance is not a pro forma proceeding. He presents a careful overview of the important decisions that are made in the face-to-face meetings between the defendant, the defense counsel, and the prosecutor. Those meetings, he asserts, assure prompt processing the case. Mr. Hillier believes that video teleconferencing is impractical and presents difficult situations for both the defendant and the defense counsel who must decide whether to remain at the courthouse, with the judge and the prosecutor or travel to where the defendant is located. He notes that the system is likely to result in increased costs and that no in-depth study has been conducted. Further, he observes that in Rule 10, the ability of the defendant to waive presence at the arraignment negates the need for teleconferencing in that rule. Finally, he identifies a list of unresolved issues and urges the Committee to table its proposals pending further study.

Judge Cynthia Imbrogno (CR-029)
United States Magistate Judge
Eastern District of Washington
February 12, 2001

Judge Imbrogno enthusiastically supports the video teleconferencing amendments. She writes that there are only two magistrate judges covering the Eastern District of Washington and that they often drive over three hours (one way) to conduct proceedings in other cities within the district. As a result, some duty stations are not covered because of the need to spend time traveling. She notes that the technology is sufficiently advanced to maintain the integrity of the proceedings. Defense counsel, she writes, are very supportive of teleconferencing because it gives them greater flexibility in scheduling. She would support video teleconferencing without requiring the defendant's consent.

Judge William A. Knox (CR-030)
United States Judge
February 13, 2001

Judge Knox favors video teleconferencing. He says that he has used it in civil proceedings, including trials, and finds it to be "reliable, practical, efficient, and [has had] no difficulty protecting the rights of the parties. Judge Knox states that if the equipment is poor it is a waste of time to use it.

Judge Leslie G. Foschio (CR-031)
United States Magistrate Judge
Buffalo, New York
February 13, 2001

Judge Foschio favors video teleconferencing for arraignments, especially for superseding arraignments, where the defendant has been already arraigned and bail has been set.

Larry Propes (CR-033)
Clerk of Court
United States District Court, South Carolina
February 13, 2001

Mr. Propes indicates that the judges in both the Greenville and Florence divisions are interested in using video teleconferencing for initial appearances because the courthouses are not in convenient or close proximity to the county jails being used by the US Marshals Service. He observes that if the rule requires the consent of the defendant, few, if any, will consent. He therefore recommends that video teleconferencing not be contingent on the defendant's consent.

Judge Lorenzo F. Garcia (CR-034)
United States Magistrate Judge
United States District Court
Albuquerque, New Mexico
February 13, 2001

Judge Garcia favors using video teleconferencing, especially for arraignments. He notes that in New Mexico, a number of defendants are simply passing through the state when they are arrested and bringing them back to court simply for an arraignment can result in unnecessary costs; where the defendant is indigent, the court must direct advancement of travel costs for the defendant. Judge Garcia also writes that he has had experience with arraignment waivers in state court and that the system worked well.

Judge George P. Kazen (CR-035)
United States District Judge
Southern District of Texas
February 13, 2001

Judge Kazen believes that it is very important to provide for waiver of personal appearance at initial proceedings (Rules 5, 10 and 43), either by written waiver or video appearance. Citing his experience in a border court, in one of five districts they hear almost 30 percent of the criminal cases for the entire nation. The initial arraignment is largely perfunctory used to set a motions schedule. Most of the defendants plead not guilty and are housed as many as 60 to 300 miles away from a courthouse. He notes that frequently the defendants reside at a distant location and if they are released, there are problems in bringing them back for those proceedings. Judge Kazen observes that given the considerable apprehension about this proposal, it would be prudent to adopt a proposal that requires the defendant's consent.

Donna A. Bucella (CR-036)
United States Attorney
Middle District of Florida,
Tampa, Florida
February 14, 2001

Ms. Bucella observes that if the defendant is allowed to waive appearances at an arraignment, the government's consent should be required. She also notes that the Committee Note is ambiguous on just how video teleconferencing will be accomplished for initial appearances. She adds that if the purpose of the amendments is to save money, that the Committee ought to say so explicitly.

Judge James E. Bredar (CR-037)
United States Magistrate Judge
United States District Court for Maryland
February 13, 2001

Judge Bredar opposes the use of video teleconferencing. He believes that there is much at stake in federal criminal cases and that the sooner the defendant understands the gravity of his situation, the better. He adds that from his time as a public defender, there nothing that helps to focus the mind than to walk into a federal courtroom. He believes that the overall process will be "denigrated" by reducing those appearances to a television experience.

Judge John C. Coughenour (CR-038)
Chief Judge, United States District Court
Western District of Washington
Seattle, Washington
February 6, 2001

Judge Coughenour opposes video teleconferencing in proposed Rules 5 and 10. In his view, the solemnity and fairness of the defendant's appearance in court in the presence of counsel and the judge far outweigh the security problems. The solution, he notes, is heightened vigilance and not the sacrifice of cherished traditions. His views, he notes, are based on his research into the issue: in 1990 he was a member of the Court Administration and Case Management Committee which had supervised a pilot program. As a result of that study, the Committee had believed strongly that video teleconferencing seriously eroded the full and fair examination of facts and witnesses. He urges the Committee to reject the amendments.

Judge Jerry A. Davis (CR-039)
United States Magistrate Judge
ND of Mississippi
February 12, 2001

Judge Davis endorses video teleconferencing. He notes that state courts have been using it for years and that he has been using it for prisoner cases for several years and that there are no "downsides." He observed that it is useful for security purposes and in rural areas. He concludes by noting that any perceived constitutional problems are imagined, not real.

Judge Janice M. Stewart (CR-040)
United States Magistrate Judge
Portland, Oregon
February 12, 2001

Judge Steward favors the proposals for video teleconferencing. But due to concerns about separating the defendant and defense counsel and the problems that that creates, she believes video teleconferencing should be used only where the defendant consents.

Judge David Nuffer (CR-041)
United States Magistrate Judge
St George, Utah
February 13, 2001

Judge Nuffer, a part time magistrate judge, strongly favors video teleconferencing. In Utah he works 300 miles from the courthouse.

Judge William Beaman (CR-042)
February 12, 2001

Judge Beaman strongly approves of video teleconferencing, but would require the defendant's consent.

Judge Susan K. Gauvey (CR-043)
United States Magistrate Judge
District of Maryland
February 15, 2001

Judge Gauvey recounts her experiences in the Maryland state courts with video teleconferencing. She observed what she calls assembly line justice. The proceedings were held in a large room and appeared surreal and chilling. There was no communication between the judge and the defendant. In contrast, in federal courts, all parties are more focused and she is concerned that a judge could not pick up the subtle hesitations or halting speech or odd manner that may be signs of impairment.

Federal Magistrate Judges Association (CR-044)
(Draft Report—Subject to Board Ratification)
February 15, 2001

The Magistrate Judges Association supports the proposed video teleconferencing. The Association recounts the benefits of using such procedures and suggests that some of the concerns about the erosion of the process might be addressed if the judge visits the detention facility and determines if that facility as a room suitable for conducting teleconferencing, along with a private telephone line and a room where the defendant can consult in private with his or her attorney. The Association favors video conferencing without requiring the defendant's consent.

The Association also supports the proposed amendment that would permit a defendant to waive appearance at the arraignment. It notes that other rules already provide for waiver of various proceedings and rights. For example, Rule 40 (removal proceeding) and Rule 11 (guilty plea waives various constitutional rights).

Judge Tommy Miller (CR-045)
United States Magistrate Judge, Eastern District of Virginia
(Law Student Comments from William and Mary Law School, Williamsburg, Virginia)
February 12, 2001

Judge Miller, a member of the Criminal Rules Committee, submitted ten written comments from the law students in his Criminal Procedure class at William and Mary. One of the students, David S. Johnson, is opposed to using video teleconferencing. He notes a number of obstacles that the courts will face, including delays in transmission. He believes that the amendment is "before its time." Only when the technology has advanced further should the amendment be adopted.

A second student, Kimberly Marinoff, expresses concern about the video conferencing provision. She believes that it "eviscerates the utility" of the proceedings "as a wake-up call by insulating the accused from the physical presence of the judge." She concludes, however, that if the amendment is to remain, she would support the alternate version that requires the defendant's consent.

Tom Brzozowski, another student, applauds the style changes to the rules, but suggests that the Committee include a provision in Rule 5 that would make clear what the remedy is for failure to comply with the timing requirements of the rule. He provides a summary of the conflicting caselaw and statutory provisions and argues that whatever remedy the Committee chooses would provide predictability to practitioners.

A fourth student, James Ewing, addresses the video teleconferencing provisions. He cites the historical arguments for the right of the defendant to appear personally in court and believes that even if a defendant consents to video teleconferencing, there may be problems with the perception of fairness. Thus, video conferencing should be the exception rather than the general rule, even where the defendant consents.

Judge Ronald E. Longstaff (CR-046)
Chief Judge, Southern District of Iowa
February 15, 2001

On behalf of the judges of his district, Judge Longstaff indicates that they agree with the comments submitted by Magistrate Judges Cohen, Dien, and Collings, *supra* concerning taking defendants to a magistrate in an adjacent district. They also support

the changes for video teleconferencing and would comport to court technology procedures already in place, including both districts in Iowa.

Judge Catherine A. Walter (CR-047)
United States Magistrate Judge
Topeka, Kansas
February 15, 2001

Although she has not used video teleconferencing, Judge Walter supports it use, especially for initial appearances. She notes that the facility used to house pretrial detainees (an hour's drive from her court) has recently installed videoconferencing equipment. In her view the opportunity for the earliest time for the hearing is more important than a face-to-face appearance before a judge. She notes that there have been occasions where the availability of video conferencing would have resulted in an earlier initial appearance.

Judge Mikel H. Williams (CR-048)
February 15, 2001

Judge Williams commends the Committee for its thorough reorganization of the criminal rules and fully endorses the use of video teleconferencing for initial criminal proceedings. He notes that for the last four years his courts have used such procedures for initial criminal proceedings; they adopted the program because of concerns for serious delays in scheduling the various parties for the hearings. The district court for Idaho covers the entire state and the 400 miles distances make automobile transportation impractical and air travel can be delayed by weather. Transporting the defendants presents similar problems. He describes the process used in his district--the defendant is taken to the closest federal courthouse where he meets his CJS counsel and within two or three hours the defendant appears with counsel before the magistrate judge via video. He cannot recall a single instance where the defendant objected to that procedure; he considers the program to be a resounding success. The defendants rights are immediately addressed and the proceeding is conducted with the same formality as if the defendant were in the judge's court. Although he would prefer to have a rule not requiring the defendant's consent, he believes that obtaining consent is not a burden.

Judge Richard A, Schell (CR-049)
Chief Judge, Eastern District of Texas
Beaumont, Texas
February 12, 2001

Judge Schell supports the proposed amendments for video teleconferencing. Although he would prefer the version that does not require consent, a rule that requires the defendant's consent is imminently reasonable. He urges the Committee to consider extending video conferencing to pleas and sentencing. He notes the long distances

involved in his district and the fact that he has been used video teleconferencing for several years for sentencing and for guilty pleas, with the defendant's consent.

Fredric F. Kay (CR-050)
Federal Public Defender, District of Arizona
Tucson, Arizona
February 15, 2001

Mr. Kay writes that in the District of Arizona there are four lawyers in his office and that in FY 2000 they were appointed to represent about 8000 indigent defendants. Many of those were immigration cases. He agrees with the views expressed by Mr. Tom Hillier, *supra,* and strongly urges the Committee to reject the amendments. He knows of no serious cost and security concerns that would support the proposed amendments and that they should not outweigh the important aspects of having the defendant and counsel appear personally before the judge. He has watched video proceedings in the state system and has observed the defendant sitting by himself in a chair answering the judge's questions. The judges he notes, may have questions about the defendant's capacity and they have to ask a guard whether the defendant appears to be sober. Using video conferencing is something that one might expect in a weird third world country where there is no concept of presumption of innocence.

William J. Genego & Peter Goldberger (CR-055)
National Assn' of Criminal Defense Lawyers
Washington, D.C.
February 28, 2001

Mr. Genego and Mr. Goldberger, writing on behalf of the National Association of Criminal Defense Lawyers, state that although they have objections to video teleconferencing of arraignments, they do believe that a defendant may consent to such procedures, with the advice of a defense counsel.

Mr. Ralph Martin (CR-056)
ABA, Criminal Justice Section
Washington, DC
March 2, 2001.

Mr. Martin, writing on behalf of the American Bar Association's Criminal Justice Section, expresses opposition to the amendments to Rule 5, 10, and 43 that would permit video teleconferencing. He notes first, that although the rule does not define video teleconferencing, its use is increasing. He details a number of "costs" of requiring a defendant to be physically present, and offers a number of reasons why Rules 5 and 10 should not permit video teleconferencing—at least not without consent of the defendant. The biggest hurdle, he claims, is that use of video teleconferencing will adversely impact

on the ability of the defendant to confer with counsel. He indicates that if the Committee is going to proceed with video teleconferencing, that the ABA would recommend that it be done only with the consent of the defendant.

V. TESTIMONY: Rule 10

Judge Paul D. Borman
United States District Judge
Detroit, Michigan
Washington, D.C., April 25, 2001

Judge Borman testified at a hearing in Washington, D.C. and expressed his personal views that no video teleconferencing should be used, either under Rule 5 or Rule 10. He expressed concern that doing so would reduce the criminal justice system to a series of talking heads on a television monitor. Simply because the state courts use video teleconferencing is not a sufficient reason for adopting its use in federal courts, he testified. He noted in particular that the federal courtroom is a "neutral" site and that a detention center—where the defendant is usually located during video teleconferencing—is not a neutral site. He also testified that because white-collar criminals are not normally incarcerated at the time of the initial appearance, using video teleconferencing would create a two-tiered system of criminal justice, between those who are incarcerated and those who are not.

Peter Goldberger & Greg Smith
National Assn' of Criminal Defense Lawyers
Hearing--Washington, D.C., April 25, 2001

Testifying on behalf of the NADCL at a hearing in Washington, D.C., Mr. Goldberger and Mr. Greg Smith expressed strong reservations about the proposed amendments governing video teleconferencing. They noted in particular that the constitutional challenges to video teleconferencing have yet to be addressed and worked out. They believe that the amendment will inhibit justice and that its essential that there be a transition from police custody to the courtroom procedures. The proceedings are cheapened, they testified, if a defendant is not brought to the courtroom. Further, it sends a subtle message that the defendant is not worthy of an in-court proceeding. Finally, they noted that the procedure would simply shift the associated costs to the defense bar.

Elizabeth Phillips Marsh
Professor of Law
ABA, Criminal Justice Section
Washington, D.C., April 25, 2001

Professor Marsh testified before the Committee in Washington, D.C. and expressed deep concerns, on behalf of the ABA, to the proposed amendments concerning video teleconferencing. In particular, she noted that using such a system separates the parties from each other and makes it difficult for the judge to assess the defendant's mental and physical condition. She observed that if the amendment were to go forward, it should require the defendant's consent, perhaps with an affirmative waiver or consent

Ms. Shelley Stark
Federal Public Defender, on behalf of Federal Public Defenders
W.D. of Pennsylvania
Washington, D.C., April 25, 2001

Ms. Stark testified that the Federal Public Defenders were opposed to the proposed amendments that would permit video teleconferencing in Rule 5, but was not opposed to such procedures for Rule 10 arraignments. She observed that the rule would basically shift the costs of conducting initial appearances, from the Marshal's service to the Federal Public Defenders. She noted that in those districts were counsel is not appointed to represent a defendant until after the initial appearance, there may be no legal advice as to what procedures should be consented to. She also testified that a major issue is developing a level of trust with defendants and that using video teleconferencing will simply delay that process and that if counsel do not have the trust of the defendant, it is harder to plea bargain. In effect, she added, there is no real opportunity to conduct private conversations with a client. Finally, she expressed concern that using video teleconferencing would lead to racial and economic disparity in the federal criminal justice system.

ADVISORY COMMITTEE ON FEDERAL RULES OF CRIMINAL PROCEDURE

PROPOSED AMENDMENTS TO RULE 12.1

I. SUMMARY OF COMMENTS: Rule 12.1

Only one commentator, a law student, expressed an opinion about the proposed amendments to Rule 12.1. She generally favored the change.

II. LIST OF COMMENTATORS: Rule 12.1

CR-045 Judge Tommy Miller, United States Magistrate Judge, Eastern District of Virginia (Law Student Comments from William and Mary Law School, Williamsburg, Virginia), February 12, 2001

III. COMMENTS: Rule 12.1

Judge Tommy Miller (CR-045)
United States Magistrate Judge, Eastern District of Virginia
(Law Student Comments from William and Mary Law School, Williamsburg, Virginia)
February 12, 2001

Judge Miller, a member of the Criminal Rules Committee, submitted ten written comments from the law students in his Criminal Procedure class at William and Mary. One of the students, Kimberly Marinoff, observes that the Committee Note reference to the fact that requiring the parties to provide phone numbers of alibi witnesses should not really be viewed as a major change. In her view this is only a nominal increase, considering our telephone-driven society. She also states that the requirement that the parties be notified of the information may be problematic if both the defendant and the defense counsel are not served. Finally, she believes that the revised version of the rule is an improvement.

ADVISORY COMMITTEE ON FEDERAL RULES OF CRIMINAL PROCEDURE

PROPOSED AMENDMENTS TO RULE 12.2

I. SUMMARY OF COMMENTS: Rule 12.2

Only two commentators provided their views and the major substantive amendments to Rule 12.2. One of them, a law student, viewed the amendments as pro-government and the other, NADCL, pointed out a drafting error (that has since been corrected by the Advisory Committee).

II. LIST OF COMMENTATORS: Rule 12.2

CR-045 Judge Tommy Miller, United States Magistrate Judge, Eastern District of Virginia (Law Student Comments from William and Mary Law School, Williamsburg, Virginia), February 12, 2001

CR-055 William J. Genego & Peter Goldberger, National Assn' of Criminal Defense Lawyers, Washington, D.C., February 28, 2001.

III. COMMENTS: Rule 12.2

Judge Tommy Miller (CR-045)
United States Magistrate Judge, Eastern District of Virginia
(Law Student Comments from William and Mary Law School, Williamsburg, Virginia)
February 12, 2001

Judge Miller, a member of the Criminal Rules Committee, submitted ten written comments from the law students in his Criminal Procedure class at William and Mary. One of the students, LaRona Owens believes that the revised version of Rule 12.2 is pro-government and will frustrate a defendant's opportunities to raise the insanity defense. This is demonstrated, she notes, by the restrictions on the judge's discretion to permit the defendant to present evidence of insanity if the defendant does not meet the notice requirements of the rule.

William J. Genego & Peter Goldberger (CR-055)
National Assn' of Criminal Defense Lawyers
Washington, D.C.
February 28, 2001

Mr. Genego and Mr. Goldberger, writing on behalf of the National Association of Criminal Defense Lawyers, point out a drafting mistake in Rule 12.2(c)(4)(A). The matter has since been corrected by the Advisory Committee.

ADVISORY COMMITTEE ON FEDERAL RULES OF CRIMINAL PROCEDURE

PROPOSED AMENDMENTS TO RULE 23

I. SUMMARY OF COMMENTS: Rule 23

One commentator—a law student—expressed his views about Rule 23. He recommended that the rule should clearly spell out when a defendant is entitled to a jury trial.

II. LIST OF COMMENTATORS: Rule 23

CR-045 Judge Tommy Miller, United States Magistrate Judge, Eastern District of Virginia (Law Student Comments from William and Mary Law School, Williamsburg, Virginia), February 12, 2001

III. COMMENTS: Rule 23

Judge Tommy Miller (CR-045)
United States Magistrate Judge, Eastern District of Virginia
(Law Student Comments from William and Mary Law School, Williamsburg, Virginia)
February 12, 2001

Judge Miller, a member of the Criminal Rules Committee, submitted ten written comments from the law students in his Criminal Procedure class at William and Mary. One of the students, Jeremy Bell, has written a paper in support of his argument that Rule 23 should specify with clarity when a defendant is entitled to a jury trial. Although the failure of Rule 23(a) to address that issue could be understandable considering that the caselaw was in flux, the problems are now pretty well settled and amending Rule 23(a) to address that issue would further the intended purpose of the rules.

ADVISORY COMMITTEE ON FEDERAL RULES OF CRIMINAL PROCEDURE

PROPOSED AMENDMENTS TO RULE 26

I. SUMMARY OF COMMENTS: Rule 26

Although there was a small number of commentators on the proposed amendments to Rule 26, permitting remote transmission of live testimony, a majority of those who did comment were opposed to the change. Several of the commentators spoke on behalf of organizations. The NADCL, and to some extent the ABA, are opposed to the amendment. The Magistrate Judge's Association is in favor of the amendment.

Two witnesses presented testimony to the Committee in Washington, D.C. One witness raised a number of concerns about whether the published version of the rule satisfied the Confrontation Clause. The other witness reflected some concerns about whether the rule could be applied fairly to both the government and the defense.

II. LIST OF COMMENTATORS: Rule 26

CR-004	Judge Alan B. Johnson, United States District Judge, D. Wyoming Cheyenne, WY, October 4, 2000
CR-011	Judge Paul D. Borman, United States District Judge, Detroit, Michigan, January 2, 2001
CR-012	Richard D. Friedman, Professor of Law, Univ. of Michigan, January 8, 2001
CR-013	Elizabeth Phillips Marsh, Professor of Law, ABA, Criminal Justice Section, January 10, 2001
CR-014	Professor John B. Mitchell, Assoc. Prof. of Law, Seattle Univ., January 8, 2001
CR-044	Federal Magistrate Judges Association (Draft Report—Subject to Board Ratification), February 15, 2001
CR-045	Judge Tommy Miller, United States Magistrate Judge, Eastern District of Virginia (Law Student Comments from William and Mary Law School, Williamsburg, Virginia), February 12, 2001
CR-056	Mr. Ralph Martin, ABA Criminal Justice Section, Washington, DC, March 2, 2001.

CR-055 William J. Genego & Peter Goldberger, National Assn' of Criminal Defense Lawyers, Washington, D.C., February 28, 2001.

CR-057 Mr. Kent S. Scheidegger, Criminal Justice Legal Foundation, Sacramento, CA, March 16, 2001

III. WITNESSES: Rule 26

Richard D. Friedman, Professor of Law, Univ. of Michigan

Elizabeth Phillips Marsh, Professor of Law, ABA, Criminal Justice Section

IV. COMMENTS: Rule 26

Judge Alan B. Johnson, CR-004
United States District Judge
D. Wyoming
Cheyenne, WY
October 4, 2000

Judge Johnson favors the proposed amendments to Rules 5, 5.1, 10, and 26 that would permit greater use of video teleconferencing and transmission of live testimony. He notes that in Wyoming the courts face problems with requiring prisoners and security personnel to travel great distances for relatively short appearances. That process is expensive and inefficient, given that at least two persons are detailed to transport prisoners. He adds that such movements are usually on short notice and do not provide an adequate opportunity for United States Marshals to screen and develop information on the general health of the individual. This presents special problems in light of exposure to resistant strains of tuberculosis. He notes that the Wyoming courts are equipped with excellent technology to use video teleconferencing.

Judge Paul D. Borman (CR-011)
United States District Judge
Detroit, Michigan
January 2, 2001

Judge Borman has requested the opportunity to present testimony to the Committee.

Richard D. Friedman (CR-012)
Professor of Law
Univ. of Michigan
January 8, 2001

Professor Friedman has requested the opportunity to present testimony to the Committee on Rule 26. A lengthy article detailing reasons why the proposed amendment for remote transmission of live testimony should be rejected accompanies his request.

Elizabeth Phillips Marsh (CR-013)
Professor of Law
ABA, Criminal Justice Section
January 10, 2001

Professor Marsh has requested the opportunity to present testimony to the Committee.

Professor John B. Mitchell (CR-014)
Assoc. Prof. of Law
Seattle University School of Law
January 8, 2001

Professor Mitchell provides an in-depth critique of the proposed amendment that would permit remote transmission of live testimony. He concludes that proposed Rule 26(b) is not the constitutional equivalent of Rule 15 (depositions). That is because there is no real opportunity for effective, face-to-face, cross-examination. He believes that the decision in *United States v. Gigante* is wrong. He is concerned that the requirement for truly compelling circumstances will not be effective. Finally, he believes that the amendment is bad public policy.

Federal Magistrate Judges Association (CR-044)
(Draft Report—Subject to Board Ratification)
February 15, 2001

The Association supports the proposed amendment to permit remote transmission of live testimony as being a "prudent and practical concept." It believes that the defendant's rights will be preserved, considering the judge's role in imposing appropriate safeguards and procedures. Finally, it notes that in many districts it is already the practice to present videotaped testimony of unavailable witnesses--particularly with material witnesses under 18 USC 3144. Thus, the experience of the courts demonstrates the value of the proposed amendment.

Judge Tommy Miller (CR-045)
United States Magistrate Judge, Eastern District of Virginia
(Law Student Comments from William and Mary Law School, Williamsburg, Virginia)
February 12, 2001

Judge Miller, a member of the Criminal Rules Committee, submitted ten written comments from the law students in his Criminal Procedure class at William and Mary. One of the students, Mark Ries, presents a list of reasons why the proposal for remote transmission of live testimony should be rejected: The rule fails to constrict the testimony to the same extent as that required by Rule of Evidence 804(b), that is the rule of evidence limits this type of hearsay evidence to only certain types of statements. Second, there is little in the rule to guide the trial judge in exercising his or her discretion. Third, the Committee Note brushes aside the defendant's confrontation rights, even though, as he recognizes, the rule is probably in line with recent Supreme Court decisions. Fourth, he has drafted an alternative version of Rule 26. He also includes a list of issues for potential litigation should the amendment be adopted. For example, what do the terms "interests of justice," "different location," "compelling circumstances," and "appropriate safeguards" mean? He agrees with the decision to insert the word "orally" in Rule 26(a) and he applauds the proposed stylistic changes.

A second student, Stephen F. Keane, also believes that the proposed amendment for remote transmission of testimony will deny the defendant his or her rights of confrontation. Thus, it should only occur in the most extreme circumstances. He suggests that the rule should identify more specific criteria and notes that a narrower rule will ensure that the rule is not "exploited by allowing cowardly, unsure or indifferent witnesses to testify against defendants."

Mr. Ralph Martin (CR-056)
ABA, Criminal Justice Section
Washington, DC
March 2, 2001.

Mr. Martin, writing on behalf of the American Bar Association's Criminal Justice Section, raises concerns about the proposed amendments to Rule 26, permitting video transmission of testimony. First, he notes that the Committee notes nor the rule address the issue of insuring that the participants can hear and see each other. He notes that the ABA is concerned with whether the rule adequately addresses the defendant's Sixth Amendment confrontation rights. He is concerned that the rule will become routinely used, with little or no benefit for the defense.

William J. Genego & Peter Goldberger (CR-055)
National Assn' of Criminal Defense Lawyers
Washington, D.C.
February 28, 2001

Mr. Genego and Mr. Goldberger, writing on behalf of the National Association of Criminal Defense Lawyers, offer three reasons for rejecting the proposed amendment to Rule 26. First, the rule would not limit use of remote transmission to those instances where deposition testimony is used. Second, the amendment would encourage use of video testimony as a substitute for live in-court testimony. And third, the rule would permit testimony to be used in violation of the Confrontation Clause.

Mr. Kent S. Scheidegger (CR-057)
Criminal Justice Legal Foundation
Sacramento, CA
March 16, 2001

Mr. Scheidegger, addressing the proposed amendments to Rule 26, expresses particular concern for child victims and witnesses. He notes that to the extent that Rule 26 may be an attempt to address *Maryland v. Craig*, there is no need for a rule because 18 USC § 3509(b) addresses that issue. He suggests that at a minimum the rule does not preclude any testimony that may be provided for by statute. In his view, the combination of the requirements of compelling circumstances and unavailability are more restrictive than that statutory provision. If the rule provides for two-way transmission, there is no constitutional issue—it is only a question of policy. Finally, he suggests that for less important witnesses the rule may be too restrictive. He suggests that the rule distinguish between one-way and two-way transmissions.

V. TESTIMONY: Rule 26

Richard D. Friedman
Professor of Law
Univ. of Michigan
Washington, D.C., April 25, 2001

Professor Friedman testified before the Committee in opposition to the proposed amendment that would permit remote transmission of live testimony. He detailed a number of reasons why the proposed amendment might violate the Confrontation Clause. He offered a number of suggestions for addressing those issues, including a more particularized list of grounds for finding a witness to be "unavailable."

Elizabeth Phillips Marsh
Professor of Law
ABA, Criminal Justice Section
Washington, D.C., April 25, 2001

Professor Marsh testified before the Committee and offered a few brief remarks on the proposed amendment to Rule 26. She noted that the defense counsel in the ABA were very concerned that the amendment would be used to unduly limit the ability of the defense to present testimony under the rule, where there would clearly be no Confrontation Clause issue.

ADVISORY COMMITTEE ON FEDERAL RULES OF CRIMINAL PROCEDURE

PROPOSED AMENDMENTS TO RULE 30

I. SUMMARY OF COMMENTS: Rule 30

Three commentators, all representing associations of defense counsel, oppose the amendment to Rule 30, that would permit the court to require the parties to submit their requested instructions before trial. The general view is that permitting the court to do so would disadvantage defense counsel.

II. LIST OF COMMENTATORS: Rule 30

CR-016 James T. Miller, Esq., on behalf of Florida Assn. of Criminal Defense Lawyers (FACDL), Jacksonville, Florida, January 24, 2001

CR-055 William J. Genego & Peter Goldberger, National Assn' of Criminal Defense Lawyers, Washington, D.C., February 28, 2001.

CR-056 Mr. Ralph Martin, ABA Criminal Justice Section, Washington, DC, March 2, 2001.

III. COMMENTS: Rule 30

James T. Miller, Esq.(CR-016)
On behalf of Florida Assn. of Criminal Defense Lawyers (FACDL)
Jacksonville, Florida
January 24, 2001

FACDL opposes the amendment to Rule 30 that would permit the court to require the parties to file their requested instructions earlier in the trial. They believe that the amendment is unfair and impractical and potentially creates an unfair burden on the trial counsel. Most Rule 30 conferences, they note, takes place at the close of the evidence and any attempt to require an earlier production would add unnecessary work and potentially encourage unnecessary pleadings. The current rule, they state, works well. Finally, requiring the defense to present its proposed instructions before trial may impinge on the right to a fair trial, by requiring the defense to disclose more than it needs to.

Mr. Ralph Martin (CR-056)
ABA, Criminal Justice Section
Washington, DC
March 2, 2001.

Mr. Martin, writing on behalf of the American Bar Association's Criminal Justice Section, suggests that Rule 30 be changed to permit the court to request instructions "no later than the close of the evidence or an any earlier time during the trial...." He believes that the Committee has offered an unintended change to the text and spirit of the rule.

William J. Genego & Peter Goldberger (CR-055)
National Assn' of Criminal Defense Lawyers
Washington, D.C.
February 28, 2001

Mr. Genego and Mr. Goldberger, writing on behalf of the National Association of Criminal Defense Lawyers, offer two reasons for opposing the amendment to Rule 30. First, the amendment would permit the court to place an unfair burden on the defense counsel to reveal the defense theory before trial. Second, the rule does not address the issue of whether defense counsel must restate every objection after the instructions are given.

ADVISORY COMMITTEE ON FEDERAL RULES OF CRIMINAL PROCEDURE

PROPOSED AMENDMENTS TO RULE 32

I. SUMMARY OF COMMENTS: Rule 32

Of the eight (8) commentators submitting written comments on Rule 32, only five commented directly on the substance of the proposed amendments to the rule. Three requested the opportunity to testify before the Committee. Of those, only one focused on the rule, due in part to the fact that the Committee subsequently withdrew the substantive amendment from further consideration. Of the remaining commentators, there was general approval of the amendments. Several suggested changes in wording, some of which were adopted by the Committee.

One witness testified before the Committee on April 25, 2001, and offered several suggested changes to the rule.

II. LIST OF COMMENTATORS: Rule 32

CR- 001 Richard Crane, Esq., Nashville, Tenn, September 22, 2000

CR- 002 Robert P. Longshore, Chief Probation Officer, MD Alabama, Montgomery Alabama, October 2, 2000.

CR-011 Judge Paul D. Borman, United States District Judge, Detroit, Michigan, January 2, 2001

CR-012 Richard D. Friedman, Professor of Law, Univ. of Michigan, January 8, 2001

CR-013 Elizabeth Phillips Marsh, Professor of Law, ABA, Criminal Justice Section, January 10, 2001

CR-035 Judge George P. Kazen, United States District Judge Southern District of Texas, February 13, 2001

CR-055 William J. Genego & Peter Goldberger, National Assn' of Criminal Defense Lawyers, Washington, D.C., February 28, 2001.

CR-056 Mr. Ralph Martin, ABA Criminal Justice Section, Washington, DC, March 2, 2001.

III. WITNESSES: Rule 32

Peter Goldberger, National Assn' of Criminal Defense Lawyers, Washington, D.C.,

IV. COMMENTS: Rule 32

Richard Crane, Esq. (CR-001)
Nashville, Tennessee
September 22, 2000

Mr. Crane notes that he is thrilled to see the requirement in Rule 32 that courts address more carefully the information in the presentence report. In his experience, it is the single most important document that the BOP considers. He adds two suggestions. First, he recommends that the definition of "material" be placed in the rule itself. And second, he recommends that the rule or the comment contain a prohibition against including information in the report that are not related to the defendant, in the absence of good cause. He notes that the practice now is to include information about co-defendant offenses and offenses on which the defendant was acquitted. Including such information can have an adverse impact on the defendant in attempting to get into drug rehab, etc.

Robert P. Longshore,
Chief Probation Officer, MD Alabama,
Montgomery Alabama
October 2, 2000.

Mr. Crane is concerned the changed wording in Rule 32(b)(4)(B), regarding the information that the probation officer should include regarding sentencing guidelines, will significantly weaken the independent inquiry that the probation officer currently provides. He indicates that the probation officer may simply become a sentence historian, reporting the facts as developed in the plea bargain, which may or may not reflect the actual offense conduct.

Judge Paul D. Borman (CR-011)
United States District Judge
Detroit, Michigan
January 2, 2001

Judge Borman has requested the opportunity to present testimony to the Committee.

Elizabeth Phillips Marsh (CR-013)
Professor of Law
ABA, Criminal Justice Section
January 10, 2001

Professor Marsh has requested the opportunity to present testimony to the Committee.

Judge George P. Kazen (CR-035)
United States District Judge
Southern District of Texas
February 13, 2001

Judge Kazen strongly opposes the proposal in Rule 32 that would require the judge to make findings of fact on issues that have no impact on sentencing. He observes that without reading the Committee Note it would not be clear from the rule itself what constitutes a material matter. This proposal, he states, could convert almost any sentencing hearing into a "genuine quagmire." And the impact on the appellate courts would be a problem. He appreciates the tremendous responsibility borne by the BOP and believes that judges should make sure, without the requirement of a rule, that the information in the report is accurate.

William J. Genego & Peter Goldberger (CR-055)
National Assn' of Criminal Defense Lawyers
Washington, D.C.
February 28, 2001

Mr. Genego and Mr. Goldberger, writing on behalf of the National Association of Criminal Defense Lawyers, offer a number of proposed changes to Rule 32. In particular, they urge the Committee to reconsider the various timing requirements in the rule and also recommend that the rule be further reorganized.

Mr. Ralph Martin (CR-056)
ABA, Criminal Justice Section
Washington, DC
March 2, 2001.

Mr. Martin, writing on behalf of the American Bar Association's Criminal Justice Section, offers several comments on the proposed amendments to Rule 32. First, he assumes that the proposed amendment to Rule 32(h)(1)(B) (as published) would continue to protect the identity of the person who provided the information. And second, he

recommends that in Rule 32(h)(4)(C), a "good cause" requirement be added for requiring in camera sessions.

V. TESTIMONY: Rule 32

Peter Goldberger
National Assn' of Criminal Defense Lawyers
Washington, D.C. April 25, 2001

Mr. Goldberger, testifying on behalf of the National Association of Criminal Defense Lawyers, offered a number of proposed changes to Rule 32. In particular, he urged the Committee to reconsider the various timing requirements in the rule and also recommended that the rule be further reorganized.

ADVISORY COMMITTEE ON FEDERAL RULES OF CRIMINAL PROCEDURE

PROPOSED AMENDMENTS TO RULE 35

I. SUMMARY OF COMMENTS: Rule 35

Only three commentators actually addressed the merits of the proposed amendment to Rule 35, in particular the provision for permitting the government to move for sentence reduction. While all three generally supported the change, they suggested that the rule go further in covering those situations where a defendant provides helpful information to the government, even though more than one has elapsed since sentencing.

II. LIST OF COMMENTATORS: Rule 35

CR-011 Judge Paul D. Borman, United States District Judge, Detroit, Michigan, January 2, 2001

CR-013 Elizabeth Phillips Marsh, Professor of Law, ABA, Criminal Justice Section, January 10, 2001

CR-028 Judge Edward R. Becker, Chief Judge, United States Court of Appeals for the Third Circuit, Philadelphia, Penn., February 9, 2001.

CR-055 William J. Genego & Peter Goldberger, National Assn' of Criminal Defense Lawyers, Washington, D.C., February 28, 2001.

CR-056 Mr. Ralph Martin, ABA Criminal Justice Section, Washington, DC, March 2, 2001.

III. COMMENTS: Rule 35

Judge Paul D. Borman (CR-011)
United States District Judge
Detroit, Michigan
January 2, 2001

Judge Borman has requested the opportunity to present testimony to the Committee.

Elizabeth Phillips Marsh (CR-013)

Professor of Law
ABA, Criminal Justice Section
January 10, 2001

Professor Marsh has requested the opportunity to present testimony to the Committee.

Judge Edward R. Becker (CR-028)
Chief Judge
United States Court of Appeals for the Third Circuit
Philadelphia, Penn.
February 9, 2001

Judge Becker proposes a revision to Rule 35(b)(2) to read: "The court may consider a government motion to reduce a sentence made one year or more after sentencing if the defendant's substantial assistance involved at least some information not known—or the usefulness of which could not have reasonably been anticipated—until more than one year after sentencing." This suggestion, he writes, comes out of a case in the Third Circuit: *United States v. Cruz-Pagan.* He indicates that the current version and proposed amendment are not clear with respect to the question of "whether information known to the defendant prior to sentencing, or not known to the defendant until after sentencing but less than one year after sentence was imposed, can serve as the basis for the motion to reduce..." He offers the example of a defendant who provides information after the one year elapses—some of which he knew about before the one year elapsed and some of which he was not aware of. Judge Becker asks whether the judge has the authority to grant the motion under that example. He recommends that the Committee revise the text in accordance with his suggestions.

William J. Genego & Peter Goldberger (CR-055)
National Assn' of Criminal Defense Lawyers
Washington, D.C.
February 28, 2001

Mr. Genego and Mr. Goldberger, writing on behalf of the National Association of Criminal Defense Lawyers, offer a brief comment on the proposed amendment to Rule 35(b). They urge the Committee to further amend the rule to provide that sentence reduction may be granted for those situations where the usefulness of the defendant's helpful information cannot be fully evaluated within one year. They believe that on-going investigations should not have to be rushed to meet an artificial deadline.

Mr. Ralph Martin (CR-056)
ABA, Criminal Justice Section
Washington, DC
March 2, 2001.

Mr. Martin, writing on behalf of the American Bar Association's Criminal Justice Section, offers only a brief comment on the proposed amendment to Rule 35. He believes that the amendment does not go far enough. The one-year requirement, he notes, may not be long enough.

ADVISORY COMMITTEE ON FEDERAL RULES OF CRIMINAL PROCEDURE

PROPOSED AMENDMENTS TO RULE 41

I. SUMMARY OF COMMENTS: Rule 41

Eleven commentators submitted written comments on the proposed amendment to Rule 41, and of those, most of the comments focused on the covert search provision—which the Committee has withdrawn from further consideration, because of concerns raised in the comments. Of those commenting on the proposal, the response was mixed. For example the NADCL was opposed to the provision but the Magistrate Judges Association endorsed the amendment.

II. LIST OF COMMENTATORS: Rule 41

CR-006 John L. Warden, Esq., New York, N.Y., October 23, 2000

CR-008 Professor Craig M. Bradley, Indiana Univ. School of Law, October 27, 2000.

CR-011 Judge Paul D. Borman, United States District Judge, Detroit, Michigan, January 2, 2001

CR-013 Elizabeth Phillips Marsh, Professor of Law, ABA, Criminal Justice Section, January 10, 2001

CR-018 Judge Robert P. Murrian, United States Magistrate Judge, ED Tenn., February 5, 2001

CR-022 Judge James E. Seibert, Magistrate Judge, Wheeling West Virginia, February 7, 2001

CR-042 Judge William Beaman, February 12, 2001

CR-044 Federal Magistrate Judges Association (Draft Report—Subject to Board Ratification), February 15, 2001

CR-045 Judge Tommy Miller, United States Magistrate Judge, Eastern District of Virginia (Law Student Comments from William and Mary Law School, Williamsburg, Virginia), February 12, 2001

CR-055 William J. Genego & Peter Goldberger, National Assn' of Criminal Defense Lawyers, Washington, D.C., February 28, 2001.

CR-056 Mr. Ralph Martin, ABA Criminal Justice Section, Washington, DC, March 2, 2001.

III. COMMENTS: Rule 41

John L. Warden, Esq. (CR-006)
New York, N.Y.
October 23, 2000

Mr. Warden writes that the amendment to Rule 41, regarding "sneak and peak" warrants "appears to be an injudicious relaxation of the requirements of the Fourth Amendment. He states that "surely the courts should not be sponsoring lock-picking and climbing in windows as proper police procedures." He expresses the hope that the Judicial Conference will reject the proposal.

Professor Craig M. Bradley (CR-008)
Indiana Univ. School of Law
Bloomington, Illinois
October 27, 2000

Professor Bradley disagrees with the language in Rule 41(d)(1) to the effect that if probable cause exists, the judge must issue a warrant. He is aware of no requirement in constitutional criminal procedure that would require the judge to do so. Rather, the judge should be able to exercise discretion in deciding whether to issue a warrant. He also suggests that the rule include some guidance on what probable cause means, as well as address those situations where a warrant is not required. He has attached an article he has authored if such guidance was included.

Judge Paul D. Borman (CR-011)
United States District Judge
Detroit, Michigan
January 2, 2001

Judge Borman has requested the opportunity to present testimony to the Committee.

Elizabeth Phillips Marsh (CR-013)
Professor of Law
ABA, Criminal Justice Section
January 10, 2001

Professor Marsh has requested the opportunity to present testimony to the Committee.

Judge Robert P. Murrian (CR-018)
United States Magistrate Judge
Eastern District of Tennessee
February 5, 2001

Judge Murrian supports the substantive amendment to Rule 41 that would permit covert entries. He does not agree with Rule 41(e)(1). In his view, the warrant should not be delivered to the clerk until a return is made on the warrant. There is no need, he asserts, to have this confidential information "floating around." The clerk should get all of the papers only after the return is made.

Judge James E. Seibert (CR-022)
United States Magistrate Judge
Northern District of West Virginia
Wheeling West Virginia
February 7, 2001

Judge Seibert has mixed feelings about the covert entry provision in Rule 41. He believes that such warrants should receive the same strict scrutiny that is given to wiretap warrants. Personally, he would be reluctant to grant such applications, except in case of imminent danger to national security. He notes that it is advisable to have guidelines for such procedures.

Judge William Beaman (CR-042)
February 12, 2001

Judge Beaman agrees the amendment for covert searches. He observes that often there is a need to continue the observations beyond seven days and that reasonableness is the appropriate standard.

Federal Magistrate Judges Association (CR-044)
(Draft Report—Subject to Board Ratification)
February 15, 2001

The Association supports the amendment to Rule 41 that would address the procedures for obtain a warrant for a covert search. It will of great assistance in providing procedural guidance for searches that are already recognized in the cases. The Association also agrees with the proposed amendment that officers first attempt to obtain a warrant from a federal judicial officer. It also supports the other amendments to Rule 41.

Judge Tommy Miller (CR-045)
United States Magistrate Judge, Eastern District of Virginia
(Law Student Comments from William and Mary Law School, Williamsburg, Virginia)
February 12, 2001

Judge Miller, a member of the Criminal Rules Committee, submitted ten written comments from the law students in his Criminal Procedure class at William and Mary. One of the students, Daniel J. Fortune, believes that the restructuring of Rule 41 is very helpful. He questions, however, whether the rule could be clearer in answering the question whether the official has to sign a faxed copy of the Duplicate Original Warrant on behalf of the judge? Or is the faxed copy good enough. He also observes that there may be an ambiguity in Rule 41(d)(3)(B)(i) on the issue of whether the rule envisions that the informant must also be involved in the phone call. Finally, he questions the language in the Rule that indicates that the magistrate must issue a warrant. Although he cannot think of any reasons why a magistrate would not want to issue a warrant, he wonders why the Committee changed the language from "shall" to "must."

Another student, Eric V.T. Nakano, states that the provision in Rule 41 for covert searches leaves out a critical third element that those warrants be granted only on a showing that there is reasonable necessity for such warrants. Permitting a covert search only on a showing of probable cause compounds any fear of government tyranny.

William J. Genego & Peter Goldberger (CR-055)
National Assn' of Criminal Defense Lawyers
Washington, D.C.
February 28, 2001

Mr. Genego and Mr. Goldberger, writing on behalf of the National Association of Criminal Defense Lawyers, strongly oppose the amendment to Rule 41 that would permit the government to obtain warrants for "covert" searches. The amendment, they argue would place the "institutional imprimatur of the federal judiciary" on such intrusions. They note that asking the Judicial Conference to Rule 41 is not the most appropriate way to seek take this significant measure. Instead, it should be vetted through the political process.

Mr. Ralph Martin (CR-056)
ABA, Criminal Justice Section
Washington, DC
March 2, 2001.

Mr. Martin, writing on behalf of the American Bar Association's Criminal Justice Section, raises a number of concerns in the proposed amendment to Rule 41. First, he notes the lack of any clear caselaw guidance on covert observations. Second, the

proposed amendments do not adequately define what is meant by the term covert observation. Third, he notes that the amendment might be read expansively to cover a wide variety of other intrusions, such as silent video or computer surveillance. Fourth, he believes that the amendment will in effect approve covert observations or searches. Fifth, even though the rule requires probable cause, he believes the courts may apply only a diluted form of that requirement. Sixth, he argues that this amendment would strain other Fourth Amendment doctrines. Seventh, he believes the amendment does not sufficiently limit the scope of covert searches.

ADVISORY COMMITTEE ON FEDERAL RULES OF CRIMINAL PROCEDURE

PROPOSED AMENDMENTS TO RULE 43

I. SUMMARY OF COMMENTS: Rule 43

Thirty-three individuals or organizations submitted written comments on the proposed conforming amendment to Rule 43, which turns on approval of the amendments to Rules 5 and 10, concerning video teleconferencing and the amendment to Rule 10 that would permit the defendant to waive his or her appearance at an arraignment. The summary here is largely a duplication of the comments submitted on Rules 5 and 10, above. Most commentators simply combined their views on Rules 5, 10, and 43, as a unit.

Four witnesses testified before the Committee on the issue of video teleconferencing, although their testimony did not specifically address the conforming amendments to Rule 43. The summary of their testimony is at Rules 5 and 10, above.

II. LIST OF COMMENTATORS: Rule 43

CR-009 Andrew M. Franck, Esq., Williamsburg, VA, November 8, 2000

CR-011 Judge Paul D. Borman, United States District Judge, Detroit, Michigan, January 2, 2001

CR-012 Richard D. Friedman, Professor of Law, Univ. of Michigan, January 8, 2001

CR-013 Elizabeth Phillips Marsh, Professor of Law, ABA, Criminal Justice Section, January 10, 2001

CR-015 Judge Bernard Zimmerman, United States Magistrate Judge, United States District Court, ND California, January 26, 2001

CR-017 Judge Robin J. Cauthron, Chair, Committee on Defender Services, Judicial Conference, January 30, 2001

CR-018 Judge Robert P. Murrian, United States Magistrate Judge, ED Tenn., February 5, 2001

CR-019 Judge Thomas W. Phillips, United States Magistrate Judge, ED Tenn., February 5, 2001

CR-022	Judge James E. Seibert, Magistrate Judge, Wheeling West Virginia, February 7, 2001
CR-023	Judge William G. Hussmann, United States Magistrate Judge, Indianapolis, Indiana, February 5, 2001
CR-025	Dean A. Stang, Federal Defender, Eastern District of Wisconsin, Milwaukee, Wisc., February 12, 2001.
CR-026	Judge Michael J. Watanabe, United States Magistrate Judge, Denver, Colorado, February 13, 2001
CR-027	Thomas W. Hillier, II, Federal Public Defender, Western District of Washington, February 12, 2001
CR-029	Judge Cynthia Imbrogno, United States Magistrate Judge, Eastern District of Washington, February 12, 2001
CR-030	Judge William A. Knox, United States Judge, February 13, 2001
CR-031	Judge Leslie G. Foschio, United States Magistrate Judge, Buffalo, New York, February 13, 2001
CR-033	Larry Propes, Clerk of Court, United States District Court, South Carolina, February 13, 2001
CR-034	Judge Lorenzo F. Garcia, United States Magistrate Judge, United States District Court, Albuquerque, New Mexico, February 13, 2001
CR-035	Judge George P. Kazen, United States District Judge, Southern District of Texas, February 13, 2001
CR-036	Donna A. Bucella, United States Attorney, Middle District of Florida, Tampa, Florida, February 14, 2001
CR-037	Judge James E. Bredar, United States Magistrate Judge, United States District Court for Maryland, February 13, 2001
CR-038	Judge John C. Coughenour, Chief Judge, United States District Court, Western District of Washington, Seattle, Wash., February 6, 2001
CR-039	Judge Jerry A. Davis, United States Magistrate Judge, ND of Mississippi, February 12, 2001

CR-040 Judge Janice M. Stewart, United States Magistrate Judge, Portland, Oregon, February 12, 2001

CR-041 Judge David Nuffer, United States Magistrate Judge, St George, Utah, February 13, 2001

CR-042 Judge William Beaman, February 12, 2001

CR-043 Judge Susan K. Gauvey, United States Magistrate Judge, D. Maryland, February 15, 2001

CR-044 Federal Magistrate Judges Association (Draft Report—Subject to Board Ratification), February 15, 2001

CR-045 Judge Tommy Miller, United States Magistrate Judge, Eastern District of Virginia (Law Student Comments from William and Mary Law School, Williamsburg, Virginia), February 12, 2001

CR-047 Judge Catherine A. Walter, United States Magistrate Judge, Topeka, Kansas, February 15, 2001

CR-048 Judge Mikel H. Williams, February 15, 2001

CR-049 Judge Richard A, Schell, Chief Judge, Eastern District of Texas, Beaumont, Texas, February 12, 2001

CR-050 Fredric F. Kay, Federal Public Defender, District of Arizona, Tucson, Arizona, February 15, 2001

III. COMMENTS: Rule 43

Andrew M. Franck, Esq.(CR-009)
Williamsburg, VA
November 8, 2000

Mr. Franck opposes the amendments to Rules 5, 10 and 43 that would permit video teleconferencing—even if the defendant consents. First, he notes, because the preliminary hearing and arraignment are administrative in nature, there is no practical problem of permitting video teleconferencing. But it is important for the defendant to be subjected to a personal appearance before the judge and realize the full impact of what he is facing. Also, is important for the judge to observe the defendant personally. He observes that there are always nuances involved in such proceedings and that it is critical that both parties are in each other's presence.

Judge Paul D. Borman (CR-011)
United States District Judge
Detroit, Michigan
January 2, 2001

Judge Borman has requested the opportunity to present testimony to the Committee.

Elizabeth Phillips Marsh (CR-013)
Professor of Law
ABA, Criminal Justice Section
January 10, 2001

Professor Marsh has requested the opportunity to present testimony to the Committee.

Judge Bernard Zimmerman (CR-015)
United States Magistrate Judge
United States District Court, ND California
January 26, 2001

Judge Zimmerman supports the amendments that would permit video teleconferencing. In his view, the amendments are long overdue. He also urges the Committee to consider amending Rule 4 to clarify the ability of the judge to issue warrants via facsimile transmission.

Judge Robin J. Cauthron (CR-017)
Chair, Committee on Defender Services
Judicial Conference of the United States
January 30, 2001

Judge Cauthron notes that her predecessor, Judge Diamond, had expressed concern in 1994 (when the Committee had last proposed video teleconferencing) that costs would not be saved by implementing video teleconferencing. Although the Committee's proposals were withdrawn pending the results of pilot programs, to date there has not been an analysis of cost or quality concerns. She requests that the Committee defer action on the video teleconferencing amendments until the Committee on Defender Services can discuss the impact of those amendments.

Judge Robert P. Murrian (CR-018)
United States Magistrate Judge
Eastern District of Tennessee
February 5, 2001

Judge Murrian supports the amendments that would provide for video teleconferencing—with or without the defendant's consent. He believes, however, that the judge should have the prerogative to require the defendant to appear in court. In his division, considerable time and resources are spent transporting defendants eighteen miles to the court for routine initial appearances and arraignments that are little more than scheduling conferences.

Judge Thomas W. Phillips (CR-019)
United States Magistrate Judge
Eastern District of Tennessee
February 5, 2001

Judge Phillips writes that he agrees with the views of Judge Murrian, *supra*.

Judge James E. Seibert (CR-022)
United States Magistrate Judge
Northern District of West Virginia
Wheeling West Virginia
February 7, 2001

Judge Seibert strongly disagrees that the defendant should be allowed to determine whether video teleconferencing is used. He notes that it is a two, three, or four hour drive to the three other cities covered by the court and that it is often not possible to plan far enough in advance to have all of the defendants at a particular location ready to appear before the court. He notes that every lawyer and defendant who has appeared before him by video conference has been "extremely grateful for the prompt hearing that wastes neither time nor money of anyone." He states that he has never had any objection to appearance by video conference.

Judge William G. Hussmann (CR-023)
United States Magistrate Judge
Indianapolis, Indiana
February 5, 2001

Judge Hussmann believes that video teleconferencing should occur only with the consent of the defendant. Although initial proceedings, etc. have limited importance, they can have great impact on some practical issues. Because of increased caseloads and crowded jails, it is common to hear complaints from defendants that they are unable to talk to their lawyer or to talk to family members about bail or other pressing family

matters. Appearing in person often presents an opportunity for communication. Although video technology has improved, in his view, it does not provide an appropriate venue for communications between counsel and family.

Dean A. Stang (CR-025)
Federal Defender
Eastern District of Wisconsin
Milwaukee, Wisconsin
February 12, 2001.

Mr. Stang opposes the proposed amendments involving video teleconferencing. He indicates that initial appearances and arraignments are not pro forma events and that those proceedings provide both parties with an opportunity to discuss very important matters. Using teleconferencing will result in lost plea bargains, early cooperation, and prompt release decisions. He notes a number of practical problems that will arise and that teleconferencing makes no practical accommodation for interpreters. Mr. Hillier notes that he is not aware of any special danger to law enforcement officers or court personnel by requiring in-court appearances. Further, teleconferencing will interfere with the critical stages of forming an attorney-client relationship. Finally, teleconferencing will undermine both the dignity of the federal courts and Sixth Amendment values.

Judge Michael J. Watanabe(CR-026)
United States Magistrate Judge
Denver, Colorado
February 13, 2001

Judge Watanabe briefly writes that he strongly favors use of video teleconferencing. He states that he has used it in civil cases and that it works very well.

Thomas W. Hillier, II (CR-027)
Federal Public Defender
Western District of Washington
February 12, 2001

Mr. Hillier presents a detailed objection to the video teleconferencing amendments, on behalf or the Federal Public and Community Defenders. He notes that the current practice works well and that the initial appearance is not a pro forma proceeding. He presents a careful overview of the important decisions that are made in the face-to-face meetings between the defendant, the defense counsel, and the prosecutor. Those meetings, he asserts, assure prompt processing the case. Mr. Hillier believes that video teleconferencing is impractical and presents difficult situations for both the defendant and the defense counsel who must decide whether to remain at the courthouse, with the judge and the prosecutor or travel to where the defendant is located. He notes that the system is likely to result in increased costs and that no in-depth study has been

conducted. Further, he observes that in Rule 10, the ability of the defendant to waive presence at the arraignment negates the need for teleconferencing in that rule. Finally, he identifies a list of unresolved issues and urges the Committee to table its proposals pending further study.

Judge Cynthia Imbrogno (CR-029)
United States Magistrate Judge
Eastern District of Washington
February 12, 2001

Judge Imbrogno enthusiastically supports the video teleconferencing amendments. She writes that there are only two magistrate judges covering the Eastern District of Washington and that they often drive over three hours (one way) to conduct proceedings in other cities within the district. As a result, some duty stations are not covered because of the need to spend time traveling. She notes that the technology is sufficiently advanced to maintain the integrity of the proceedings. Defense counsel, she writes, are very supportive of teleconferencing because it gives them greater flexibility in scheduling. She would support video teleconferencing without requiring the defendant's consent.

Judge William A. Knox (CR-030)
United States Judge
February 13, 2001

Judge Knox favors video teleconferencing. He says that he has used it in civil proceedings, including trials, and finds it to be "reliable, practical, efficient, and [has had] no difficulty protecting the rights of the parties. Judge Knox states that if the equipment is poor it is a waste of time to use it.

Judge Leslie G. Foschio (CR-031)
United States Magistrate Judge
Buffalo, New York
February 13, 2001

Judge Foschio favors video teleconferencing for arraignments, especially for superseding arraignments, where the defendant has been already arraigned and bail has been set.

Larry Propes (CR-033)
Clerk of Court
United States District Court, South Carolina
February 13, 2001

Mr. Propes indicates that the judges in both the Greenville and Florence divisions are interested in using video teleconferencing for initial appearances because the courthouses are not in convenient or close proximity to the county jails being used by the US Marshals Service. He observes that if the rule requires the consent of the defendant, few, if any, will consent. He therefore recommends that video teleconferencing not be contingent on the defendant's consent.

Judge Lorenzo F. Garcia (CR-034)
United States Magistrate Judge
United States District Court
Albuquerque, New Mexico
February 13, 2001

Judge Garcia favors using video teleconferencing, especially for arraignments. He notes that in New Mexico, a number of defendants are simply passing through the state when they are arrested and bringing them back to court simply for an arraignment can result in unnecessary costs; where the defendant is indigent, the court must direct advancement of travel costs for the defendant. Judge Garcia also writes that he has had experience with arraignment waivers in state court and that the system worked well.

Judge George P. Kazen (CR-035)
United States District Judge
Southern District of Texas
February 13, 2001

Judge Kazen believes that it is very important to provide for waiver of personal appearance at initial proceedings (Rules 5, 10 and 43), either by written waiver or video appearance. Citing his experience in a border court, in one of five districts they hear almost 30 percent of the criminal cases for the entire nation. The initial arraignment is largely perfunctory used to set a motions schedule. Most of the defendants plead not guilty and are housed as many as 60 to 300 miles away from a courthouse. He notes that frequently the defendants reside at a distant location and if they are released, there are problems in bringing them back for those proceedings. Judge Kazen observes that given the considerable apprehension about this proposal, it would be prudent to adopt a proposal that requires the defendant's consent.

Donna A. Bucella (CR-036)
United States Attorney
Middle District of Florida,
Tampa, Florida
February 14, 2001

Ms. Bucella observes that if the defendant is allowed to waive appearances at an arraignment, the government's consent should be required. She also notes that the

Committee Note is ambiguous on just how video teleconferencing will be accomplished for initial appearances. She adds that if the purpose of the amendments is to save money, that the Committee ought to say so explicitly.

Judge James E. Bredar (CR-037)
United States Magistrate Judge
United States District Court for Maryland
February 13, 2001

Judge Bredar opposes the use of video teleconferencing. He believes that there is much at stake in federal criminal cases and that the sooner the defendant understands the gravity of his situation, the better. He adds that from his time as a public defender, there nothing that helps to focus the mind than to walk into a federal courtroom. He believes that the overall process will be "denigrated" by reducing those appearances to a television experience.

Judge John C. Coughenour (CR-038)
Chief Judge, United States District Court
Western District of Washington
Seattle, Washington
February 6, 2001

Judge Coughenour opposes video teleconferencing in proposed Rules 5 and 10. In his view, the solemnity and fairness of the defendant's appearance in court in the presence of counsel and the judge far outweigh the security problems. The solution, he notes, is heightened vigilance and not the sacrifice of cherished traditions. His views, he notes, are based on his research into the issue: in 1990 he was a member of the Court Administration and Case Management Committee which had supervised a pilot program. As a result of that study, the Committee had believed strongly that video teleconferencing seriously eroded the full and fair examination of facts and witnesses. He urges the Committee to reject the amendments.

Judge Jerry A. Davis (CR-039)
United States Magistrate Judge
ND of Mississippi
February 12, 2001

Judge Davis endorses video teleconferencing. He notes that state courts have been using it for years and that he has been using it for prisoner cases for several years and that there are no "downsides." He observed that it is useful for security purposes and in rural areas. He concludes by noting that any perceived constitutional problems are imagined, not real.

Judge Janice M. Stewart (CR-040)
United States Magistrate Judge
Portland, Oregon
February 12, 2001

Judge Steward favors the proposals for video teleconferencing. But due to concerns about separating the defendant and defense counsel and the problems that that creates, she believes video teleconferencing should be used only where the defendant consents.

Judge David Nuffer (CR-041)
United States Magistrate Judge
St George, Utah
February 13, 2001

Judge Nuffer, a part time magistrate judge, strongly favors video teleconferencing. In Utah he works 300 miles from the courthouse.

Judge William Beaman (CR-042)
February 12, 2001

Judge Beaman strongly approves of video teleconferencing, but would require the defendant's consent.

Judge Susan K. Gauvey (CR-043)
United States Magistrate Judge
District of Maryland
February 15, 2001

Judge Gauvey recounts her experiences in the Maryland state courts with video teleconferencing. She observed what she calls assembly line justice. The proceedings were held in a large room and appeared surreal and chilling. There was no communication between the judge and the defendant. In contrast, in federal courts, all parties are more focused and she is concerned that a judge could not pick up the subtle hesitations or halting speech or odd manner that may be signs of impairment.

Federal Magistrate Judges Association (CR-044)
(Draft Report—Subject to Board Ratification)
February 15, 2001

The Magistrate Judges Association supports the proposed changes to Rule 43, as being consistent with the proposed rules governing video teleconferencing. The Association recounts the benefits of using such procedures and suggests that some of the concerns about the erosion of the process might be addressed if the judge visits the

detention facility and determines if that facility as a room suitable for conducting teleconferencing, along with a private telephone line and a room where the defendant can consult in private with his or her attorney. The Association favors video conferencing without requiring the defendant's consent.

Judge Tommy Miller (CR-045)
United States Magistrate Judge, Eastern District of Virginia
(Law Student Comments from William and Mary Law School, Williamsburg, Virginia)
February 12, 2001

Judge Miller, a member of the Criminal Rules Committee, submitted ten written comments from the law students in his Criminal Procedure class at William and Mary. One of the students, David S. Johnson, is opposed to using video teleconferencing. He notes a number of obstacles that the courts will face, including delays in transmission. He believes that the amendment is "before its time." Only when the technology has advanced further should the amendment be adopted.

A second student, Kimberly Marinoff, expresses concern about the video conferencing provision. She believes that it "eviscerates the utility" of the proceedings "as a wake-up call by insulating the accused from the physical presence of the judge." She concludes, however, that if the amendment is to remain, she would support the alternate version that requires the defendant's consent.

Tom Brzozowski, another student, applauds the style changes to the rules, but suggests that the Committee include a provision in Rule 5 that would make clear what the remedy is for failure to comply with the timing requirements of the rule. He provides a summary of the conflicting caselaw and statutory provisions and argues that whatever remedy the Committee chooses would provide predictability to practitioners.

A fourth student, James Ewing, addresses the video teleconferencing provisions. He cites the historical arguments for the right of the defendant to appear personally in court and believes that even if a defendant consents to video teleconferencing, there may be problems with the perception of fairness. Thus, video conferencing should be the exception rather than the general rule, even where the defendant consents.

Judge Ronald E. Longstaff (CR-046)
Chief Judge, Southern District of Iowa
February 15, 2001

On behalf of the judges of his district, Judge Longstaff indicates that they agree with the comments submitted by Magistrate Judges Cohen, Dien, and Collings, *supra* concerning taking defendants to a magistrate in an adjacent district. They also support

the changes for video teleconferencing and would comport to court technology procedures already in place, including both districts in Iowa.

Judge Catherine A. Walter (CR-047)
United States Magistrate Judge
Topeka, Kansas
February 15, 2001

Although she has not used video teleconferencing, Judge Walter supports it use, especially for initial appearances. She notes that the facility used to house pretrial detainees (an hour's drive from her court) has recently installed videoconferencing equipment. In her view the opportunity for the earliest time for the hearing is more important than a face-to-face appearance before a judge. She notes that there have been occasions where the availability of video conferencing would have resulted in an earlier initial appearance.

Judge Mikel H. Williams (CR-048)
February 15, 2001

Judge Williams commends the Committee for its thorough reorganization of the criminal rules and fully endorses the use of video teleconferencing for initial criminal proceedings. He notes that for the last four years his courts have used such procedures for initial criminal proceedings; they adopted the program because of concerns for serious delays in scheduling the various parties for the hearings. The district court for Idaho covers the entire state and the 400 miles distances make automobile transportation impractical and air travel can be delayed by weather. Transporting the defendants presents similar problems. He describes the process used in his district--the defendant is taken to the closest federal courthouse where he meets his CJS counsel and within two or three hours the defendant appears with counsel before the magistrate judge via video. He cannot recall a single instance where the defendant objected to that procedure; he considers the program to be a resounding success. The defendant's rights are immediately addressed and the proceeding is conducted with the same formality as if the defendant were in the judge's court. Although he would prefer to have a rule not requiring the defendant's consent, he believes that obtaining consent is not a burden.

Judge Richard A, Schell (CR-049)
Chief Judge, Eastern District of Texas
Beaumont, Texas
February 12, 2001

Judge Schell supports the proposed amendments for video teleconferencing. Although he would prefer the version that does not require consent, a rule that requires the defendant's consent is imminently reasonable. He urges the Committee to consider extending video conferencing to pleas and sentencing. He notes the long distances

involved in his district and the fact that he has been used video teleconferencing for several years for sentencing and for guilty pleas, with the defendant's consent.

Fredric F. Kay (CR-050)
Federal Public Defender, District of Arizona
Tucson, Arizona
February 15, 2001

Mr. Kay writes that in the District of Arizona there are four lawyers in his office and that in FY 2000 they were appointed to represent about 8000 indigent defendants. Many of those were immigration cases. He agrees with the views expressed by Mr. Tom Hillier, *supra*, and strongly urges the Committee to reject the amendments. He knows of no serious cost and security concerns that would support the proposed amendments and that they should not outweigh the important aspects of having the defendant and counsel appear personally before the judge. He has watched video proceedings in the state system and has observed the defendant sitting by himself in a chair answering the judge's questions. The judges he notes, may have questions about the defendant's capacity and they have to ask a guard whether the defendant appears to be sober. Using video conferencing is something that one might expect in a weird third world country where there is no concept of presumption of innocence.

ADVISORY COMMITTEE ON FEDERAL RULES OF CRIMINAL PROCEDURE

PROPOSED AMENDMENTS TO RULE 53

I. SUMMARY OF COMMENTS: Rule 53

The Committee received only one comment on the proposed amendments to Rule 53. The commentator, a law student, provided an extensive discussion on the issues raised by transmission of proceedings from a federal court room and presented a redrafted version of the rule.

II. LIST OF COMMENTATORS: Rule 53

CR-045 Judge Tommy Miller, United States Magistrate Judge, Eastern District of Virginia (Law Student Comments from William and Mary Law School, Williamsburg, Virginia), February 12, 2001

III. COMMENTS: Rule 53

Judge Tommy Miller (CR-045)
United States Magistrate Judge, Eastern District of Virginia
(Law Student Comments from William and Mary Law School, Williamsburg, Virginia)
February 12, 2001

Judge Miller, a member of the Criminal Rules Committee, submitted ten written comments from the law students in his Criminal Procedure class at William and Mary. One of the students, David S. Johnson, has presented an extensive written comment on amending Rule 53 to permit electronic coverage of criminal trials under the trial judge's discretion. Although he recognizes the concerns associated with broadcasting trials, he believes that the current rule goes too far. He has drafted a revised Rule 53 that includes a list of factors for the court to consider in deciding whether to broadcast the case.

PROPOSED RULE AMENDMENTS OF SIGNIFICANT INTEREST

The following summary outlines considerations underlying the recommendations of the advisory committees and the Standing Rules Committee on topics that raised significant interest. A fuller explanation of the committees' considerations was submitted to the Judicial Conference and is sent together with this report.

Federal Rules of Appellate and Civil Procedure

I. Appellate Rule 4 and Civil Rules 54 and 58

A. Brief Description

The proposed amendments would address a conflict in circuit law regarding the time to appeal a judgment or order that has been entered in the civil docket but not set forth on a separate document as required by Civil Rule 58. Every circuit, save the First, holds that, under such circumstances, the time to appeal never begins to run. Under the amendments, the time to appeal a judgment or order would begin to run on the occurrence of the earlier of two events: (1) when the judgment or order is entered in the civil docket and actually set forth on a separate document; or (2) if not set forth on a separate document, when 150 days have run from the entry of the judgment or order in the civil docket.

B. Arguments in Favor

- The amendments place a 180-day "cap" (150 days from the date of entry of the judgment in the civil docket but not on a separate document and 30 days to file an appeal from the judgment–an additional 30 days for the government) on the time to file an appeal from a judgment that otherwise could be appealed years later because of the failure to enter judgment on a separate document.

- The amendments eliminate a conflict in circuit law on the consequences of failing to enter a judgment on a separate document.

C. Objections

The originally proposed 90-day "cap" (a 60-day grace period plus 30 days to file an appeal) published for public comment drew some concern as being too short a time, creating a potential trap for the unwary.

D. Rules Committees Consideration

The rules committees believed that the existence of judgments and orders that could be resurrected years after they were issued simply because they were not set forth on a separate document posed a significant problem that required attention. Both the Advisory Committees on Appellate and Civil Procedure agreed with public comment that a 90-day "cap" was too short, and recommended an expanded period — 150 days before the time to appeal a judgment begins to run and then 30 days (60 days if the government is a party) to file an appeal from that judgment.

A party who receives no notice whatsoever of a judgment has only 180 days to move to reopen the time to appeal from that judgment. *See* Appellate Rule 4(a)(6)(A). The committees believed that a similar 180-day "cap" should apply when a party receives notice of a judgment, but the judgment is not set forth on a separate piece of paper. The committees concluded that the proposed amendments would not undermine the "separate document" rule, which is intended to notify parties that the time to appeal has begun to run. The parties should be aware of the duty to inquire when there has been no activity in the case for 150 days.

Federal Rules of Bankruptcy Procedure

I. Bankruptcy Rule 2014

A. Brief Description

Section 327 of the Bankruptcy Code conditions appointment of a professional to serve in a bankruptcy case on a court's finding that the professional "does not have an interest materially adverse to the interest of the estate or any class of creditors or equity security holders, *by reason of any direct or indirect relationship to, connection with, or interest in the debtor* or an investment banker ... or for any other reason." (emphasis added). Present Rule 2014 implements § 327 by imposing an absolute requirement, which is broader than the one required under the Code, on an applicant to disclose all of the

person's connections, not only with the "debtor" as required by the section, but also with "creditors, any other party in interest, their respective attorneys and accountants, the United States trustee, or any person employed in the office of United States trustee."

The proposed amendment to Rule 2014 requires a professional to disclose, among other things, "(3) any interest in, relationship to, or connection the person has with the debtor; (4) any interest, connection, or relationship the person has that may cause the court or a party in interest reasonably to question whether the person is disinterested under § 101."

B. Arguments in Favor

- The existing rule is undefined and very broad on its face. It requires more disclosure of a professional's connections with creditors and non-debtor parties in interest than is required by the Bankruptcy Code provision that it implements. The proposed amendments leave intact the demanding disclosure requirements with respect to "connections" with debtors (addressing questions about the neutrality of the professional's disinterestedness that are most likely relevant and which are the focus of § 327), while establishing a more appropriate objective standard with respect to "connections" to creditors and other participants in the case.

- Full compliance with the disclosure requirements, which extends to any connections with attorneys and accountants of creditors, is virtually impossible to meet, resulting in attorneys honoring the rule in the breach. Chapter 11 cases often involve thousands of creditors and other parties in interest, so that full compliance would overwhelm the courts and creditors with irrelevant information.

- The existing rule's undefined standard can result in selective enforcement producing arbitrary results. Courts have refrained from sanctioning a professional for a minor infraction, but that is no guarantee against future sanctions.

C. Objections

- Professionals might have less incentive to investigate and disclose potential connections with creditors and their attorneys and accountants.

- Increased chance that a court will not have adequate information to make an informed decision on the application of a professional.

D. Rules Committees Consideration

The rules committees concluded that the rule should be amended to establish a more realistic and fairer disclosure standard, while still ensuring that the information necessary to make a "disinterestedness" determination continued to be disclosed to the court. Professionals sometimes submit voluminous disclosure documents that contain a mass of irrelevant information in an attempt to gain some level of comfort that their appointment will not result in a later imposed sanction for a failure to be disinterested as required by the Bankruptcy Code. These lengthy submissions are filed at the beginning of Chapter 11 cases when creditors, the United States trustee, and the court have limited time to evaluate the materials and an immediate decision is needed for the case to proceed. The combination of the limited opportunity for review and the extensive nature of the disclosures make it nearly impossible for the court and the creditors to evaluate the request for employment in a manner that fully considers the propriety of the appointment under the Code.

The rules committees concluded that the disclosure requirements articulated under the present rule are too exacting, not required by the Bankruptcy Code, and often counterproductive because they resulted in disclosing too much irrelevant information. The committees believed that the proposed amendment creates a more rational and reasonable disclosure standard that more closely follows the intent of § 327 of the Code, which it is intended to implement. The proposed amendment leaves intact a judge's discretion to require disclosure of more information in an individual case.

The initially published version of the amendment directed the professional to disclose all connections "relevant" to a determination of disinterestedness, which was thought to be broader than "material information" specified under the Bankruptcy Code. The advisory committee revised the proposed amendment after receiving comment to address concerns that the published version of the rule provided too much discretion to the professional in determining the scope of the disclosure. The proposed revision requires a professional to disclose any connection with a debtor and information regarding others that could lead the court or other party in interest reasonably to question the disinterestedness of the professional.

Federal Rules of Criminal Procedure

I. Comprehensive Restyling of Criminal Rules

The proposed style revision of the Criminal Rules is intended to improve the rules' clarity, consistency, and readability. The advisory rules committees identified and eliminated ambiguities and inconsistencies that inevitably had crept into the rules since their enactment. The style changes are intended to be nonsubstantive, unless otherwise specified to resolve ambiguities. Although limited, virtually all comments from the bench, bar, and academia on the stylized rules were favorable.

The style revision has taken up most of the advisory committee's work for the past three years. The revision of the criminal rules completes the second leg of a long-term plan to re-examine all the procedural rules. The Federal Rules of Appellate Procedure were comprehensively restyled in 1998. The experience with that revision was positive and has reinforced the rules committees' commitment to make all the procedural rules clear, consistent, and readable.

In addition to publishing the restyled criminal rules in major legal publications and circulating them to the large bench-and bar mailing list, the proposed amendments were distributed to several hundred law professors who teach criminal procedure. Copies of the proposals were also sent to all major bar groups, including liaisons from each of the state bar associations. Major organizations involved in the administration of criminal justice were alerted early to the project, provided input throughout the project, and commented on the published proposals. The rules committees' deliberate and laborious process was designed to ferret out any inadvertent substantive change. Changes reflecting the resolution of ambiguous language have been explained in the Committee Notes.

II. Video Teleconferencing of Initial Appearance and Arraignment Proceedings

A. Brief Description

The proposed amendments to Rules 5, 10, and 43 would explicitly provide a judge with discretion to conduct initial appearance or arraignment proceedings by video teleconferencing (in lieu of the defendant's physical presence) upon the defendant's consent.

B. Arguments in Favor

- Initial appearances and arraignments conducted by video teleconferencing can only take place with the defendant's consent, which the committees believe avoids most, if not all, the problems opponents raise.

- Video teleconferencing reduces security risks in the courtroom where adequate law enforcement officers are sometimes unavailable to police large groups of prisoners. It also eliminates security risks to officers and to defendants during transit to the courthouse.

- Judges in heavy criminal-caseload districts continue to request that the rules be amended to permit video teleconferencing as a significant way to make their proceedings safer and more efficient.

- The ability to conduct an initial appearance by video teleconference may eliminate delays of up to 48 hours encountered in some large geographic districts before a judge can travel to the defendant's location or the defendant can be transported to the judge's courtroom. Under these circumstances, video teleconferencing can expedite a defendant's release.

- The long distances and inconveniences experienced in traveling from holding facilities to the courthouse can be eliminated by using video teleconferencing.

- Video teleconferencing of preliminary judicial proceedings already is being conducted in many state and some federal court jurisdictions with positive results.

C. Objections

- There might be some cost shifting from the U.S. Marshals' appropriation to the judiciary's Defender Services' appropriation if defense counsel travels to the defendant's holding facility to accompany the defendant to the video teleconferencing.

- A defendant may not fully appreciate the importance of the proceeding if conducted by video, particularly if the setting bears little resemblance to a courtroom.

- The voluntariness of the defendant's consent to the procedure may be questioned if made outside the physical presence of the judge in the holding facility.

- An early and confidential meeting between a public defender and defendant at the initial appearance serves a useful purpose. It may provide a first-time opportunity for counsel to interview the defendant, which might be forfeited if defense counsel opts to appear at the courtroom instead of the holding facility at the initial appearance conducted by video teleconferencing.

D. Rules Committees Consideration

Courts continue to request that the rules be amended to explicitly authorize video teleconferencing of initial appearances and arraignments. The judges in some of these courts routinely face 50 to 100 defendants for summary proceedings in their courtrooms with inadequate security. In other courts, the long distances between the holding facility and the courthouse impose significant delays, security risks, and inconvenience in transporting defendants. The proposed amendments recognize that courts operate under widely differing circumstances and are designed to give courts flexibility to conduct these summary pretrial proceedings by video teleconference where that procedure is needed—so long as the defendant consents.

Most judges probably will not elect to conduct initial appearances and arraignments by video teleconference because the holding facilities, counsel, and prosecutor are all located near the courthouse. But in those courts where distances or a crushing workload are factors, the rules committees concluded that the proposed amendments should be adopted because they promote security, efficiency, and convenience for the defendant and counsel.

The committees believe that the unqualified right of a defendant to insist that the initial appearance or arraignment be held in open court substantially satisfies the concerns raised against the proposed amendments. The committees also believe that vesting discretion in the judge to conduct these proceedings by video teleconference provides a safeguard against potential abuses, which opponents have raised.

Finally, it is likely that the overall cost to the government will be reduced by using video teleconferencing rather than incurring significant costs in transporting defendants to the courthouse, but there may be some cost shifting

from the Marshals' appropriations to the judiciary's appropriations. The extent of the cost shift cannot be precisely estimated because it is unknown how often the video-teleconferencing option will be exercised by defendants. We do know, however, that there is no need for the procedure in many places, while in other places counsel is not now appointed or present at the initial appearance and no travel costs would be incurred if video teleconferencing were used. Any actual cost shift that would result, moreover, may be partially offset by savings derived from other uses of video-conferencing equipment by defense counsel, e.g., providing secure connections for confidential client interviews in lieu of actual meetings obviating travel expenses. On balance, the rules committees believe that any additional costs charged to the judiciary's appropriation would be offset by improvements in security, efficiency, and convenience for the defendant and counsel.