ADVISORY COMMITTEE ON CRIMINAL RULES

File Copy

Washington, D.C.
April 27-28, 1998

CRIMINAL RULES COMMITTEE MEETING

April 27-28, 1998
Washington, D.C.

I. HEARING ON PROPOSED AMENDMENTS TO THE FEDERAL RULES OF CRIMINAL PROCEDURE (Memo)

A. Introduction and Comments by Chair

B. Testimony by Witnesses on Proposed Amendments

II. COMMITTEE MEETING: PRELIMINARY MATTERS

A. Remarks and Administrative Announcements by the Chair

B. Approval of Minutes of October, 1997, Meeting in Monterey, CA.

C. Draft Minutes of Standing Committee Meeting, January 1998.

D. Criminal Rules Agenda Docketing.

III. CRIMINAL RULES UNDER CONSIDERATION

A. Rules Approved by Standing Committee and Judicial Conference and Pending Before Supreme Court (No Memo).

1. Rule 5.1. Preliminary Examination; Production of Witness Statements.

2. Rule 26.2. Production of Witness Statements, Applicability to Rule 5.1 Proceedings.

3. Rule 31. Verdict; Individual Polling of Jury.

4. Rule 33. New Trial; Time for Filing Motion.

5. Rule 35(b). Correction or Reduction of Sentence; Changed Circumstances.

6. Rule 43. Presence of Defendant; Presence at Reduction or Correction of Sentence.

B. Rules Published for Public Comment & Pending Further Review by Advisory Committee. (Memo):

1. Rule 6. Grand Jury (Presence of Interpreters; Return of Indictment) (Memo).

2. Rule 7. The Indictment and the Information (Conforming Amendment) (Memo).

3. Rule 11. Pleas (Acceptance of Pleas and Agreements, etc) (Memo).

4. Rule 24(c). Alternate Jurors (Retention During Deliberations) (Memo).

5. Rule 30. Instructions (Submission of Requests for Instructions) (Memo).

6. Rule 31. Verdict (Conforming Amendment) (Memo).

7. Rule 32. Sentence and Judgment (Conforming Amendment) (Memo).

8. Rule 32.2. Forfeiture Procedures (New Rule) (Memo).

9. Rule 38. Stay of Execution (Conforming Amendment) (Memo).

10. Rule 54. Application and Exception (Conforming Amendment) (Memo).

C. Proposed Amendments to Rules of Criminal Procedure

1. **Rule 5(c), Initial Appearance Before the Magistrate Judge.** Proposed Amendment; On Remand from Judicial Conference (Memo).

2. **Rule 10, Arraignment & Rule 43, Presence of Defendant.** Proposed Amendment to Permit Defendant to Waive Personal Appearance at Arraignment (Memo).

3. **Rule 12.2, Notice of Insanity Defense or Expert Testimony of Defendant's Mental Condition .** Proposed Amendment Re Notice and Ordering Of Mental Examination For Defendant. (Memo).

4. **Rule 24(b). Trial Jurors.** Proposed Amendment to Equalize Number of Peremptory Challenges (Memo).

5. **Rule 26. Taking of Testimony.** Proposed Amendment to Permit Taking of Testimony from Remote Location. (Memo).

6. **Rule 32. Sentence and Judgment.** Proposal by Committee on Criminal Law Regarding Disclosure of Presentence Reports. (Memo).

7. **Rule 32.1. Revocation or Modification of Probation or Supervised Release**. Correction of Terminology re Magistrate Judge (Memo).

8. **Rule 41. Search and Seizure**. Proposed Amendment Regarding Warrant Based on Telephonic Statements by Affiant (Memo).

9. **Rule 43. Presence of Defendant** (Memo)

10. **Rule 46. Release From Custody**. Proposed Legislation Regarding Forfeiture of Bond for Reasons Other Than Failure to Appear (Memo).

11. **Rule 49. Service and Filing of Papers**. Proposed Amendment to Provide for Facsimile Transmission of Notice (Memo).

12. **Rules Governing Habeas Corpus Proceedings; Report of Subcommittee. (Memo)**

D.. Rules and Projects Pending Before Advisory Committees, Standing Committee and Judicial Conference

1. Rules Governing Attorney Conduct; Possible Amendments to Rules of Criminal Procedure (Memo).

2. Local Rules Project; Effective Date for Rules (Memo)

3. Electronic Filing of Comments on Proposed Rules Changes (Memo)

4. Criminal Rule 27. Proof of Foreign Record (Memo)

5. Status Report on Proposed Restyling of Criminal Rules (Memo)

E. Status Report on Legislation Affecting Federal Rules of Criminal Procedure, Including Victim's Rights Legislation (No Memo).

IV. DESIGNATION OF TIME AND PLACE OF NEXT MEETING

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Chief Justice Daniel E. Wathen

Subcommittee on Rule 11
Judge George M. Marovich, Chair
Professor Kate Stith
Henry A. Martin, Esquire
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Agenda Item I

MEMO TO: **Members, Criminal Rules Advisory Committee**

FROM: **Professor Dave Schlueter, Reporter**

RE: **Hearing on Proposed Amendments to the Federal Rules of Criminal Procedure**

DATE: **March 23, 1998**

The Advisory Committee will be meeting in Washington, D.C. on April 27th and 28th to discuss various agenda items. That meeting will be preceded on the morning of Monday, April 27th with a hearing to consider the testimony of several witnesses who wish to address the proposed amendments pending before the Committee; the previously scheduled hearings on the proposed amendments were postponed until the 27th.

At this point, it appears that there will approximately four to six witnesses testifying on their own or on behalf of an organization on two amendments: The Rule 11 waiver provision and new Rule 32.2. Each member of the Committee should have received copies of any written comments submitted by the witnesses.

Agenda Item IIB

MINUTES [DRAFT]
of
THE ADVISORY COMMITTEE
on
FEDERAL RULES OF CRIMINAL PROCEDURE

October 13-14, 1997
Monterey, California

The Advisory Committee on the Federal Rules of Criminal Procedure met at Monterey, California on October 13th and 14th, 1997. These minutes reflect the discussion and actions taken at that meeting.

I. CALL TO ORDER & ANNOUNCEMENTS

Judge Davis, Chair of the Committee, called the meeting to order at 8:30 a.m. on Monday, October 13, 1997. The following persons were present for all or a part of the Committee's meeting:

Hon. W. Eugene Davis, Chair
Hon. D. Lowell Jensen
Hon. Edward E. Carnes
Hon. George M. Marovich
Hon. David D. Dowd, Jr.
Hon. D. Brooks Smith
Hon. John M. Roll
Hon. Tommy E. Miller
Hon. B. Waugh Crigler
Hon. Daniel E. Wathen
Prof. Kate Stith
Mr. Robert C. Josefsberg, Esq.
Mr. Darryl W. Jackson, Esq.
Mr. Henry A. Martin, Esq.
Mr. Roger Pauley, Jr., designate of the Asst. Attorney General for the Criminal Division
Professor David A. Schlueter, Reporter

Also present at the meeting were: Hon. Alicemarie Stotler, Chair of the Standing Committee on Rules of Practice and Procedure; Mr. Peter McCabe and Mr. John Rabiej from the Administrative Office of the United States Courts; Mr. David Pimentel, Judicial Fellow at the Administrative Office, and Ms. Mary Harkenrider from the Department of Justice.

The attendees were welcomed by the incoming chair, Judge Davis, who welcomed the two new members to the Committee, Judge Roll and Magistrate Judge Miller

II. APPROVAL OF MINUTES OF APRIL 1997 MEETING

Judge Marovich moved that the Minutes of the Committee's April 1997 meeting be approved. Following a second by Professor Stith, the motion carried by a unanimous vote.

III. RULES PUBLISHED FOR PUBLIC COMMENT AND PENDING FURTHER REVIEW BY ADVISORY COMMITTEE

The Reporter informed the Committee that at its June 1997 meeting, the Standing Committee had approved the publication of a number of amendments to the Criminal Rules:

1. Rule 6. Grand Jury (Presence of Interpreters; Return of Indictment)
2. Rule 11. Pleas (Acceptance of Pleas and Agreements, etc.)
3. Rule 24(c). Alternate Jurors (Retention During Deliberations)
4. Rule 30. Instructions (Submission of Requests for Instructions)
5. Rule 32.2. Forfeiture Procedures.
6. Rule 54. Application and Exception.

The Reporter added that the Standing Committee had modified the proposed amendment to Rule 6 to permit all necessary interpreters to be present during grand jury deliberations--and not just interpreters for the hearing-impaired. The Committee believed that it would be beneficial to obtain public comments on an amendment which would expand the list oft those permitted to remain in the deliberations. Finally, the Reporter informed the Committee that a hearing on the proposed amendments has been tentatively set for December 12, 1997 in New Orleans. The Comment period ends on February 15, 1998.

IV. RULES APPROVED BY STANDING COMMITTEE AND FORWARDED TO JUDICIAL CONFERENCE AND SUPREME COURT

The Reporter informed the Committee that at its June 1997 meeting, the Standing Committee had approved and forwarded to the Judicial Conference the amendments to the following rules:

1. Rule 5.1 (Preliminary Examination; Production of Witness

Statements);
2. Rule 26.2 (Production of Witness Statements; Applicability to Rule 5.1 Proceedings);
3. Rule 31 (Verdict; Individual Polling of Jurors);
4. Rule 33 (New Trial; Time for Filing Motion);
5. Rule 35(b) (Correction or Reduction of Sentence; Changed Circumstances);
6. Rule 43 (Presence of Defendant; Presence at Reduction or Correction of Sentence).

V. CRIMINAL RULE APPROVED BY SUPREME COURT AND PENDING BEFORE CONGRESS

The Reporter informed the Committee that the Supreme Court had approved an amendment to Rule 58 and that absent any further action by Congress, the amendment would become effective on December 1, 1997.

VI CRIMINAL RULES CURRENTLY UNDER CONSIDERATION BY ADVISORY COMMITTEE

A. Report of Subcommittee on Victim Allocution Legislation; Possible Amendments to Rules 11, 32, and 32.1.

Judge Davis offered introductory comments on pending legislation which would amend a number of criminal rules to provide for notice to victims and victim allocution when the accused enters a plea, at sentencing, and at revocation of probation proceedings. He noted that in the past the Committee had been reluctant to provide for victim allocution but that the proposed legislation provided the Committee with an opportunity to re-examine its position. He noted that a subcommittee consisting of Judge Dowd (Chair), Judge Smith, Mr. Josefsberg, and Mr. Pauley had been appointed to study the legislation and recommend a course of action to the Committee.

Speaking for the subcommittee, Judge Dowd provided additional information on the legislation, and the fact that it had apparently been offered as an alternative to a move to amend the Constitution. He added that under the legislation, the Judicial Conference would be given a short period of time to respond to the proposed changes and that the role of the subcommittee had been to review the proposed changes and be prepared to recommend changes to the full Committee for its consideration.

Mr. Rabiej believed that the legislation was not going to be passed in the current session of Congress. Mr. Pauley agreed but indicated that the legislation might be passed

in the next session. He believed that the Committee might be overreacting to the proposed legislation because it disregards the legislation proposed by the President and the it disregards the fact that the legislation will only move at the behest of the chairs of the congressional committees on the judiciary. He agreed, however, that the subcommittee should continue to monitor the legislation.

Judge Jensen observed that the legislation put the committee in the unique posture of requiring the Judicial Conference to react to specific amendments. Judge Stotler echoed that view and indicated that once again there was a question about the fundamental role of Congress in the rule-making enterprise. Justice Wathen noted that from a State's perspective, there was concern that the victim's movement might result in a constitutional amendment. Mr. Josefsberg opined that the proposed legislation seemed to require very little, e.g., notice to victims of pending hearings and an opportunity to be heard. Judge Marovich agreed with that assessment and saw little danger in the legislation. Several members indicated that under the circumstances, it would be wise to keep the subcommittee in place and ready to react to the legislation. Judge Jensen added that for the most part the federal system was catching up to what was already in place in many state and local jurisdictions. Judge Davis indicated that it would be appropriate, absent the need for more immediate action, to discuss the subcommittee's proposals at the Spring meeting. Following additional discussion concerning the definition of "victim" and "alleged victim" in the proposed legislation, Judge Carnes moved that the Committee express the view that it was not opposed to addressing the legislation. Mr. Josefsberg seconded the motion which carried by a vote of 10 to 1, with one abstention.

B. Rule 5(c). Initial Appearance Before the Magistrate Judge. Proposed Amendment.

Judge Davis provided a brief overview of a proposed amendment to Rule 5(c) which would permit a magistrate judge to grant a continuance in a preliminary examination over a defendant's objection. He noted that the Committee had previously considered the matter at its April 1997 meeting and that because the amendment would have directly contradicted 18 U.S.C. § 3060, that it had been referred to the Standing Committee with a recommendation that the Committee take steps to initiate an amendment to the statute. The Standing Committee responded by referring the proposal back to the Advisory Committee and indicating that the most appropriate method of effecting a change would be to follow the procedures in the Rules Enabling Act. Following brief discussion on proposed style changes to the rule, Mr. Josefsberg moved that the rule be amended. Judge Miller seconded the motion. Following additional discussion on the motion, several members questioned whether the amendment was even necessary. Judge Crigler observed that he had never seen the problem but Judge Miller indicated that in larger cities, it would help if a magistrate judge had the authority to act on a continuance opposed by the defendant. Judge Dowd indicated that in his 15 years of

experience, he had never experienced a problem with the rule. Ultimately, Mr. Josefsberg withdrew his motion to approve the amendment.

Professor Stith moved to approve the amendment. Judge Miller seconded that motion which failed by a vote of 5 to 7.

C. Rule 6. The Grand Jury. Legislative Proposal to Reduce Size of Grand Jury.

The Reporter indicated that at its April 1997 meeting the Committee had briefly discussed pending legislation (sponsored by Congressman Goodlatte from Virginia) which would reduce the size of grand juries. The matter had been carried over as an agenda item to permit additional research and discussion of the issue.

Mr. Josefsberg indicated that if the grand jury system were to continue, that the current size should be retained. Justice Wathen noted that Maine had reduced the size of its grand juries and that many regretted that reduction. Judge Carnes added that in his experience reducing the size of the grand jury would risk the danger of runaway prosecutions. Both Mr. Martin and Judge Jensen shared the view that it was important to get more, rather than less, people involved in the grand jury process. Ms. Harkenrider added that the Department of Justice had sent a letter to Congress last year recommending that the current size of grand juries be retained.

Judge Carnes moved that the Committee oppose any reduction of size in the grand jury. Professor Stith seconded the motion, which carried by a vote of 12 to 0.

D. Rule 11. Pleas. Report of Subcommittee on Proposed Amendments re Notice to Defendant of Relevant Sentencing Information.

Judge Marovich provided an overview of the Rule 11 subcommittee's work on Rule 11 issues. He noted that a number of proposals were in the process of approval and that one issue remained for discussion--the question of whether the Government should be required to notify a defendant of the sentencing factors it intended to rely upon during sentencing, following a plea of guilty. Judge Marovich noted that Professor Stith had provided a memo detailing reasons for such a requirement and that the Department of Justice had responded with reasons for rejecting that requirement. He noted that over the last several years the Committee had touched upon the issue of whether anything more should, or could, be done to insure that a defendant was entering a voluntary and knowing plea of guilty, in the context of guideline sentencing.

Professor Stith provided a lengthy explanation of why Rule 11 should be amended to provide for some form of notice to a defendant on what sort of sentencing information

the prosecution would be relying upon. She noted that the sentencing procedural rules had not kept pace with actual practice and that there was two particular problem areas. First, the question of what the Government would consider to be "relevant conduct." And second, whether the defendant had been a leader or organizer in the alleged criminal activity. It is unrealistic, she said, to assume that a defendant would be able to calculate the effect of such factors, even with the assistance of a defense counsel. She noted that her proposal requiring notice would simply shift the sentencing calculus to pre-plea stages.

Judge Marovich responded by observing that defendants typically want the trial judge to make factual decisions earlier in the process and cannot understand why the judge cannot take a more active role in the plea bargaining stage. Professor Stith suggested that the Rules Enabling Act procedures would be an appropriate means of obtaining debate and comment on her proposal.

Judge Dowd indicated that there seems to be a diversity of practice developing with regard to what should be included in a plea agreement. There was not, in his view, any uniform system of dealing with sentencing guideline issues in such agreements. The real issue, he said, is what constitutes a knowing and voluntary plea of guilty.

Judge Davis observed that in those jurisdictions where there is a heavy caseload, the trial judges generally permit the defendant to withdraw a plea under Rule 32 if there is any real question about whether the plea is knowing and voluntary. Judge Marovich, however, noted that there is some dispute as to what constitutes a fair and just reason for withdrawing a plea and that sentencing proceedings had become more adversarial. And that, said Judge Dowd, leads to a lack of uniformity in practice.

Ms. Harkenrider expressed the view that a system of government notice was not required. Under the current procedures, the prosecutors cannot control what ultimate sentence will be imposed by the court. She added that it would be difficult to draft a rule which would adopt such a notice provision. On the other hand, she noted, it would be better to rely upon the experience and advice of defense counsel to inform the defendant of what, if any, factors or facts, would impact on the sentence.

Mr. Josefsberg observed that in his experience as a defense counsel that defendants do not always understand, or believe, what might happen during sentencing. Amending Rule 11, he stated, would not help.

Ms. Harkenrider continued by noting that if a defendant wants more certainty in sentencing, he or she is free to agree to a specific sentence under Rule 11(e)(1)(C). And the Committee has already taken steps to provide for more certainty in sentencing. In most cases, she added, an amendment to Rule 11 would not fix any problems with a lack of certainty.

Mr. Martin noted that generally most agreements do not cover a specific sentence under Rule 11(e)(1)(C). He urged the Committee to consider providing for more notice in Rule 11 and to approve, in concept, an amendment to the rule. He noted that a study by the Federal Judicial Center has indicated that private practitioners were at the bottom of the list in understanding the sentencing guidelines. He noted that he would prefer to see the prosecutors more involved in the sentencing decisions, rather than probation officers.

Judge Roll was opposed to any proposal to require more notice to the defendant. He noted that it would be difficult to determine what would constitute adequate notice because of the variances in application of the sentencing guidelines among the judicial circuits. He observed that the Committee might be aspiring to certainty which does not exist.

Judge Marovich responded by noting that he did not disagree with the comments opposing an amendment and that he agreed with the point that some problems are not capable of a solution.

Judge Jensen reviewed some of the amendments which have already been made to Rule 11 and that the Committee's work had already focused to some extent on disclosure, even though the current rule lacks any enforcement mechanism. He agreed with those who believed that it would be difficult to craft an enforceable notice provision in the rule.

Professor Stith responded that in her view, any notice provision would not be binding on the trial court and that it could consider facts or factors presented by the probation officer, but not the prosecutor.

After Judge Carnes questioned the advisability of tinkering with the rule, Mr. Martin observed that adding a notice provision would not increase the number of not guilty pleas.

Mr. Pauley observed that intuitively, there are bound to be withdrawn pleas of guilty and that there must be a balance with the fairness to the defendant--who should know as much as reasonably possible--and the fairness intended under the Sentencing Reform Act--which was intended to reduce unwarranted sentence disparity. In short, he said, similarly situated defendants should receive similar sentences.

Following additional brief comments, the Committee agreed do take a "straw" vote on whether to proceed with drafting an amendment to Rule 11. The motion failed by a vote of 5 to 7.

E. Rule 12.2. Notice of Insanity Defense or Expert Testimony of Defendant's Mental Condition.

On behalf of the Department of Justice, Mr. Pauley presented a proposed amendment to Rule 12.2 which would address the authority of the trial court to order a mental examination of the defendant under 18 U.S.C. § 4247. He explained that as a result of *United States v. Davis*, 93 F.3d 1286 (6th Cir. 1996), there is a real question whether a court may order a custodial mental examination under Rule 12.2(b). To remedy the problem, he indicated that Rule 12.2(c) could be amended to provide for such an examination by adding a reference to § 4247.

Professor Stith questioned whether the proposal would extend to any mental evidence or only expert testimony. Mr. Pauley explained how the rule would work and what would trigger the need, or request, for such a mental examination. Judge Miller observed that the rule would be narrower if the defendant intends to introduce the expert testimony of his or her mental state.

Mr. Martin observed that that the amendment would raise a number of significant constitutional issues and questioned whether there was really a problem to be fixed. He pointed out that the Government got what it wanted in the *Davis* case.

Judge Davis observed that this was a complex issue and noted the interplay between the defendant's notice of an intent to introduce mental evidence and a government requested mental examination. If an examination is held, the Government has the statements of the defendant, regardless of whether the defendant testifies or otherwise introduces evidence of his or her mental health.

Mr. Pauley noted that whatever the merits of the proposal, there should be a balance of opportunity for both the defense and the prosecution to present evidence on the defendant's mental condition. Mr. Martin, however, questioned whether simply adding a reference to § 4247 would remedy whatever gap existed; there was still the problem of custodial examination.

Following additional discussion, the Committee voted 11 to 1, with one abstention, to consider a proposed draft amendment to Rule 12.2 at its next meeting.

F. Rule 23. Trial by Jury or by the Court. Discussion re Possible Reduction of Size of Jury.

The Reporter indicated that pending legislation would reduce the size of juries in federal criminal trials. Mr. Rabiej indicated that there had apparently been no real movement on the proposal. Mr. Josefsberg noted that even with a provision permitting the defendant to agree to a smaller jury, there was the risk that a judge would lean on a

defense counsel to waive a 12-person jury. Following brief discussion Judge Carnes moved that the Committee oppose the legislation. The motion, which was seconded by Judge Dowd, carried by a vote of 12 to 0.

G. Rule 24. Trial Jurors.

1. Discussion re Possible Amendments re Number of Peremptory Challenges.

The Reporter informed the Committee that pending legislation (Section 501) in the Crime Control Act of 1997 (S. 3) would amend Rule 24(b) by equalizing the number of peremptory challenges. He informed the Committee that in 1990 and 1991, the Committee had proposed a similar amendment, that it had been published for public comment, and that the Standing Committee unanimously rejected the proposal at its February 1991 meeting. Since then, the Committee had made no further attempts to equalize the number of challenges, although there had been numerous attempts to do so through legislation. But the Standing Committee's rejection of the Committee's proposal had generally been used to convince Congress not to amend Rule 24(b).

Mr. Pauley indicated that the current status of the legislation was murky but that Crime Bills do tend to get through during the second session of Congress.

Mr. Josefsberg moved that the Committee oppose any attempt to equalize peremptory challenges. Judge Miller seconded the motion.

Following a brief discussion about the benefits and costs of amending the Rule, the motion failed by a vote of 6 to 7.

Judge Roll moved that Rule 24(b) be amended to provide for 10 peremptory challenges for each side in a noncaptial case. Following a second by Judge Dowd, the motion carried by a vote of 7 to 6. The Reporter indicated that he would draft appropriate amending language for the Committee's Spring 1998 meeting.

2. Proposed Amendments re Randomly Selected Petit and Venire Juries and Deletion of Provision for Peremptory Challenges.

The Reporter informed the Committee that Judge William M. Acker, Jr. (N. Dist. Alabama) had recommended that the Rules be amended to abolish peremptory challenges and to provide for random selection of both the venire and petit juries. Following brief discussion, a consensus emerged that no action should be taken on the proposal.

H. Rule 26. Taking of Testimony. Report by Subcommittee re Taking of Testimony from Remote Location.

Judge Davis indicated that Judge Jensen had appointed a three-member subcommittee to study a proposed amendment to Rule 26 which would permit transmission of testimony from a remote location: Judge Carnes (Chair), Mr. Josefsberg, and Mr. Pauley. Judge Carnes reported that the Subcommittee had considered the issue

and that it proposed that Rule 26 be amended to permit contemporaneous transmission of testimony from a remote location where the court concluded that there were compelling circumstances (and good cause shown) and that the witness was unavailable, as that term is defined in Federal Rule of Evidence 804. He noted that there were potential confrontation clause issues and that requiring a showing of "unavailability" was designed to address that point. He also noted that the Committee might wish to address the issue of the potential interplay between using depositions versus contemporaneous transmission and whether one should be preferred over the other.

Judge Davis questioned whether the amendment should cover audio-only transmissions and Judge Crigler raised concerns about relying only on an audio transmission where the fact-finder and defendant would not be able to observe the witness.

Following additional brief discussion on possible confrontation issues, the Committee voted 12-0 to proceed with drafting an amendment to Rule 26 to provide for contemporaneous transmission. The Reporter indicated that he would draft appropriate language for the Committee's consideration at the Spring 1998 meeting.

I Rule 32. Sentence and Judgment. Proposal to Provide for Mental Examination of Defendant.

Continuing an earlier discussion, *supra*, concerning a Department of Justice proposal to regarding mental examinations of the defendant, supra at Rule 12.2, Mr. Pauley proposed that Rule 32 be amended to permit a trial court to order such an examination for purposes of sentencing. (This discussion actually took place in conjunction with the discussion regarding Rule 12.2, but is presented here to coincide with the numbering of the Rules)

Judge Jensen questioned whether the defendant's mental condition or health was a sentencing factor and Ms. Harkenrider indicated that it would be in a capital case. Judge Carnes observed that even in capital cases, the defendant's mental condition would normally have been raised during the cases-in-chief. Mr. Martin gave examples of how the judge may act in capital cases regarding sealing of the mental examination.

Following additional brief discussion, the Committee voted 10 to 1, with one abstention, to proceed with drafting an amendment to Rule 32 which would provide for mental examinations in capital cases, including a notice provision and a provision for sealing the record.

J. Rule 43. Presence of the Defendant. Proposal to Permit Defendant to Waive Presence at Arraignment.

The Reporter stated that the Committee had received a recommendation from Mr. Mario S. Cano (an attorney in Coral Gables, Florida) to amend Rule 43 to permit the defendant to waive his or her presence at an arraignment. He provided some background information on similar amendments which had been previously considered by the Committee in 1992-93 regarding in absentia arraignments from remote locations.

Mr. Rabiej reported that although several pilot programs had been initiated, they had not yet provided any useful empirical data concerning in absentia arraignments. Judge Crigler noted that the Committee's earlier proposals had been opposed by defense counsel because it would have limited their opportunity to meet with their clients at the arraignment proceedings. Mr. Josefsberg responded that in many cases the arraignment is not a critical proceeding and that in his experience his client has waived presence at arraignment. Judge Marovich agreed that in his experience, the arraignments are routine and that he rarely encounters an arraignment where a major issue is raised. Other members shared that view and Mr. Martin indicated that he could probably support a waiver of appearance but not an in absentia arraignment from a remote location.

Judge Dowd indicated that he uses the arraignment to conduct other inquires and in response several members suggested that any amendment for waiver include a provision for obtaining the trial court's approval.

Ultimately, the Committee voted 11 to 1 to proceed with consideration of an amendment to the Rules. The Reporter indicated that he would draft language for amending both Rules 10 and 43 for the Committee's next meeting.

K. Rules Governing Habeas Corpus Proceedings.

Judge Davis reported to the Committee that the Civil Rules Committee had asked the Committee to consider the possibility of amending the Rules Governing § 2254 and § 2255 Proceedings. In memos provided by the Reporters of the Civil Rules and Criminal Committee, he noted two potential problems. First, a technical, conforming, amendment was probably required in Rule 8 to reflect a change in statutory cross-referencing. Second, the timing requirements for filing a response to a habeas petition appear to be inconsistent in Civil Rule 81, § 2243, and Rule 4 of the Rules Governing § 2255 Proceedings and Rule 4 of the Rules Governing § 2254 Proceedings.

Considering the issues involved, and the fact that recent legislation affecting habeas proceedings may have created additional issues, Judge Davis indicated that he would appoint a subcommittee to study the problems. He later appointed Judge Carnes (Chair), Judge Miller, Mr. Jackson, and Mr. Pauley or Ms. Harkenrider.

VII.-RECOGNITION OF OUT-GOING MEMBERS

During the meeting, Judge Davis recognized the outstanding contributions of two out-going members of the Committee: Judge Jensen, who had served the Committee's chair and Magistrate Judge Crigler. He thanked both for their dedicated service and their contributions to the Committee and on behalf of the Committee wished them well.

VIII. RULES AND PROJECTS PENDING BEFORE STANDING COMMITTEE AND JUDICIAL CONFERENCE

A. Status Report on Legislation Affecting Federal Rules of Criminal Procedure

Mr. Rabiej informed the Committee that Congress was considering a Civil Forfeiture Act which would exactly following the language in proposed Rule 32.2, which is currently out for public comment. He stated that no action would be taken on the proposed legislation until the second session of Congress.

B. Status Report on Restyling the Appellate Rules of Procedure.

Mr. Rabiej also reported that the restyled Appellate Rules of Procedure had been approved by the Judicial Conference and had been delivered to the Supreme Court for its consideration. He added that the Appellate Rules Committee had received 25 comments on the proposed changes and that all but one of them had been positive in nature.

C. Status Report on Electronic Filing in the Courts

Mr. McCabe informed the Committee that as a result of amendments to several federal rules of procedure which permit courts to accept electronic filings, that a number of federal courts had begun identifying and acquiring appropriate technology to accept such matters. He noted that a number of questions remained to be addressed and introduced Ms. Karen Molzen, who provided an audio-visual presentation on how the District of New Mexico is handling such filings.

IX. DESIGNATION OF TIME AND PLACE OF NEXT MEETING

The Committee decided to hold its next meeting on April 27 and 28, 1998 at a location to be determined.

Respectfully submitted,

David A. Schlueter
Professor of Law
Reporter

Agenda Item IIC

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
DRAFT MINUTES of the Meeting of January 8-9, 1998
Santa Barbara, California

The winter meeting of the Judicial Conference Committee on Rules of Practice and Procedure was held in Santa Barbara, California on Thursday and Friday, January 8-9, 1998. The following members were present:

Judge Alicemarie H. Stotler, Chair
Judge Frank W. Bullock, Jr.
Professor Geoffrey C. Hazard, Jr.
Judge Phyllis A. Kravitch
Gene W. Lafitte, Esquire
Judge James A. Parker
Sol Schreiber, Esquire
Judge Morey L. Sear
Alan C. Sundberg, Esquire
Judge A. Wallace Tashima
Chief Justice E. Norman Veasey
Judge William R. Wilson, Jr.

Associate Attorney General Eileen C. Mayer represented the Department of Justice at the meeting. Member Patrick F. McCartan, Esquire was unable to be present.

Participating in the meeting, at the request of the chair, were Judge Frank H. Easterbrook, former member of the committee, and Judge Harry L. Hupp, representing the Judicial Conference Committee on Court Administration and Case Management.

Supporting the committee were: Professor Daniel R. Coquillette, reporter to the committee; Peter G. McCabe, secretary to the committee; John K. Rabiej, chief of the Rules Committee Support Office of the Administrative Office of the United States Courts; and Mark D. Shapiro, senior attorney in that office.

Representing the advisory committees were:

Advisory Committee on Appellate Rules -
Judge Will L. Garwood, Chair
Professor Patrick J. Schiltz, Reporter
Advisory Committee on Bankruptcy Rules -
Judge Adrian G. Duplantier, Chair
Professor Alan N. Resnick, Reporter
Advisory Committee on Civil Rules -
Judge Paul V. Niemeyer, Chair
Professor Edward H. Cooper, Reporter

Advisory Committee on Criminal Rules -
Judge W. Eugene Davis, Chair
Professor David A. Schlueter, Reporter
Advisory Committee on Evidence Rules -
Judge Fern M. Smith, Chair
Professor Daniel J. Capra, Reporter

Also participating in the meeting were: Joseph F. Spaniol, Jr. and Bryan A. Garner, consultants to the committee; Professor Mary P. Squiers, project director of the Local Rules Project; and Thomas E. Willging and Marie Leary of the Research Division of the Federal Judicial Center.

INTRODUCTORY REMARKS

Judge Stotler introduced the new advisory committee chairs — Judge Garwood of the Advisory Committee on Appellate Rules and Judge Davis of the Advisory Committee on Criminal Rules— and the new advisory committee reporter — Professor Schiltz of the Advisory Committee on Appellate Rules. Following committee tradition, all the members, participants, and observers introduced themselves in turn and made brief remarks.

September 1997 Judicial Conference Action

Judge Stotler reported that the committee's September 1997 report to the Judicial Conference had been placed on the Conference's consent calendar and all its recommendations approved without change. The proposed rules amendments in the report had been submitted to the Supreme Court shortly after the Conference meeting and were scheduled to take effect on December 1, 1998.

Judge Stotler added that the members of the committee had been provided with copies both of the committee's report to the Conference and the package of amendments and supporting materials transmitted to the Supreme Court in November 1997. She noted that she had included in the Supreme Court package a memorandum to the justices summarizing the amendments and inviting them to contact her or the advisory committee chairs for any assistance. She said that the Court had not yet acted on the amendments.

Judicial Conference Committee Practices and Procedures

The committee considered suggested changes in Judicial Conference committee practices and procedures and authorized the chair to communicate the committee's views to the Executive Committee of the Conference.

Federal Courts Improvement Act

Judge Stotler reported that the Executive Committee of the Judicial Conference had asked each committee of the Conference to review the Federal Courts Improvement Act of 1997 — a comprehensive compilation of various legislative recommendations approved by the Judicial Conference — and to identify any provisions that should be deleted from the bill. The Executive Committee advised that it intended to conduct similar reviews of all pending Conference legislative positions contained in future court improvements acts at the beginning of each Congress with a view towards eliminating any provisions that are no longer needed or have virtually no chance of being enacted.

Several members expressed support for this new procedure. None of the members, however, identified any provision in the current legislation that should be deleted.

Authority of the Federal Judicial Center and the Administrative Office

Judge Stotler reported that an ad hoc committee of the Judicial Conference had been appointed to consider two motions forwarded by the director of the Federal Judicial Center regarding: (1) the respective mission and authority of the Federal Judicial Center vis a vis the Administrative Office in education and training, and (2) the creation of a special mechanism to resolve disputes between the two organizations. She advised that she had asked Chief Judge Sear to appear before the ad hoc committee as the representative of the rules committees to address the potential impact of these proposals on the work of the rules committees. She added that Chief Judge Sear had spent considerable time studying the history of these matters and had served on the Judicial Conference, its Executive Committee, and several other Conference committees.

APPROVAL OF THE MINUTES OF THE LAST MEETING

The committee voted without objection to approve the minutes of the last meeting, held on June 19-20, 1997.

REPORT OF THE ADMINISTRATIVE OFFICE

Legislative Report

Mr. Rabiej reported that 18 bills had been introduced in the Congress that would impact, directly or indirectly, on the federal rules and the rules process. A status report of each bill had been included in Agenda Item 3A.

He pointed out that the Civil Justice Reform Act of 1990 had expired generally on December 1, 1997. The Congress, however, had recently amended the Act's sunset provision to make 28 U.S.C. § 476 a part of permanent law, thereby requiring continued public reporting of individual judges' pending motions, trials, and cases. The Congress also had continued 28 U.S.C. § 471 into permanent law, requiring each district court to implement a civil justice expense and delay reduction plan. Judge Hupp reported that the Court Administration and Case Management Committee had on its pending agenda a proposal to seek legislation repealing 28 U.S.C. § 471.

Professor Coquillette advised that it had been anticipated that local Civil Justice Reform Act plans would all sunset in 1997. Thereafter, local procedural provisions would have to be promulgated formally as local rules through the process specified in the Rules Enabling Act. He suggested that the continuation of 28 U.S.C. § 471 by the Congress could create mischief because it might be argued that courts could continue to operate under local plans that are inconsistent with the national procedural rules.

Mr. Rabiej stated that comprehensive crime control legislation had been introduced in the Congress that would impact on both the criminal rules and the evidence rules. He added that the Advisory Committee on Criminal Rules and the Advisory Committee on Evidence Rules had considered the proposed legislation at their fall meetings. An analysis of the pertinent provisions in the legislation was contained in correspondence from Judge Stotler to Senator Hatch and set forth in Agenda Item 3A.

Mr. Rabiej reported that several bills had been introduced in the Congress to provide constitutional or statutory rights to victims of crimes. He noted that the bills, among other things, would give victims the right to notice of court proceedings and the right to address the court.

He pointed out that, at the request of the Department of Justice, civil forfeiture legislation had been introduced that would, among other things, alter the time limits set forth in the admiralty rules and conflict with proposed amendments to those rules recently approved by the Advisory Committee on Civil Rules. He noted that the Department of Justice was working with the advisory committee to ensure that the differences between the proposed legislation and the admiralty rules were eliminated.

Mr. Rabiej reported that recently introduced legislation would enact, with style revisions, the committee's proposed new FED. R. CRIM. P. 32.2, governing criminal forfeiture proceedings. He pointed out that the committee had published the rule for public comment in August 1997, and Judge Stotler had written to the chairman of the House Judiciary Subcommittee on Crime requesting that he defer action on the bill until the rulemaking process has been completed and the bench, bar, and public have an opportunity to review and comment on the rule.

Finally, Mr. Rabiej reported that Representative Howard Coble, chair of the House Judiciary Subcommittee on Courts and Intellectual Property, had written to Judge Niemeyer, chair of the Advisory Committee on Civil Rules, requesting that the committee delay consideration of any changes in the copyright rules in order to allow Congress to consider the need for changes in substantive law.

Administrative Actions

Mr. Rabiej reported that his office had assembled a docket of all actions of the Advisory Committee on Evidence Rules over the past four years, and it had updated the dockets for the other advisory committees. He stated that a letter was being circulated for approval requesting that courts send their local rules to the Administrative Office in electronic format for posting on the Internet. Finally, Mr. Rabiej stated that the Administrative Office had compiled and published the committee's working papers on attorney conduct and was proceeding to compile the working papers of the Advisory Committee on Civil Rules on its discovery project.

REPORT OF THE FEDERAL JUDICIAL CENTER

Ms. Leary presented an update on the Federal Judicial Center's recent publications, educational programs, and research projects. (Agenda Item 4) Among other things, she noted that substantial progress had been made in installing the judiciary's new satellite television facilities and that the Center was producing many new seminars and television programs, including programs on evidence and voir dire.

Mr. Willging stated that the Research Division of the Center had conducted a national survey of 2,000 lawyers in recently terminated civil cases (of whom 59% responded), examining the frequency and nature of problems in discovery, the impact of the 1993 amendments to the civil rules, and the need, if any, for additional rules changes. He said that the lawyers reported that comparatively little discovery activity occurred in the great majority of cases. Moreover, the cost of discovery was generally about 50% of the total litigation cost and about 3% of the financial stakes in the litigation.

The attorneys reported that they had experienced relatively few problems with discovery in general. Most of the problems they had in fact encountered appeared to have occurred in large, complicated cases, where both contentiousness and financial stakes were high.

Mr. Willging said the survey had disclosed that mandatory disclosure procedures were in wider use than previously thought. Even in districts opting out of FED. R. CIV. P. 26(a), a sizeable number of the judges imposed mandatory disclosure. The Center, he noted, had found

that a majority of the lawyers responding to the survey reported that they had not experienced any measurable effect from mandatory disclosure. But a majority of those reporting an effect stated that mandatory disclosure had been favorable in reducing cost and delay, in promoting settlement, and in increasing procedural fairness.

He reported that the Center had been unable to replicate the finding of the RAND Civil Justice Reform Act study that early discovery cutoffs are related to reducing cost and delay. The Center had not found any statistically significant or otherwise meaningful correlation between the length of the discovery cutoff period and litigation costs or the time to disposition of civil cases. He concluded that in the absence of further research, the empirical data did not support imposing national discovery cutoffs.

Mr. Willging further reported that the Center was in the process of analyzing experiences in districts that have imposed less restrictive disclosure requirements than FED. R. CIV. P. 26(a), *i. e.*, requiring disclosure only of information supporting a party's claim or defense. The Center is also analyzing local rules and general orders that impose specific limits on interrogatories and depositions.

One member of the committee suggested that there was a need for the civil rules to address the issues of discovery conducted by court-appointed experts. Mr. Willging noted that the Center was examining the use of court-appointed experts in the breast implant cases.

REPORT OF THE ADVISORY COMMITTEE ON APPELLATE RULES

Judge Garwood presented the report of the advisory committee, as set forth in his memorandum and attachments of November 14, 1997. (Agenda Item 5)

He reported that, after four years of work, the advisory committee had completed its restyling of all the appellate rules. The package of proposed amendments had been approved by the Judicial Conference in September 1997 and forwarded to the Supreme Court.

Judge Garwood said that the advisory committee had handled a large agenda at its September 1997 meeting, consisting of a general review of all matters still pending on its docket. The committee eliminated many items from the docket, identified several items that merited further study, and established priorities for future committee agendas.

He pointed out that the advisory committee had approved a change in FED. R. APP. P. 31, to require that briefs be served on all parties. But the committee decided as a matter of policy not to forward any further rules changes to the Standing Committee until the restyled appellate rules have been in effect for a while.

Judge Garwood reported that the advisory committee was considering the advisability of uniform national rules on the publication of court opinions that would address, among other things, such issues as the precedential effect, if any, of unpublished opinions. He noted that the subject matter is addressed in many local rules of the circuits, but those rules conflict with each other in several respects. He added that the Court Administration and Case Management Committee was also looking into the matter, and that he had conferred with Judge Brock Hornby, chair of that committee. They had agreed that it was appropriate for both committees to examine the subject, but the Advisory Committee on Appellate Rules might have a more immediate concern because it is covered in local circuit court rules.

REPORT OF THE ADVISORY COMMITTEE ON BANKRUPTCY RULES

Judge Duplantier presented the report of the advisory committee, as set forth in his memorandum and attachments of December 2, 1997. (Agenda Item 6)

Judge Duplantier reported that the advisory committee had no action items to present. He noted that a package of bankruptcy rules amendments was pending before the Supreme Court and, if approved, would take effect on December 1, 1998. Another set of 16 proposed amendments had been published for comment in August 1997 and would be considered at the advisory committee's March 1998 meeting.

He noted that the advisory committee had a major project underway to revise the litigation provisions of the Federal Rules of Bankruptcy Procedure. He explained that the project had emanated from a survey of bankruptcy judges and lawyers conducted by the Federal Judicial Center in 1996. The results of the survey showed that there was general satisfaction with the substance and organization of the bankruptcy rules, but significant dissatisfaction was expressed with the rules governing motion practice.

Judge Duplantier stated that the project of rethinking and reorganizing the litigation rules was very complex and controversial. It had taken up a great deal of the committee's time over the past two years.

Professor Resnick stated that the revisions that the advisory committee was considering would not affect adversary proceedings, which are akin to civil cases in the district courts and are governed largely by the Federal Rules of Civil Procedure. Rather, the proposed amendments would materially change the procedures for handling (1) routine administrative matters that are usually unopposed, and (2) "contested matters." He explained that the latter category of bankruptcy matters are usually initiated by motion, but are not like motions filed in the district courts. They may involve complex disputes that are unrelated to any other litigation in a bankruptcy case.

Professor Resnick reported that the advisory committee was in the process of considering the recommendations contained in the October 1997 report of the National Bankruptcy Review Commission. He noted that the report was more than 1,300 pages long and contained 172 recommendations. He pointed out that many of the Commission's recommendations called for substantive changes in the Bankruptcy Code, which — if enacted — would eventually require conforming changes to the rules. He noted, for example, that the report recommended giving Article III status to bankruptcy judges. If signed into law, this provision would likely eliminate the need in both the Code and the rules for maintaining distinctions between "core" and "non-core" proceedings.

Other Commission recommendations were directed expressly to the Advisory Committee on Bankruptcy Rules and called for specific changes in the Federal Rules of Bankruptcy Procedure and the Official Bankruptcy Forms.

Professor Resnick stated that he was in the process of drafting a report on the Commission's recommendations for the advisory committee's consideration at its March 1998 meeting. He added that it was unlikely that there would be a single, comprehensive bill introduced in the Congress to enact all the recommendations of the Commission. Rather, several bills are likely to be introduced by various members of Congress, incorporating some of the Commission recommendations and offering other proposals contrary to the Commission's recommendations.

He reported that the advisory committee has also been considering proposals to improve the effectiveness of notices to governmental units in bankruptcy cases. He pointed out that, under current practice, governmental offices experience difficulties in having bankruptcy notices routed to them in time to take appropriate action in a case. He added that the advisory committee had been dealing with this problem for some time and that, at the committee's invitation the chairman of the bankruptcy commission had attended committee meetings and presented their views and proposed solutions.

REPORT OF THE ADVISORY COMMITTEE ON CIVIL RULES

Judge Niemeyer presented the report of the advisory committee, as set forth in his memorandum and attachments of December 8, 1997. (Agenda Item 7)

Amendments to the Admiralty Rules

Judge Niemeyer reported that the advisory committee was seeking the Standing Committee's approval to publish proposed amendments to the Supplemental Rules for Certain Admiralty and Maritime Claims and a conforming amendment to FED. R. CIV. P. 14. He

explained that the changes had been prompted in large part by the increasing use of admiralty in rem procedures in civil forfeiture proceedings.

Judge Niemeyer explained that the proposed amendments had been prepared over a long period of time with the assistance of a special subcommittee, chaired by advisory committee member Mark Kasanin. He said that the subcommittee had worked from proposals drafted by the Maritime Law Association and the Department of Justice, and it had analyzed and monitored proposed civil forfeiture legislation pending in Congress. He added that the chair of the Maritime Law Association's rules committee and a representative of the Department of Justice had participated in the advisory committee's October 1997 meeting.

Professor Cooper explained that there had been increased use of the admiralty in rem procedures for drug-related civil forfeiture proceedings. The advisory committee determined, however, that there was a need to make certain distinctions in the rules between pure admiralty proceedings and forfeiture proceedings. To that end, the proposed amendments would provide a longer time to respond in forfeiture proceedings than in admiralty proceedings. It would also provide an automatic right to participate to a broader range of persons who assert rights against the property in forfeiture proceedings than in admiralty proceedings.

He also pointed out that FED. R. CIV. P. 4 had been amended in 1993, but conforming changes had not been made in the admiralty rules. He said that it was time to correct that omission.

He noted that the advisory committee had decided that it should, as far as possible, make stylistic improvements in the admiralty rules, using the style conventions incorporated in the recent omnibus revision of the appellate rules. Nevertheless, the committee believed that it was necessary to preserve certain traditional admiralty terminology.

He added that the style subcommittee had suggested changes in the language of the amendments following the October 1997 advisory committee meeting, most of which had been included in the draft set forth in Agenda Item 7. He noted that Mr. Spaniol had also suggested a number of thoughtful stylistic changes, but the advisory committee had not had time to consider them fully and recommended that they be included with the public comment materials.

ADMIRALTY RULE B

Professor Cooper reported that the advisory committee was proposing three changes to Rule B, which deals with maritime attachment and garnishment in in personam actions.

First, new Rule B(1)(d)(ii) would allow service to be made by persons other than the United States marshal when the property to be arrested is not a vessel or tangible property on

board a vessel. This change would adopt the service provisions of Rule C(3) providing service alternatives in an in rem proceeding. Where the property is a vessel, however, service under item (d)(i) may only be made by the marshal.

Second, the revised rule would eliminate the current rule's reference to FED. R. CIV. P. 4 and state quasi in rem jurisdiction remedies. Instead, revised Rule B(1)(e) refers expressly to FED. R. CIV. P. 64, ensuring that Rule B is not inconsistent with Rule 64 in a way that would prevent an admiralty plaintiff from invoking state-law remedies.

Third, the revised rule conforms the notice provisions of subdivision (2) to revised FED. R. CIV. P. 4, without designating any of its subdivisions.

Some members stated that there was an ambiguity in Rule B, which limits the use of maritime attachment and garnishment to cases in which the defendant is not found in the district. They explained that a defendant occasionally will appoint an agent for service of process after the action is commenced, hoping by this means to defeat attachment or garnishment. Rule B can be read to provide that the defendant is "found" in the district only at the moment the action is commenced, but this reading is not entirely clear. Dissatisfaction also was expressed by some members with ex parte proceedings, noting that plaintiffs "always appear at 4:45 on Friday afternoon." It was suggested that the advisory committee might explore these matters and consider future rules amendments to deal with them.

ADMIRALTY RULE C

Professor Cooper said that the proposed advisory committee note to revised Rule C provided statutory references and an introduction and background to the rule. He pointed out that a growing number of statutes invoke admiralty in rem proceedings for forfeiture proceedings. But Rule C, governing in rem actions, had not been adjusted to reflect that reality. Accordingly, most of the proposed amendments to Rule C were designed to distinguish between pure admiralty proceedings and forfeiture proceedings.

He noted that a number of forfeiture statutes permit a forfeiture proceeding against property that is not located in the district. The proposed new item C(2)(d)(ii) would reflect those statutory provisions. Paragraph C(3)(b)(i) would be amended to specify that the marshal must serve any supplemental process addressed to a vessel or tangible property on board a vessel, as well as the original warrant.

He said that Rule C(4) provided for notice and contained two changes. The first would require that public notice state both the time for filing an answer and the time for filing a statement of interest or claim. The second would allow termination of publication if the property is released more than 10 days after execution but before publication is completed.

Professor Cooper stated that the most important changes in Rule C were set forth in subdivision (6). The advisory committee had created separate paragraphs on responsive pleading to distinguish civil forfeiture actions from maritime in rem proceedings. He pointed out that, in admiralty actions, a response must be filed within 10 days of execution of process or completed publication of notice. He said that the need for speed is not as great in forfeiture proceedings, and the advisory committee proposal would allow 20 days to respond. He added that legislation pending in the Congress would amend Rule C to provide for a uniformly longer period of 20 days in both admiralty proceedings and forfeiture proceedings.

A second distinction related to who may participate in the proceeding. In a forfeiture action, the rule would allow anyone who asserts an interest in, or right against, the property to file a response. The admiralty provision reflects the long-standing rule that only those who assert a right of possession or an ownership interest in the property may respond.

He pointed out that paragraph C(6)(c) authorized interrogatories to be served with the complaint in an in rem action without leave of court. This provision departed from the general provision of FED. R. CIV. P. 26(d) requiring that discovery be deferred until after the parties have met and conferred. He explained that the special needs of expedition that often arise in admiralty justify continuing the practice of allowing interrogatories to be filed with the complaint in an in rem proceeding.

ADMIRALTY RULE E

Professor Cooper stated that Rule E, governing in rem and quasi in rem proceedings, would be amended to reflect statutory provisions that permit service of process outside the district in certain forfeiture proceedings. But service in an admiralty or maritime proceeding still must be made within the district. Professor Cooper added that he had conferred with representatives of the Department of Justice, who informed him that they were unaware of any quasi in rem forfeitures. Accordingly, he recommended that the words "or quasi in rem" be deleted from Rule E(3)(b).

He said that the proposed amendment to subdivision (7)(a) would make it clear that a plaintiff must give security to meet a counterclaim only when the counterclaim is asserted by a person who has given security in the original action.

Subdivision (8) would reflect the proposed change in Rule B(1)(e) that would delete the provision in the current rule authorizing a restricted appearance when state quasi in rem jurisdiction provisions are invoked.

Subdivision (9)(b)(ii) would be amended to reflect the changes in terminology made in amended Rule C(6), substituting "statement of interest or right" for "claim." Judge Niemeyer explained that the advisory committee had retained the word "claim" in the amended admiralty

rules only where it was consistent with the meaning of that term as used in FED. R. CIV. P. 9. In all other cases, it had been eliminated because it had created confusion. Professor Cooper added that the word "claim" had different meanings in the current admiralty rules.

Professor Cooper said that subdivision (10) was new. It would make clear that the court has authority to preserve and prevent removal of attached or arrested property remaining in the possession of the owner or another person.

FED. R. CIV. P. 14

Professor Cooper explained that the proposed change in terminology in Rule C(6), eliminating the terms "claim" and "claimant" required parallel changes in FED. R. CIV. P. 14(a) and (c).

Judge Niemeyer explained that in revising the admiralty rules the advisory committee had not attempted to change admiralty law or address all current procedural problems. It just intended to preserve the admiralty process, fill in some of the gaps in the process, and improve the organization and language of the rules.

Judge Niemeyer stated that the representatives from the Maritime Law Association and the Department of Justice who had worked on the proposal had recommended that the period of public comment on the proposed admiralty amendments be reduced from the normal six months to three months. An abbreviated comment period could expedite the effective date of the amendments by one year. He stated, however, that the advisory committee had decided that there was not a sufficient emergency to justify reducing the period for public comment on the proposals.

Professor Cooper stated that the advisory committee had approved a draft revision of Rule E(3)(a) and was presenting it to the Standing Committee together with alternative language rejected by the advisory committee but preferred by Messrs. Garner and Spaniol. He asked whether the amendments published for public comment should include both the advisory committee's approved language and the alternative language. **The committee decided to publish only the version approved by the advisory committee.**

The committee voted without objection to approve the proposed amendments to the admiralty rules for publication.

Informational Items

Judge Niemeyer stated that the advisory committee in August 1996 had published several proposed changes to FED. R. CIV. P. 23, dealing with class actions. But after considering the public comments and conducting public hearings, the advisory committee voted to forward only two of the proposed changes to the Standing Committee.

At its June 1997 meeting, the Standing Committee approved one proposed amendment to Rule 23 — to authorize interlocutory appeals of class action certification determinations. That change was later approved by the Judicial Conference and forwarded to the Supreme Court. It is scheduled to take effect on December 1, 1998, if approved by the Court and not altered by Congress.

Judge Niemeyer said that the advisory committee had deferred consideration of the other proposed changes to Rule 23, largely because a consensus could not be reached on them. The committee had decided, for example, that further case law development was necessary on such issues as settlement classes and maturity of litigation.

The committee, moreover, concluded that many of the solutions to the problems of mass torts lay beyond its own jurisdiction and might require legislation. Therefore, it had recommended that a task force be formed across Judicial Conference committee lines to address broadly the problems of mass torts.

Judge Niemeyer reported that the Chief Justice had approved a modified version of the advisory committee's proposal, authorizing an informal working group, under the leadership of the Advisory Committee on Civil Rules, to study the problems of mass torts litigation over a 12-month period and make recommendations for further action. He said that Judge Anthony Scirica would serve as chair of the working group and that Professor Francis McGovern would serve as special consultant to the group.

Judge Niemeyer reported that the advisory committee had sponsored a symposium on discovery at Boston College Law School in September 1997. The program focused on the costs of discovery and whether the benefits of discovery to the dispute resolution process are worth those costs. He reported that the symposium had been a great success. Members of the Standing Committee had attended, together with corporate counsel, experienced plaintiff lawyers and defendant lawyers, representatives of national bar organizations, leading academics, and other judges. He added that several consensus themes emerged from the symposium, including the following:

1. The discovery process works well in most civil cases.
2. There are, however, serious problems in a small percentage of civil cases.
3. Full disclosure is a policy inherent in federal practice and should be retained.
4. Too much discovery is generated in certain cases.

5. Uniformity of practice among federal districts is a desirable goal.
6. Attorney costs related to discovery account for about 50% of litigation costs in civil cases.
7. In large cases, plaintiffs complain about the number and costs of depositions. In fact, depositions are the largest single cost item for plaintiffs.
8. Defendants, on the other hand, complain most about the amount and cost of document discovery. They point particularly to heavy costs incurred in reviewing documents and compiling logs in order to avoid waiving privileges.
9. Ready access to a judge in order to resolve discovery disputes is number one on the lawyers' wish list.
10. Both plaintiffs and defendants favor fixed trial dates and discovery cutoff periods.
11. Mandatory disclosure draws mixed opinions among the bar. Some attorneys like it, and others do not. The empirical data from the early academic studies, moreover, are also inconclusive.

Judge Niemeyer stated that the advisory committee planned to offer amendments to the discovery rules in light of the "sunsetting" of the Civil Justice Reform Act. He added that the committee was striving for greater national uniformity, particularly in such areas as disclosure. He pointed out that the advisory committee was examining a range of other discovery issues, including the appropriate scope of discovery.

He stated that the advisory committee would consider, at its March 1998 meeting, a package of proposed amendments addressing both the concerns identified at the symposium and the discovery-related recommendations contained in the Judicial Conference's 1997 report to Congress on the Civil Justice Reform Act. The advisory committee then plans to present a package of recommendations for publication at the Standing Committee's June 1998 meeting. He added that it was very important for the committees to achieve broad consensus on a package that is widely acceptable to both bench and bar.

REPORT OF THE ADVISORY COMMITTEE ON CRIMINAL RULES

Judge Davis presented the report of the advisory committee, as set forth in his memorandum and attachments of December 1, 1997. (Agenda Item 9)

Reduction in the Size of Grand Juries

Judge Davis reported that the advisory committee had been asked to study a pending legislative proposal (H.R. 1536) that would reduce the size of grand juries to not less than nine jurors nor more than 13, with seven jurors required to return an indictment. Currently, under FED. R. CRIM. P. 6(a) — which tracks 18 U.S.C. § 3321 — the size of a grand jury is 16 to 23

persons, with a requirement that 16 be present. Under Rule 6(f), 12 jurors must concur in order to return an indictment.

He stated that the advisory committee had voted unanimously to oppose any reduction in the size of the grand jury. He noted that several members of the committee believed that most people serving on grand juries have a positive feeling about the experience and that it was sound policy to have more, rather than fewer, persons involved in the grand jury process. Other members had stated that a reduction in the size of the grand jury would increase the likelihood of runaway indictments. He reported also that the state chief justice who serves on the advisory committee had pointed out that his state had reduced the size of grand juries, and that the experience had not been successful. Finally, he mentioned that the Department of Justice was opposed to legislating a reduction in the size of the grand jury.

Judge Davis reported that the advisory committee was recommending that the Judicial Conference go on record as opposing any attempts to reduce the size of grand juries. Judge Stotler asked whether the proposed Judicial Conference action should state a general policy or merely be directed to commenting on the specific provisions contained in H.R. 1536. In response, Judge Davis amended the advisory committee's recommendation to limit its reach to address only the specific pending legislation.

The committee voted unanimously to approve the recommendation of the advisory committee to have the Judicial Conference oppose H.R. 1536, which would reduce the size of the grand jury.

Informational Items

Judge Davis reported that the advisory committee had received many comments on the proposed amendment to FED. R. CRIM. P. 6, which would authorize any interpreter necessary to assist a jury to be present at a grand jury proceeding.

He pointed out that the advisory committee had proposed amending 18 U.S.C. § 3060 to remove its prohibition on a magistrate judge granting a continuance of a preliminary examination without the consent of the defendant. The Standing Committee, however, decided at its June 1997 meeting not to seek a statutory amendment. It referred the matter back to the advisory committee to consider making the change through an amendment to FED. R. CRIM. P. 5(c), which tracks the language of 18 U.S.C. § 3060. The advisory committee considered the matter afresh at its October 1997 meeting and decided that the problem sought to be addressed through the amendment was just not serious enough to warrant seeking an amendment to FED. R. CRIM. P. 5(c).

Judge Davis stated that the advisory committee had canceled the public hearings scheduled for December 12, 1997. Instead, it had invited the witnesses to appear at a hearing to be held contiguous to the committee's April 1998 meeting.

Judge Davis also reported that he had appointed a subcommittee to continue monitoring victims' rights legislation.

REPORT OF THE ADVISORY COMMITTEE ON EVIDENCE RULES

Judge Smith presented the report of the advisory committee, as set forth in her memorandum and attachments of December 3, 1997. (Agenda Item 10)

Action Items

Judge Smith reported that the advisory committee was seeking approval to publish three proposed amendments for public comment. She explained that the amendments were being brought to the Standing Committee at its January 1998 meeting in order to lessen the heavy agenda for the committee's June 1998 meeting. She added that the advisory committee did not intend to accelerate or otherwise change the regular schedule for public comment.

FED. R. EVID. 103

Judge Smith pointed out that the proposed amendment to Rule 103 — designed to clarify when an attorney must renew a pretrial objection to, or proffer of, evidence — had a long history. The advisory committee had published an amendment in September 1995, but withdrew it after publication because public comments demonstrated little consensus.

She noted that the advisory committee had redrafted the amendment at its April 1997 meeting and sought approval from the Standing Committee in June 1997 to publish it. The Standing Committee, however, questioned aspects of the proposal and referred it back to the advisory committee for further study. The advisory committee then took a fresh look at the rule at its October 1997 meeting and prepared a new draft amendment to meet the concerns voiced by the Standing Committee.

Judge Smith stated that the advisory committee had restructured the proposal from the earlier versions, now setting forth the changes as a new paragraph within subdivision (a). She explained that the proposed amendment would codify the principles of *Luce v. United States,* 469 U.S. 38 (1984) — concerning the preservation of a claim of error when admission of evidence is dependent on an event occurring at trial — and would make them applicable in both civil and criminal cases. She added that the advisory committee had tried to make clear that the rule applied to all rulings on evidence, whether made at or before trial, including in limine rulings. Finally, she pointed out that the proposed amendment appeared to be stylistically inconsistent with a convention established by the style subcommittee in that it contained an unnumbered paragraph in subdivision (a). She welcomed the input of the style subcommittee on this matter.

One of the members suggested that the advisory committee might consider dropping the word "definitive" from the first line of the amendments and eliminating the second sentence.

The committee voted without objection to approve for publication the proposed amendment to the rule.

FED. R. EVID. 404

Judge Smith said that the proposed amendment to Rule 404(a) had not been initiated by the Advisory Committee on Evidence Rules. Rather, the committee was responding to legislation pending in the Congress that would amend Rule 404(a) to provide that evidence of a criminal defendant's pertinent character trait is admissible if the defendant attacks the character of the victim. She pointed out that the majority of the advisory committee agreed generally with what the sponsors of the legislation were trying to achieve, but believed that the language of the legislation was too broad and would cause technical problems. The Congressional language, she suggested, appeared to allow the prosecution to introduce evidence of any character trait of the accused. Accordingly, the committee decided to draft its own version of Rule 404(a), providing that if a defendant attacks a character trait of the victim of the crime, the prosecution could offer evidence of the same character trait of the accused.

Judge Smith said that the advisory committee also wished to move an amendment to line 11 of its proposal by adding the words "offered by an accused and" before the word "admitted."

She also pointed out that the advisory committee had used the word "accused" rather than the word "defendant" because it was consistent with usage in the Federal Rules of Criminal Procedure.

Some of the members of the Standing Committee expressed disapproval of the proposal on the merits because it would lessen the rights of the accused in certain types of criminal cases. Judge Smith responded that the decision of the advisory committee to proceed with the amendment was not unanimous, and that the committee would not have proposed the change except for the pending legislation. She explained that the majority of the advisory committee were of the view that the proposal represented a fair trade-off, believing that if the defense introduces character trait evidence, the prosecution should be allowed to do so also.

Professor Capra pointed out that there was precedent for the advisory committee's approach, noting that the Judicial Conference had offered alternate language on FED. R. EVID. 413 to 415 when the Congress was considering enacting these rules by legislation.

The committee approved the proposed amendment for publication by an 8 to 3 vote.

FED. R. EVID. 803 and 902

Judge Smith reported that the proposed amendments to Rules 803(6) and 902 were designed to provide for uniform treatment of business records and to rectify an inconsistency in the present rules dealing with foreign records. She explained that admissibility of foreign business records can be established — without a foundation witness — by certifications in criminal cases, but not in civil cases. She said that the advisory committee believed that foreign records should not be deemed more trustworthy than domestic records in any cases. The amendments were based on the procedures governing the certification of foreign business records in criminal cases under 18 U.S.C. § 3055 and would establish a similar procedure for domestic and foreign records offered in civil cases.

She added that the language of the amendments differed in certain respects and it mixed the terms "certification" and "declaration." The advisory committee had done so to incorporate language from existing statutes. She said that if that approach would cause problems in distinguishing between the two, the language could be made consistent throughout to require certification by a signed declaration. She added that there was a typographical error in the agenda item, as the word "record" on lines 42 and 44 of the proposal should read "declaration."

The committee voted without objection to approve the amendments for publication.

Informational Items

Professor Capra explained that he had reviewed the original advisory committee notes to the Federal Rules of Evidence and produced the document set forth at Agenda Item 10B, identifying inaccuracies and inconsistencies created because several of the rules adopted by Congress in 1975 differ materially from the version approved by the advisory committee. He pointed out that the inconsistencies between the text of the rules, as enacted by legislation, and the accompanying advisory notes created a trap for the unwary. He added that the Federal Judicial Center had agreed to publish his memorandum.

Judge Smith reported that she had appointed a subcommittee to review Article VII of the evidence rules, dealing with opinions and expert testimony. She noted that there was legislation pending in the Congress that attempted — inadequately — to amend FED. R. EVID. 702 and codify *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993). She pointed out that the advisory committee had decided in 1995 to delay considering any amendments to the evidence rules regarding expert testimony until the courts had been given enough time to digest and interpret the *Daubert* opinion. She reported, though, that the advisory committee at its October 1997 meeting had decided that there was now enough case law, and conflicts among the circuits, to justify consideration of amendments to Rule 702 to

clarify the standards of reliability applicable to expert testimony. The subcommittee will prepare a report for consideration by the advisory committee at its April 1998 meeting.

Judge Smith said that the advisory committee would also consider whether any amendments were necessary to accommodate technological innovations in the presentation of evidence. Among other things, it would review Rule 1001 to determine whether the terms "writings" and "recordings" should be redefined and whether they should apply to the entire body of the evidence rules.

Judge Stotler suggested that the Advisory Committee on Civil Rules should examine FED. R. CIV. P. 44, regarding proof of official records, to see whether it dovetails properly with provisions in the evidence rules. She also suggested that the advisory committee might wish to consider the advisability of a cross-reference to FED. R. EVID. 1001, regarding written records. She added that the Standing Committee had discussed in the past the issue of creating standard definitions that would apply throughout all the federal rules.

ATTORNEY CONDUCT

Professor Coquillette reported that a wealth of background materials had been specially prepared to assist the committee in determining whether national rules should be promulgated to govern attorney conduct in the federal courts. He pointed out that the materials included Agenda Item 8, seven background studies conducted by his office and the Federal Judicial Center, and the proceedings of two conferences of attorney conduct experts.

Professor Coquillette noted that the committee at its June 1997 meeting had requested him to draft a proposed set of uniform attorney conduct rules for discussion purposes. Therefore, he had prepared the 10 draft rules set forth in Agenda Item 8. He suggested that the members not debate the substance of the draft rules, but focus on the general approach and outline of the document. He recommended that if the committee were generally comfortable with the draft, it should be forwarded to each of the advisory committees for study and comment.

Professor Coquillette explained that proposed Rule 1 was a "dynamic conformity" rule, specifying that a district court must apply the standards of attorney conduct currently adopted by the highest court of the state in which the court sits. He pointed out that the proposed rule had the advantages of avoiding any conflicts with the states and obviating the need for a federal bureaucracy. He suggested that the first option that the committee might consider would be to adopt only Rule 1, thereby creating no uniform federal attorney conduct standards and leaving all issues of attorney conduct to the states.

A second option, he suggested, would be for the committee to do nothing regarding attorney conduct, thereby leaving the matter to local court rules. He recommended against that

course of action, however, because the participants in the committee's recent attorney conduct conferences had agreed overwhelmingly that the status quo was unacceptable. Although they had differed in their proposed solutions, there was a strong consensus that something had to be done to address attorney conduct in the federal courts in a more uniform manner.

Professor Coquillette stated that a third option would be to adopt proposed Rule 1 plus some, or all, of the other nine rules. He explained that he had selected the 10 rules very narrowly to address only those conduct issues that raise a substantial federal interest and have resulted in actual problems in the federal courts. All other matters would be deferred to the states.

He explained, for example, that proposed Rule 10 dealt with communication with persons who are represented by counsel, which is the subject of Rule 4.2 of the American Bar Association's Model Rules of Professional Conduct. He emphasized that the matter was very controversial and had been the subject of lengthy negotiations between the Conference of Chief Justices and the Department of Justice. He recommended that the language eventually agreed upon by the Conference and the Department be incorporated as the national rule applicable in the federal courts.

Professor Coquillette noted that most attorney conduct issues addressed by the proposed rules arise in the district courts. Therefore, he recommended that the rules committees' efforts be directed principally to considering conduct rules for the district courts.

He noted that fewer attorney conduct problems arose in the courts of appeals. He pointed out that FED. R. APP. P. 46 authorized a court of appeals to take any appropriate action against an attorney for "conduct unbecoming a member of the bar." He said that the language of the rule was unworkably vague, prompting most courts of appeals to adopt their own local rules governing attorney conduct.

Professor Coquillette reported that the local rules of the bankruptcy courts generally adopted the rules of the district courts, but that bankruptcy practice presented a number of additional, unique problems because the Bankruptcy Code prescribed certain specific conduct standards of its own. For that reason, he stated that the Advisory Committee on Bankruptcy Rules was generally of the view that separate rules should be tailored to govern attorney conduct in bankruptcy practice. Professor Resnick added that Professor Coquillette's draft rules had specifically exempted bankruptcy proceedings, whether conducted by a bankruptcy judge or a district judge. He stated that it would be necessary — because of specific provisions in the Bankruptcy Code and pertinent case law — to consider drafting specific provisions governing such issues as disinterestedness and confidentiality in bankruptcy proceedings.

Mr. Schreiber moved that the package of proposed attorney conduct rules be referred to each of the advisory committees for review and comment by June, if possible.

Ms. Mayer stated that the Department of Justice favored reducing balkanization of attorney conduct rules in the federal courts. She explained that the Department would not support the option of simply adopting only Rule 1 of the proposed draft rules because it would turn over federal interests to the states and effectively turn state laws into national laws. She added that the Department also had problems with the specific language of some of the other nine draft rules.

Ms. Mayer pointed out that the Department was concerned about how the proposed attorney conduct rules would be interpreted and enforced. She emphasized that there was a need to lodge authority in the federal courts to issue binding interpretations of the rules.

Chief Justice Veasey stated that serious federalism interests were at stake. He personally favored adoption of only Rule 1 as the best solution and would not support adoption of all 10 proposed attorney conduct rules. He added, though, that substantial additional information and debate were essential before the committees could make meaningful decisions on the appropriate course of action to pursue.

He explained that a special committee of the Conference of Chief Justices had just arrived at a negotiated solution with the Attorney General on the controversial issue of communication with represented parties for consideration by the Conference at its annual meeting. [The Conference postponed its consideration of the proposal until a later time so that the members could have more time to study it carefully.] He noted, too, that the American Bar Association had appointed an ethics commission to study needed revisions to the rules of professional responsibility. He added that the commission, which he chaired, would convene following the meeting of the Conference of Chief Justices. In sum, he said, attorney conduct issues were receiving considerable attention at the highest levels of the legal profession. In light of this imminent activity and the evolving nature of the debate, he recommended that Professor Coquillette's draft federal rules be tabled.

Ms. Mayer suggested that the committee consider appointing an ad hoc subcommittee to review the proposed attorney conduct rules. Other members added that the rules could be referred to a special committee comprised of members from each of the advisory committees.

Several members countered that a better course of action would be to refer Professor Coquillette's draft and the supporting documentation to each of the advisory committees for study, with the expectation that there would be extensive coordination among the advisory committees, their reporters, and the Standing Committee.

One member stated that it would be impossible for the advisory committees to make any meaningful contributions in time for consideration at the Standing Committee's June 1998 meeting because the issues addressed in the proposed rules were simply too complex and controversial. He emphasized that it was essential for the committees to give appropriate deference to the rights of the states to oversee the conduct of the attorneys they license.

Accordingly, the committees needed to consider whether paramount federal interests were at stake that warranted superseding state rules in certain matters.

Judge Stotler stated that she did not favor directing the advisory committees to accomplish a specific task by a specific date. Rather, she emphasized the need for the advisory committees to make recommendations on the best ways to deal with the attorney conduct issues.

The committee agreed to have each advisory committee consider the proposed draft rules and supporting materials presented by Professor Coquillette and present status reports to the Standing Committee at its June 1998 meeting.

LOCAL RULES OF COURT

Uniform Renumbering of Local Rules

Professor Squiers reported that in March 1996 the Judicial Conference had required the courts to renumber their local rules in accordance with the national rules. As of June 1997, 41% of the district courts had renumbered their rules, and by December 1997, 58% had completed the renumbering. She said that she had contacted the remaining district courts by telephone to determine whether they were making progress in renumbering and had received largely positive responses.

Several members stated that the renumbering requirement had been very helpful in motivating the courts to review their local rules, improve them, and eliminate inconsistencies. They also said that the project had fostered the goal of greater national uniformity and would prove to be of substantial benefit to the bar.

Impact on Local Rules of the Expiration of the Civil Justice Reform Act

Professor Squiers reported that with the recent sunsetting of the Civil Justice Reform Act, she had examined the local CJRA plans of all the district courts. She found that 31% of the district plans referred to the court's local rules and specified the court's interest in eventually integrating the content of the plans into the court's local rules. The other plans were silent on the matter. Accordingly, she telephoned 12 district courts randomly and inquired whether they anticipated incorporating the content of their CJRA plans into their local rules or intended to use their CJRA plans in another fashion. She reported that seven of the 12 courts had already taken action to modify their local rules as of December 1997. Three of the courts said that they anticipated doing so at some point, and the remaining two districts reported that they contemplated taking no action.

Other Proposed Changes in Local Rule Requirements

A number of members added that it would also be beneficial to require courts to send their local rules to the Administrative Office for posting on the Internet. One participant suggested that consideration be given to amending the Rules Enabling Act to require that all local rules take effect on or shortly after December 1 of each year, in coordination with the effective date of amendments to the national rules. Judge Garwood responded that the Advisory Committee on Appellate Rules had placed that suggestion on its agenda. Another participant said that consideration might be given to amending the national rules to provide that local rules may not take effect until they are filed electronically with the Administrative Office.

Judge Stotler agreed to refer to each of the advisory committees the various suggestions raised at the meeting regarding the effective date and the effectiveness of local court rules.

Judge Stotler requested that Professor Squiers and the Local Rules Project study the impact on local court rules of the 1995 amendments to FED. R. CRIM. P. 57, FED. R. BANKR. P. 8018 and 9029, and FED. R. APP. P. 47. She also asked the project to consider the merits and impact of a requirement that all local rules be posted in electronic format.

Limitations on the Number of Local Rules

Judge Wilson stated that there were too many local rules of court and too many local procedural variations. Therefore, he recommended that the rules committees take appropriate action to promote greater uniformity in federal practice and place limits on local rulemaking authority. **To that end, he moved to request that the Advisory Committee on Civil Rules study amending FED. R. CIV. P. 83 by striking the words "imposing a requirement of form" from subdivision (2) and adding a new subdivision (3) that would prohibit a court from adopting more than 20 local rules, including discrete subparts.**

The committee thereupon engaged in an extensive discussion regarding the number, scope, and merit of local rules. Some members stated that a number of courts were strongly attached to their own practices and would resist efforts to limit local rulemaking authority. They noted that the district courts had taken a wide variety of approaches to local rules. Some courts have very few local rules, while others have promulgated lengthy and detailed sets of rules.

Several members stated that there had been a long-standing consensus among the members of both the Standing Committee and the advisory committees that (1) there were too many local rules, and (2) local rules should fill the gaps in the national rules, rather than legitimize local variations in federal practice. Several pointed out that the rules committees had debated these issues extensively in the past and had concluded that it would not be feasible to eliminate local variations simply by limiting local rules. Local procedural variations would

likely continue in effect through the use of standing orders, individual case orders, and other, less formal mechanisms.

A number of members pointed out that the 1995 amendments to FED. R. CIV. P. 83 — together with companion amendments to FED. R. CRIM. P. 57, FED. R. BANKR. P. 8018 and 9029, and FED. R. APP. P. 47 — had been designed expressly to foster national uniformity by requiring that:

1. all local rules be consistent with the national rules and federal statutes;
2. all local rules conform to a national numbering system;
3. no local rule imposing a requirement of form be enforced in a manner that causes a party to lose rights because of a nonwillful failure to comply with the requirement; and
4. no sanction or other disadvantage be imposed for noncompliance with any requirement not published in federal law, federal rules, or local rules, unless the alleged violator has been furnished with actual notice of the requirement in a particular case.

One member emphasized that the judicial councils of the circuits have — and should exercise — the authority to abrogate any local rules that are illegal or inconsistent with the national rules. He added that there was a need to collect and analyze more information on local rules. Professor Coquillette suggested that it would be very desirable for the Local Rules Project to conduct a new study of local rules, particularly in the wake of the sunset of the Civil Justice Reform Act.

Another member suggested that Judge Wilson amend his motion to have the Advisory Committee on Civil Rules study local rules issues broadly, rather than mandate that it consider a specific amendment to Rule 83. He added that the rules committees also needed to address local rule issues in both the district courts and the bankruptcy courts.

Judge Wilson agreed to amend his motion to require that the other advisory committees also study appropriate limitations on local rules. He added, however, that it was essential that the committees address the merits of imposing a national limit on the number of local rules that any court may promulgate.

Other members responded that it was premature to consider additional amendments to the rules governing local rules because the impact of the 1995 amendments had only begun to be felt. They warned, moreover, against changing the language of those amendments because they had been very carefully crafted and subjected to extensive committee discussion and public comment. They pointed out, for example, that the language of the proposed motion could create practical problems because it deleted the specific limitation in the current rules on locally imposed requirements of form.

Some participants suggested that it would be better to have a single, coordinated local rules initiative conducted under the direction of the Standing Committee, rather than have the five advisory committees each undertake their own efforts. One member added that the ultimate goal of the committees might be to prepare a set of proposed model local rules.

The committee voted 6-5 to defeat Judge Wilson's motion.

REPORT OF THE STYLE SUBCOMMITTEE

Judge Parker reported that the style subcommittee would proceed to prepare a restyled draft of the body of criminal rules for initial consideration by the advisory committee. He added that the style subcommittee was not considering an effort to restyle any other set of rules until the Supreme Court has acted on the restyled appellate rules.

In the interim, as amendments and new rules are proposed by any of the advisory committees, the style subcommittee would continue with the procedure that has been in place. That is, once the reporter drafts an amendment or new rule, it will be submitted to the Rules Committee Support Office of the Administrative Office. That office will then provide copies to all members of the style subcommittee. The subcommittee members will have 10 days to submit their comments to Mr. Garner, who will review them and contact the reporter of the appropriate advisory committee with the collective views of the style subcommittee. The reporter will then edit the suggestions provided by the style subcommittee and return a revised draft to the Administrative Office for transmission to the advisory committee members.

REPORT OF THE TECHNOLOGY SUBCOMMITTEE

Mr. Lafitte presented the report of the Technology Subcommittee, which was set forth in his report and attachments of December 5, 1997. (Agenda Item 11)

Rules Issues Raised by Technology

He reported that the subcommittee was in the process of gathering information on the interrelationship between technology and the rules. He said that Judge Stotler had asked each of the advisory committees to identify for the subcommittee any future rules amendments that they were considering to take account of advances in automation.

He noted that the advisory committees had responded by pointing to such topics as the filing of briefs on disk, electronic case filing generally, electronic service of notices and other documents, taking of testimony from remote locations, discovery of information contained in electronic format, publication and citation of opinions in electronic form, and including electronic materials in the various definitions contained in the rules.

Mr. Lafitte said that electronic case filing and the serving of notices by electronic means appeared to be the most significant matters to be addressed. He noted that several electronic case file prototypes had been established in the federal courts, and the Administrative Office was monitoring the information gathered in the pilot courts.

Mr. McCabe stated that the Administrative Office had been in regular contact with the pilot courts and had obtained and analyzed copies of their local rules. Judge Stotler added that the chart that the Office of Judges Programs had prepared on these rules was very helpful, and that the committee should also be provided with copies of the local rules governing the pilot programs.

Receiving Rules Comments on the Internet

Mr. Lafitte reported that his subcommittee was also examining whether to permit public comments on proposed rules amendments to be sent to the Administrative Office electronically. He had asked the Administrative Office to provide the subcommittee with the pros and cons of permitting the public to use the Internet to submit comments on the rules. The most significant benefit cited by the Administrative Office was that it would make it easier for the public to comment, thereby furthering the rules committees' policy of reaching out to the bar and encouraging more comments on proposed amendments. A disadvantage of electronic comments would be that many of them may be less thoughtful than written comments. Another disadvantage would be that any significant increase in the number of comments might place an intolerable burden on the reporters.

Mr. Lafitte said that the subcommittee expected to receive the views of the advisory committees on this proposal. It would then make recommendations to the Standing Committee at its June 1998 meeting. He added that the informal responses he had received to date had been very favorable toward receiving comments electronically.

ELECTRONIC CASE FILES DEMONSTRATION

Karen Molzen, law clerk to Chief Judge Conway of the United States District Court for the District of New Mexico, presented a demonstration of the electronic case file systems being piloted in the District of New Mexico and nine other federal district and bankruptcy courts. Mr. McCabe pointed out that electronic filing raises a number of important procedural issues that had not yet been addressed by the federal rules. He added that the pilot courts were filling in the gaps in the national rules, where necessary, by provisions in their local rules and by obtaining consent of the parties.

FORUM ON COMMITTEE PRACTICES AND PROCEDURES

Judge Stotler asked the members to reflect on the committee's December 1995 *Self-Study of Federal Judicial Rulemaking,* to comment on the way the committees were currently conducting their business, and to provide a retrospective look at changes occurring in the rules process during their service on the committees.

She pointed out that the volume of materials sent to the Standing Committee had increased substantially, and it was very important for every member to be made aware of all developments in the rules process. She said that it was incumbent upon the members to read the material promptly and identify any matters with which they disagree. She recommended that any member of the Standing Committee who has a concern with the substance or language of any amendment call the chair or reporter of the appropriate advisory committee in advance of the Standing Committee meeting to address or correct the proposal. In that way, the Standing Committee's meeting can be devoted to discussing the merits of proposals.

She also suggested that the committees should propose changes in the rules only when amendments are essential. They should also ensure that they are carefully considered and well drafted because they are scrutinized by the bench and bar, the Judicial Conference, the Supreme Court, and the Congress. She noted that lawyers and judges use the rules on an everyday basis and are generally comfortable with them. Many tend to react negatively to changes, particularly if they are viewed as nonessential. Accordingly, the rules committees should appraise the value of any proposed change against the anticipated opposition. In addition, the committees need to strike the correct balance between the need for national uniformity and legitimate local variations.

Following the custom of having retiring members provide a retrospective view of their service on the committee, Judge Easterbrook noted that when he started on the committee six years earlier, its procedures had been very different. An advisory committee would bring a proposed amendment to the committee's attention and be asked to provide little description. The committee's ensuing discussion would mix both substance and style, and a good deal of time would be spent in making language improvements.

He said that the Standing Committee's procedures had changed materially for the better, thanks in large part to the *Self-Study* and the leadership of the current chair. He added that the committee had also profited greatly from the work of its style consultant, Bryan Garner, and the style subcommittee. The Standing Committee, he said, had concluded that it was simply too difficult to draft language in large groups. Rather, style and expression problems are best resolved by having the members speaking directly to the advisory committee. The alternative was for the Standing Committee — as a reviewing body — to remand an amendment to an advisory committee, rather than attempt to rewrite it. On this point, Judge Stotler pointed out that the committee's *Self-Study* stated specifically that the advisory committees have the responsibility for drafting amendments and that the Standing Committee should normally remand rules, rather than redraft them.

One of the participants concurred that style matters used to take up much of the time of Standing Committee meetings, but now are normally handled in advance of the meetings. He thanked Judge Keeton for appointing a style subcommittee, which, he said, had produced standard style conventions and worked closely with the advisory committees. He emphasized that the advisory committees were uniformly producing substantially improved drafts. Several other members expressed their support for the style process and stressed the need for consistent usage in the rules.

Judge Easterbrook added that the agendas of the Standing Committee had improved, as a wider variety of matters had been included, and members are now given greater opportunities to raise policy issues. He also pointed out that the Standing Committee had coordinated the promulgation of a number of common provisions in the various sets of federal rules and had placed certain policy matters on the agendas of the advisory committees. It had also fostered better communications among the reporters and the advisory committees and should continue to play a coordinating role with the advisory committees.

Judge Stotler stated that the work of the Rules Committee Support Office had increased greatly, and others added that the staff had been instrumental in fostering enhanced relations with the state bars. Chief Justice Veasey said that he would like to see a strengthening of the process of providing state courts with timely information of proposed changes in the rules, particularly rules that the state courts are likely to adopt. He said that state courts commonly only consider the merits of a rule after it has been adopted in the federal courts. He mentioned that he intended to discuss this matter with the Conference of Chief Justices.

One of the participants said that there was a large gap between the time a proposed amendment is published for public comment and the time it is adopted as a rule, often with changes. He suggested that interim notice of actions taken by the Standing Committee and the Judicial Conference would be very helpful. Chief Justice Veasey suggested that notice of rules developments might be sent electronically to the states.

One of the reporters stated that the work of the advisory committee chairs and reporters had increased enormously. He expressed appreciation for the procedural improvements of the last few years, which had resulted in better communications, guidance, and coordination.

Several members stated that the rules process was excellent and needed to be protected. They said that despite recurring legislative attempts in every Congress to amend rules directly by statute, Congress in fact defers in most cases to the rules process.

Judge Stotler pointed out that one of the recommendations in the *Self-Study* was to ask the Chief Justice to consider making the chairs of the advisory committees voting members of the Standing Committee. She said that the Standing Committee had not made a recommendation on the matter and might wish to give the matter further thought.

SUPPORT SERVICES

The committee approved the following motion made by Judge Wilson:

> **We resolve to acknowledge the excellent support of the Administrative Office for the work of the rules committees—all six — and especially the devotion to duty shown by Peter McCabe, our Secretary, Chief John K. Rabiej, Attorney-Advisor Mark Shapiro, and the entire distinguished staff of the Rules Committee Support Office. Further, the Chair of the Committee is instructed to so report to the Director of the Administrative Office.**

Judge Stotler thanked Professor Coquillette and the reporters of the advisory committees for the enormous amount of quality work that they produce.

NEXT COMMITTEE MEETINGS

The committee voted to hold its next meeting, scheduled for Thursday and Friday, June 18 and 19, 1998, in Santa Fe, New Mexico.

The committee scheduled the following meeting for Thursday and Friday, January 7 and 8, 1999, with a location to be determined later.

Respectfully submitted,

Peter G. McCabe,
Secretary

Agenda Item IID

AGENDA DOCKETING

ADVISORY COMMITTEE ON CRIMINAL RULES

Proposal	Source, Date, and Doc #	Status
[CR 4] — Require arresting officer to notify pretrial services officer, U.S. Marshal, and U.S. Attorney of arrest	Local Rules Project	10/95 — Subc appointed 4/96 — Rejected by subc **COMPLETED**
[CR 5(a)] — Time limit for hearings involving unlawful flight to avoid prosecution arrests	DOJ 8/91; 8/92	10/92 — Subc appointed 4/93 — Considered 6/93 — Approved for publication 9/93 — Published for public comment 4/94 — Revised and forwarded to ST Cmte 6/94 — Approved by ST Cmte 9/94 — Approved by Jud Conf 12/95 — Effective **COMPLETED**
[CR 5(c)] — Misdemeanor defendant in custody is not entitled to preliminary examination. Cf CR58(b)(2)(G)	Magistrate Judge Robert B. Collings 3/94	10/94 — Deferred pending possible restylizing efforts **PENDING FURTHER ACTION**
[CR 5(c)] — Eliminate consent requirement for magistrate judge consideration	Judge Swearingen 10/28/96 (96-CR-E)	1/97 — Sent to reporter 4/97 — Recommends legislation to ST Cmte 6/97 — Recommitted by ST Cmte 10/97—Adv. Cmte declines to amend provision. **COMPLETED**
[CR 5.1] — Extend production of witness statements in CR26.2 to 5.1.	Michael R. Levine, Asst. Fed. Defender 3/95	10/95 — Considered 4/96 — Draft presented and approved 6/96 — Approved by ST Cmte 8/96— Published for public comment 4/97— Forwarded to ST Cmte 6/97 — Approved by ST Cmte 9/97—Approved by Jud Conf **PENDING FURTHER ACTION**
[CR 6] — Statistical reporting of indictments	David L. Cook AO 3/93	10/93 — Committee declined to act on the issue **COMPLETED**
[CR6(a)] — Reduce number of grand jurors	H.R. 1536 introduced by Cong Goodlatte	5/97 — Introduced by Congressman Goodlatte, referred to CACM with input from Rules Cmte 10/97—Adv Cmte unanimously voted to oppose any reduction in grand jury size. 1/98—ST Cmte voted to recommend that the Judicial Conference oppose the legislation. **PENDING FURTHER ACTION**

Proposal	Source, Date, and Doc #	Status
[CR 6(d)] — Interpreters allowed during grand jury	DOJ 1/22/97 (97-CR-B)	1/97 — Sent directly to chair 4/97 — Draft presented and approved for request to publish 6/97 — Approved by ST Cmte for publication 8/97— Published for public comment **PENDING FURTHER ACTION**
[CR 6(e)] — Intra-Department of Justice use of Grand Jury materials	DOJ	4/92 — Rejected motion to send to ST Cmte for public comment 10/94 — Discussed and no action taken **COMPLETED**
[CR 6(e)(3)(C)(iv)] — Disclosure of Grand Jury materials to State Officials	DOJ	4/96 — Cmte decided that current practice should be reaffirmed **COMPLETED**
[CR 6(e)(3)(C)(iv)] — Disclosure of Grand Jury materials to State attorney discipline agencies	Barry A. Miller, Esq. 12/93	10/94 — Considered, no action taken **COMPLETED**
[CR6 (f)] — Return by foreperson rather than entire grand jury	DOJ 1/22/97 (97-CR-A)	1/97 — Sent directly to chair 4/97— Draft presented and aprroved for publication 6/97 — Approved by ST Cmte for publication 8/97— Published for public comment **PENDING FURTHER ACTION**
[CR7(c)(2)] — Reflect proposed new Rule 32.2 governing criminal forfeitures		4/97— Draft presented and approved for publication 6/97 — Approved by ST Cmte for publication 8/97— Published for public comment **PENDING FURTHER ACTION**
[CR8(c)] — Apparent mistakes in Federal Rules Governing § 2255 and § 2254	Judge Peter C. Dorsey 7/9/97 (97-CR-F)	8/97 — Referred to reporter and chair 10/97—Referred to subcom for study **PENDING FURTHER ACTION**
[CR 10] — Arraignment of detainees through video teleconferencing	DOJ 4/92	4/92 — Deferred for further action 10/92 — Subc appointed 4/93 — Considered 6/93 — Approved for publication by ST Cmte 9/93 — Published for public comment 4/94 — Action deferred, pending outcome of FJC pilot programs 10/94 — Considered **PENDING FURTHER ACTION**
[CR 10] — Guilty plea at an arraignment	Judge B. Waugh Crigler 10/94	10/94 — Suggested and briefly considered **DEFERRED INDEFINITELY**
[CR 11] — Magistrate judges authorized to hear guilty pleas, and inform accused of possible deportation	James Craven, Esq. 1991	4/92 — Disapproved **COMPLETED**

Proposal	Source, Date, and Doc #	Status
[CR 11] — Advise defendant of impact of negotiated factual stipulation	David Adair & Toby Slawsky, AO 4/92	10/92 — Motion to amend withdrawn **COMPLETED**
[CR 11(c)] — Advise defendant of any appeal waiver provision which may be contained in plea agreement	Judge Maryanne Trump Barry 7/19/96 (96-CR-A)	10/96 — Considered, draft presented 4/97 — Draft presented and approved for request to publish 6/97 — Approved for publication by ST Cmte 8/97— Published for public comment **PENDING FURTHER ACTION**
[CR 11(d)] — Examine defendant's prior discussions with an government attorney	Judge Sidney Fitzwater 11/94	4/95 — Discussed and no motion to amend **COMPLETED**
[CR 11(e)] — Judge, other than the judge assigned to hear case, may take part in plea discussions	Judge Jensen 4/95	10/95 — Considered 4/96 —Tabled as moot, but continued study by subcommittee on other Rule 11 issues **DEFERRED INDEFINITELY**
[CR 11(e)(4) — Binding Plea Agreement (Hyde decision)	Judge George P. Kazen 2/96	4/96 — Considered 10/96 — Considered 4/97 — Deferred until Sup Ct decision **COMPLETED**
[CR 11(e)(1) (A)(B) and (C)] — Sentencing Guidelines effect on particular plea agreements	CR Rules Committee 4/96	4/96 — To be studied by reporter 10/96 — Draft presented and considered 4/97 — Draft presented and approved for request to publish 6/97 — Approved for publication by ST Cmte 8/97— Published for public comment **PENDING FURTHER ACTION**
[CR 11]—Pending legislation regarding victim allocution	Pending legislation 97-98	10/97—Adv Cmte expressed view that it was not opposed to addressing the legislation and decided to keep the subcommittee in place to monitor/respond to the legislation.
[CR 12] — Inconsistent with Constitution	Paul Sauers 8/95	10/95 — Considered and no action taken **COMPLETED**
[CR 12(b)] — Entrapment defense raised as pretrial motion	Judge Manuel L. Real 12/92 & Local Rules Project	4/93 — Denied 10/95 — Subcommittee appointed 4/96 — No action taken **COMPLETED**
[CR 12(i)] — Production of statements		7/91 — Approved by ST Cmte for publication 4/92 — Considered 6/92 — Approved by ST Cmte 9/92 — Approved by Jud Conf 4/93 — Approved by Sup Ct 12/93 — Effective **COMPLETED**

Proposal	Source, Date, and Doc #	Status
[CR12.2]—authority of trial judge to order mental examination.	Presented by Mr. Pauley on behalf of DOJ at 10/97 meeting.	10/97—Adv Cmte voted to consider draft amendment at next meeting. **PENDING FURTHER ACTION**
[CR 16] — Disclosure to defense of information relevant to sentencing	John Rabiej 8/93	10/93 — Cmte took no action **COMPLETED**
[CR 16] — Prado Report and allocation of discovery costs	'94 Report of Jud Conf	4/94 — Voted that no amendment be made to the CR rules **COMPLETED**
[CR 16] — Prosecution to inform defense of intent to introduce extrinsic act evidence	CR Rules Committee '94	10/94 — Discussed and declined **COMPLETED**
[CR 16(a)(1)] — Disclosure of experts		7/91 — Approved by for publication by St Cmte 4/92 — Considered 6/92 — Approved by ST Cmte 9/92 — Approved by Jud Conf 4/93 — Approved by Sup Ct 12/93 — Effective **COMPLETED**
[CR 16(a)(1)(A)] — Disclosure of statements made by organizational defendants	ABA	11/91 — Considered 4/92 — Considered 6/92 — Approved by ST Committee for publication, but deferred 12/92 — Published 4/93 — Discussed 6/93 — Approved by ST Cmte 9/93 — Approved by Jud Conf 4/94 — Approved by Sup Ct 12/94 — Effective **COMPLETED**
[CR 16(a)(1)(C)] — Government disclosure of materials implicating defendant	Prof. Charles W. Ehrhardt 6/92 & Judge O'Brien	10/92 — Rejected 4/93 — Considered 4/94 — Discussed and no motion to amend **COMPLETED**

Proposal	Source, Date, and Doc #	Status
[CR 16(a)(1)(E)] — Require defense to disclose information concerning defense expert testimony	Jo Ann Harris, Asst. Atty. Gen., CR Div., DOJ 2/94; clarification of the word "complies" Judge Propst (97-CR-C)	4/94 — Considered 6/94 — Approved for publication by ST Cmte 9/94 — Published for public comment 7/95 — Approved by ST Cmte 9/95 — Rejected by Jud Conf 1/96 — Discussed at ST meeting 4/96 — Reconsidered and voted to resubmit to ST Cmte 6/96 — Approved by ST Cmte 9/96 — Approved by Jud Conf 4/97 — Approved by Sup Ct 12/97 — Effective **COMPLETED** 3/97 — Referred to reporter and chair **PENDING FURTHER ACTION**
[CR 16(a) and (b)] — Disclosure of witness names and statements before trial	William R. Wilson, Jr., Esq. 2/92	2/92 — No action 10/92 — Considered and decided to draft amendment 4/93 — Deferred until 10/93 10/93 — Considered 4/94 — Considered 6/94 — Approved for publication by ST Cmte 9/94 — Published for public comment 4/95 — Considered and approved 7/95 — Approved by ST Cmte 9/95 — Rejected by Jud Conf **COMPLETED**
[CR 16(d)] — Require parties to confer on discovery matters before filing a motion	Local Rules Project & Mag Judge Robert Collings 3/94	10/94 — Deferred 10/95 — Subcommittee appointed 4/96 — Rejected by subcommittee **COMPLETED**
[CR23(b)] — Permits six-person juries in felony cases	S. 3 introduced by Sen Hatch 1/97	1/97 — Introduced as § 502 of the Omnibus Crime Prevention Act of 1997 10/97—Adv. Cmte voted to oppose the legislation 1/98— ST Cmte expressed grave concern about any such legislation. **COMPLETED**
[CR 24(a)] — Attorney conducted voir dire of prospective jurors	Judge William R. Wilson, Jr. 5/94	10/94 — Considered 4/95 — Considered 6/95 — Approved for publication by ST Cmte 9/95 — Published for public comment 4/96 — Rejected by advisory cmte, but should be subject to continued study and education; FJC to pursue educational programs **COMPLETED**

Proposal	Source, Date, and Doc #	Status
[CR 24(b)] — Reduce or equalize peremptory challenges in an effort to reduce court costs	Renewed suggestions from judiciary; Judge Acker (97-CR-E); pending legislation S-3.	2/91 — ST Cmte, after publication and comment, rejected CR Cmte 1990 proposal 4/93 — No motion to amend 1/97 — Omnibus Crime Control Act of 1997 (S.3) introduced [Section 501] 6/97 — Stotler letter to Chairman Hatch **COMPLETED** 10/97—Adv. Cmte decided to take no action on proposal to randomly select petit and venire juries and abolish peremptory challenges. 10/97—Adv. Cmte directed reporter to prepare draft amendment equalizing preemptory challenges at 10 per side. **PENDING FURTHER ACTION**
[CR 24(c)] — Alternate jurors to be retained in deliberations	Judge Bruce M. Selya 8/96 (96-CR-C)	10/96 — Considered and agreed to in concept; reporter to draft appropriate implementing language 4/97 — Draft presented and approved for request to publish 6/97 — Approved for publication by ST Cmte 8/97— Published for public comment **PENDING FURTHER ACTION**
[CR 26] — Questioning by jurors	Prof. Stephen Saltzburg	4/93 — Considered and tabled until 4/94 4/94 — Discussed and no action taken **COMPLETED**
[CR 26] — Expanding oral testimony, including video transmission	Judge Stotler 10/96	10/96 — Discussed 4/97 — Subcommittee will be appointed 10/97—Subcommittee recommended amendment. Adv Cmte voted to consider a draft amendment at next meeting. **PENDING FURTHER ACTION**
[CR 26] — Court advise defendant of right to testify	Robert Potter	4/95 — Discussed and no motion to amend **COMPLETED**
[CR 26.2] — Production of statements for proceedings under CR 32(e), 32.1(c), 46(i), and Rule 8 of § 2255		7/91 — Approved for publication by ST Cmte 4/92 — Considered 6/92 — Approved by ST Cmte 9/92 — Approved by Jud Conf 4/93 — Approved by Sup Ct 12/93 — Effective **COMPLETED**
[CR 26.2] — Production of a witness' statement regarding preliminary examinations conducted under CR 5.1	Michael R. Levine, Asst. Fed. Defender 3/95	10/95 — Considered by cmte 4/96 — Draft presented and approved 6/96 — Approved by ST Cmte 8/96 — Published for public comment 4/97— Forwarded to ST Cmte 6/97 — Approved by ST Cmte 9/97—Jud Conf approves **PENDING FURTHER ACTION**

Proposal	Source, Date, and Doc #	Status
[CR26.2(f)] — Definition of Statement	CR Rules Cmte 4/95	4/95 — Considered 10/95 — Considered and no action to be taken **COMPLETED**
[CR 26.3] — Proceedings for a mistrial		7/91 — Approved for publication by ST Cmte 4/92 — Considered 6/92 — Approved by ST Cmte 9/92 — Approved by Jud Conf 4/93 — Approved by Sup Ct 12/93 — Effective **COMPLETED**
[CR 29(b)] — Defer ruling on motion for judgment of acquittal until after verdict	DOJ 6/91	11/91 — Considered 4/92 — Forwarded to ST Cmte for public comment 6/92 — Approved for publication, but delayed pending move of RCSO 12/92 — Published for public comment on expedited basis 4/93 — Discussed 6/93 — Approved by ST Cmte 9/93 — Approved by Jud Conf 4/94 — Approved by Sup Ct 12/94 — Effective **COMPLETED**
[CR 30] — Permit or require parties to submit proposed jury instructions before trial	Local Rules Project	10/95 — Subcommittee appointed 4/96 — Rejected by subcommittee **COMPLETED**
[CR 30] — discretion in timing submission of jury instructions	Judge Stotler 1/15/97 (97-CR-A)	1/97 — Sent directly to chair and reporter 4/97 — Draft presented and approved for request to publish 6/97 — Approved for publication by ST Cmte 8/97— Published for public comment **PENDING FURTHER ACTION**
[CR 31] — Provide for a 5/6 vote on a verdict	Sen. Thurmond, S.1426, 11/95	4/96 — Discussed, rulemaking should handle it **COMPLETED**
[CR 31(d)] — Individual polling of jurors	Judge Brooks Smith	10/95 — Considered 4/96 — Draft presented and approved 6/96 — Approved by ST Cmte 8/96 — Published for public comment 4/97 — Forwarded to ST Cmte 6/97 — Approved by ST Cmte 9/97—Approved by Jud Conf **PENDING FURTHER ACTION**
[31(e)] — Reflect proposed new Rule 32.2 governing criminal forfeitures		4/97— Draft presented and approved for publication 6/97 — Approved for publication by ST Cmte 8/97— Published for public comment **PENDING FURTHER ACTION**

Proposal	Source, Date, and Doc #	Status
[CR 32] — Amendments to entire rule; victims' allocution during sentencing	Judge Hodges, before 4/92; pending legislation reactivated issue in 1997/98.	10/92 — Forwarded to ST Cmte for public comment 12/92 — Published 4/93 — Discussed 6/93 — Approved by ST Cmte 9/93 — Approved by Jud Conf 4/94 — Approved by Sup Ct 12/94 — Effective **COMPLETED** 10/97—Adv Cmte expressed view that it was not opposed to addressing the legislation and decided to keep the subcommittee in place to monitor/respond to the legislation. **PENDING FURTHER ACTION**
[CR 32]—mental examination of defendant in capital cases	An extension of a proposed amendment to CR 12.2(DOJ) at 10/97 meeting.	10/97 Adv Cmte voted to proceed with the drafting of an amendment. **PENDING FURTHER ACTION**
[CR 32(d)(2) — Forfeiture proceedings and procedures reflect proposed new Rule 32.2 governing criminal forfeitures	Roger Pauley, DOJ, 10/93	4/94 — Considered 6/94 — Approved by ST Cmte for public comment 9/94 — Published for public comment 4/95 — Revised and approved 6/95 — Approved by ST Cmte 9/95 — Approved by Jud Conf 4/96 — Approved by Sup Ct 12/96 — Effective **COMPLETED** 4/97— Draft presented and approved for publication 6/97 — Approved for publication by ST Cmte 8/97— Published for public comment **PENDING FURTHER ACTION**
[CR 32(e)] — Delete provision addressing probation and production of statements (later renumbered to CR32(c)(2))	DOJ	7/91 — Approved by ST Committee for publication 4/92 — Considered 6/92 — Approved by ST Committee 9/92 — Approved by Judicial Conference 4/93 — Approved by Supreme Court 12/93 — Effective **COMPLETED**
[CR 32.1] — Production of statements		7/91 — Approved for publication by ST Cmte 4/92 — Considered 6/92 — Approved by ST Cmte 9/92 — Approved by Jud Conf 4/93 — Approved by Sup Ct 12/93 — Effective **COMPLETED**

Proposal	Source, Date, and Doc #	Status
[CR 32.1]— Technical correction of "magistrate" to "magistrate judge."	Rabiej (2/6/98)	2/98—Letter sent advising chair & reporter **PENDING FURTHER ACTION**
[CR 32.1]—pending victims rights/allocution litigation	Pending litigation 1997/98.	10/97—Adv Cmte expressed view that it was not opposed to addressing the legislation and decided to keep the subcommittee in place to monitor/respond to the legislation. **PENDING FURTHER ACTION**
[CR 32.2] — Create forfeiture procedures	John C. Keeney, DOJ, 3/96 (96-CR-D)	10/96 — Draft presented and considered 4/97 — Draft presented and approved for request to publish 6/97 — Approved for publication by ST Cmte 8/97— Published for public comment **PENDING FURTHER ACTION**
[CR 33] — Time for filing motion for new trial on ground of newly discovered evidence	John C. Keeney, DOJ 9/95	10/95 — Considered 4/96 — Draft presented and approved 6/96 — Approved for publication by ST Cmte 8/96 — Published for public comment 4/97 — Forwarded to ST Cmte 6/97 — Approved by ST Cmte 9/97—Approved by Jud Conf **PENDING FURTHER ACTION**
[CR 35(b)] — Recognize combined pre-sentencing and post-sentencing assistance	Judge T. S. Ellis, III 7/95	10/95 — Draft presented and considered 4/96 — Forwarded to ST Cmte 6/96 — Approved for publication by ST Cmte 8/96 — Published for public comment 4/97 — Forwarded to ST Cmte 6/97 — Approved by ST Cmte 9/97—Approved by Jud Conf **PENDING FURTHER ACTION**
[CR 35(b)] — Recognize assistance in any offense	S.3, Sen Hatch 1/97	1/97 — Introduced as § 602 and 821 of the Omnibus Crime Prevention Act of 1997 6/97 — Stotler letter to Chairman Hatch **PENDING FURTHER ACTION**
[CR 35(c)] — Correction of sentence, timing	Jensen, 1994 9th Cir. decision	10/94 — Considered 4/95 — No action pending restylization of CR Rules **PENDING FURTHER ACTION**
[CR 40] — Commitment to another district (warrant may be produced by facsimile)		7/91 — Approved for publication by ST Cmte 4/92 — Considered 6/92 — Approved by ST Cmte 9/92 — Approved by Jud Conf 4/93 — Approved by Sup Ct 12/93 — Effective **COMPLETED**

Proposal	Source, Date, and Doc #	Status
[CR 40] —Treat FAX copies of documents as certified	Mag Judge Wade Hampton 2/93	10/93 — Rejected **COMPLETED**
[CR 40(a)] — Technical amendment conforming with change to CR5	Criminal Rules Cmte 4/94	4/94 — Considered, conforming change no publication necessary 6/94 — Approved by ST Cmte 9/94 — Approved by Jud Conf 4/95 — Approved by Sup Ct 12/95 — Effective **COMPLETED**
[CR 40(a)] —Proximity of nearest judge for removal proceedings	Mag Judge Robert B. Collings 3/94	10/94 — Considered and deferred further discussion until 4/95 10/96 — Considered and rejected **COMPLETED**
[CR 40(d)] — Conditional release of probationer; magistrate judge sets terms of release of probationer or supervised release	Magistrate Judge Robert B. Collings 11/92	10/92 — Forwarded to ST Cmte for publication 4/93 — Discussed 6/93 — Approved by ST Cmte 9/93 — Approved by Jud Conf 4/94 — Approved by Sup Ct 12/94 — Effective **COMPLETED**
[CR 41] — Search and seizure warrant issued on information sent by facsimile		7/91 — Approved for publication by ST Cmte 4/92 — Considered 6/92 — Approved by ST Cmte 9/92 — Approved by Jud Conf 4/93 — Approved by Sup Ct 12/93 — Effective **COMPLETED**
[CR 41] — Warrant issued by authority within the district	J.C. Whitaker 3/93	10/93 — Failed for lack of a motion **COMPLETED**
[CR 43(b)] — Arraignment of detainees by video teleconferencing; sentence absent defendant	DOJ 4/92	10/92 — Subcommittee appointed 4/93 — Considered 6/93 — Approved for publication by ST Cmte 9/93 — Published for public comment 4/94 — Deleted video teleconferencing provision & forwarded to ST Cmte 6/94 — Approved by ST Cmte 9/94 — Approved by Jud Conf 4/95 — Approved by Sup Ct 12/95 — Effective **COMPLETED**
[CR 43(c)(4)] — Defendant need not be present to reduce or change a sentence	John Keeney, DOJ 1/96	4/96 — Considered 6/96 — Approved for publication by ST Cmte 8/96 — Published for public comment 4/97 — Forwarded to ST Cmte 6/97 — Approved by ST Cmte 9/97—Approved by Jud Conf **PENDING FURTHER ACTION**

Proposal	Source, Date, and Doc #	Status
[CR 43(c)(5) — Defendant to waive personal arraignment on subsequent, superseding indictments and enter plea of not guilty in writing	Judge Joseph G. Scoville, 10/16/97 (97-CR-I)	10/97 — Referred to reporter and chair **PENDING FURTHER ACTION**
[CR 43]—defendant to waive presence at arraignment	Mario Cano 97---	10/97—Adv Cmte voted to consider amendment(and related amendment to CR 10) at next meeting **PENDING FURTHER ACTION**
[CR 46] — Production of statements in release from custody proceedings		6/92 — Approved by ST Cmte 9/92 — Approved by Jud Conf 4/93 — Approved by Sup Ct 12/93 — Effective **COMPLETED**
[CR 46] — Release of persons after arrest for violation of probation or supervised release	Magistrate Judge Robert Collings 3/94	10/94 — Defer consideration of amendment until rule might be amended or restylized **PENDING FURTHER ACTION**
[CR 46] — Requirements in AP 9(a) that court state reasons for releasing or detaining defendant in a CR case	11/95 Stotler letter	4/96 — Discussed and no action taken **COMPLETED**
[CR 46(i)] — Typographical error in rule in cross-citation	Jensen	7/91 — Approved for publication by ST Cmte 4/94 — Considered 9/94 — No action taken by Jud Conf because Congress corrected error **COMPLETED**
[CR 47] — Require parties to confer or attempt to confer before any motion is filed	Local Rules Project	10/95 — Subcommittee appointed 4/96 — Rejected by subcommittee **COMPLETED**
[CR 49] — Double-sided paper	Environmental Defense Fund 12/91	4/92 — Chair informed EDF that matter was being considered by other committees in Jud Conf **COMPLETED**
[CR 49(c)] — Fax noticing to produce substantial cost savings while increasing efficiency and productivity	Michael E. Kunz, Clerk of Court 9/10/97 (97-CR-G)	9/97 — Mailed to reporter and chair **PENDING FURTHER ACTION**
[CR49(c)] — Facsimile service of notice to counsel	William S. Brownell, District Clerks Advisory Group 10/20/97 (CR-J)	11/97 — Referred to reporter and chair **PENDING FURTHER ACTION**

Proposal	Source, Date, and Doc #	Status
[CR 49(e)] —Delete provision re filing notice of dangerous offender status — conforming amendment	Prof. David Schlueter 4/94	4/94 — Considered 6/94 — ST Cmte approved without publication 9/94 — Jud Conf approved 4/95 — Sup Ct approved 12/95 — Effective **COMPLETED**
[CR53] — Cameras in the courtroom		7/93 — Approved by ST Cmte 10/93 — Published 4/94 — Considered and approved 6/94 — Approved by ST Cmte 9/94 — Rejected by Jud Conf 10/94 — Guidelines discussed by cmte **COMPLETED**
[CR54] — Delete Canal Zone	Roger Pauley, minutes 4/97 mtg	4/97 — Draft presented and approved for request to publish 6/97 — Approved for publication by ST Cmte 8/97— Published for public comment **PENDING FURTHER ACTION**
[CR 57] — Local rules technical and conforming amendments & local rule renumbering	ST meeting 1/92	4/92 — Forwarded to ST Cmte for public comment 6/93 — Approved for publication by ST Cmte 9/93 — Published for public comment 4/94 — Forwarded to ST Cmte 12/95 — Effective **COMPLETED**
[CR 58] — Clarify whether forfeiture of collateral amounts to a conviction	Magistrate Judge David G. Lowe 1/95	4/95 — No action **COMPLETED**
[CR 58 (b)(2)] — Consent in magistrate judge trials	Judge Philip Pro 10/24/96 (96- CR-B)	1/97 — Reported out by CR Rules Committee and approved by ST Cmte for transmission to Jud Conf without publication; consistent with Federal Courts Improvement Act 4/97 — Approved by Sup Ct **COMPLETED**
[CR 59] — Authorize Judicial Conference to correct technical errors with no need for Supreme Court & Congressional action	Report from ST Subcommittee on Style	4/92 — Considered and sent to ST Cmte 6/93 — Approved for publication by ST Cmte 10/93 — Published for public comment 4/94 — Approved as published and forwarded to ST Cmte 6/94 — Rejected by ST Cmte **COMPLETED**
[Megatrials] — Address issue	ABA	11/91 — Agenda 1/92 — ST Cmte, no action taken **COMPLETED**

Proposal	Source, Date, and Doc #	Status
[Rule 8. Rules Governing §2255] — Production of statements at evidentiary hearing		7/91 — Approved for publication by ST Cmte 4/92 — Considered 6/92 — Approved by ST Cmte 9/92 — Approved by Jud Conf 4/93 — Approved by Sup Ct 12/93 — Effective **COMPLETED**
[Rules Governing Habeas Corpus Proceedings]— miscellaneous changes to Rule 8 & Rule 4 for §2255 & §2254 proceedings	CV Cmte	10/97—Adv Cmte appointed subcom to study issues
[U.S. Attorneys admitted to practice in Federal courts]	DOJ 11/92	4/93 — Considered **PENDING FURTHER ACTION**
[Restyling CR Rules]		10/95 — Considered 4/96 — On hold pending consideration of restyled AP Rules published for public comment **PENDING FURTHER ACTION**

Item III-B1

MEMO TO: **Members, Criminal Rules Advisory Committee**

FROM: **Professor Dave Schlueter, Reporter**

RE: **Proposed Amendments to Rule 6(d), (f)**

DATE: **March 22, 1998**

The proposed amendments to Rule 6 were originally intended to address two issues: first, assisting deaf persons who might serve on a grand jury (Rule 6(d)) and second, permit the foreperson or deputy foreperson to return the indictment, rather than requiring the whole grand jury to be present (Rule 6(f). The Standing Committee, however, voted to change the amendment to Rule to Rule 6(d) to permit the presence of any interpreters in the grand jury proceedings and deliberations. The published version of Rule 6 is attached.

As the attached summary of comments indicates, the Committee received nine comments on the proposed changes. Five commentators opposed the amendment to Rule 6(d) to the extent that it permits language interpreters in the deliberations. Several of them indicate that the amendment would be inconsistent with 28 U.S.C. § 1865(b) which requires that all petit and grand jurors must speak English. Of those apparently supporting the amendments, two of them offer no substantive comment on this particular language; they are simply in favor of the proposed amendments to all of the rules.

Regarding the proposed amendment to Rule 6(f), two commentators are opposed to the amendment: Judge Kennedy and the NADCL. Their objections generally express concern about distancing the grand jury from the process and that whatever benefit may be derived from the rule change would be outweighed by that concern. One Magistrate Judge, Judge Mesa, supports the change to Rule 6(f). Another Magistrate Judge, Judge Ashmanskas, apparently supports the amendment to Rule 6(f) but would go further and change the names of the foreperson and deputy foreperson and would also reduce the size of the grand jury. Again, two of the commentators generally support all of the rules changes without offering any specific reasons.

I am attaching a copy of 28 U.S.C. § 1865 which clearly includes a requirement that petit and grand jurors be proficient in English. The limited caselaw apparently supports that requirement. With regard to the ability of deaf jurors to serve, I located one case which indicated that it was not an abuse of discretion to permit a hearing-impaired juror to serve. *United States v. Jonnet*, 597 F.Supp. 999 (D.C. Pa. 1984), *rev'd in part on other grounds*, 762 F.2d 16 (3d Cir. 1985) The Ninth Circuit has ruled that a showing

that a juror was incompetent to serve because of a hearing impairment was not not sufficient to show an abuse of discretion in denying a new trial. *Lyda v. United States*, 321 F.2d 788 (9th Cir. 1963). In neither of these cases, was the juror considered to be deaf, i.e. totally incapable of hearing.

Rule 6. The Grand Jury

* * * * *

(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.* ~~but no~~ No person other than the jurors, and any interpreter necessary to assist a juror, may be present while the grand jury is deliberating or voting.

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(f) FINDING AND RETURN OF INDICTMENT. A grand jury may indict ~~An indictment may be found~~ 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 jurors do not vote to indict ~~concur in finding an indictment~~, the foreperson shall so report to a federal magistrate judge in writing as soon as possible ~~forthwith~~.

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

COMMITTEE NOTE

Subdivision 6(d). As currently written, Rule 6(d) absolutely bars any person, other than the jurors themselves, from being present during the jury's deliberations and voting. Accordingly, interpreters are barred from attending the deliberations and voting by the grand jury, even though they may have been present during the taking of testimony. The amendment is intended to permit interpreters to assist persons serving on a grand jury. Although the Committee believes that the need for secrecy of grand jury deliberations and voting is paramount, permitting interpreters in the process seems a reasonable accommodation. *See also United States v. Dempsy*, 830 F.2d 1084 (10th Cir. 1987) (constitutionally rooted prohibition of non-jurors being present during deliberations was not violated by interpreter for deaf petit jury member).

As originally drafted by the Advisory Committee, the provision for interpreters would have been extended only to interpreters for deaf persons serving on a grand jury. The Standing Committee, however, believed that the limitation as to the kind of interpreter permitted to be present during grand jury deliberations should be removed in order to provide an opportunity for the widest range of public comment on all the issues raised by the presence of an interpreter during those deliberations. Thus, the proposed amendment extends to any interpreter who may be necessary to assist a grand juror.

The subdivision has also been restyled and reorganized.

Subdivision 6(f). The amendment to Rule 6(f) is intended to avoid the problems associated with bringing the entire grand jury to the court for the purpose of returning an indictment. Although the practice is long-standing, in *Breese v. United States*, 226 U.S. 1 (1912), the Court rejected the argument that the requirement was rooted in the Constitution and observed that if there were ever any strong reasons for the requirement, they "have disappeared, at least in part." 226 U.S. at 10. The Court added that grand jury's presence at the time the indictment was presented was a defect, if at all, in form only. *Id.* at 11. Given the problems of space, in some jurisdictions the grand jury sits in a building completely separated from the courtrooms. In those cases, moving the entire jury to the courtroom for the simple process of presenting the indictment may prove

difficult and time consuming. Even where the jury is in the same location, having all of the jurors present can be unnecessarily cumbersome in light of the fact that filing of the indictment requires a certification as to how the jurors voted.

The amendment provides that the indictment must be presented either by the jurors themselves, as currently provided for in the rule, or by the foreperson or the deputy foreperson, acting on behalf of the jurors. In an appropriate case, the court might require all of the jurors to be present if it had inquiries about the indictment.

ADVISORY COMMITTEE ON FEDERAL RULES OF CRIMINAL PROCEDURE

PROPOSED AMENDMENTS TO RULE 6

I. SUMMARY OF COMMENTS: RULE 6

Nine commentators submitted statements on the proposed amendments to Rule 6. Three judges and the one private practitioner are opposed to allowing interpreters into grand jury deliberations because it would contravene the statutory requirement that jurors be able to read and write English. The NACDL does not believe the proposal regarding interpreters should be adopted at this time. Two private practictioners support the amendments.

One magistrate judge supports the amendment which would allow the grand jury foreperson to return the indictment alone. A federal appellate court judge is strongly opposed to it. The NACDL is also opposed to this proposed amendment.

One magistrate judge suggests name changes for jury personnel and changes of the number of grand jurors.

II. LIST OF COMMENTATORS: CRIMINAL RULE 6

CR-001 **Judge Hayden W. Head, Jr., U.S. District Judge, Corpus Christi, Texas September 19, 1998**

CR-002 **John Gregg McMaster, Esq., Attorney at Law, Columbia, South Carolina, September 19, 1998**

CR-003 **Jack E. Horsley, Esq., Craig & Craig, Matoon, Illinois, September 23, 1997**

CR-005 **James W. Evans, Esq., American College of Trial Lawyers, Harrisburg, Pennsylvania, September 25, 1997**

CR-006 **Judge George P. Kazen Chief U.S. District Judge, Laredo, Texas, October 7, 1998**

CR-008 **Judge Cornelia G. Kennedy, Circuit Judge, Detroit, Michigan, October 21, 1997**

CR-010 **Judge Donald C. Ashmanskas, United States Magistrate Judge, Portland, Oregon, October 29, 1997**

CR-018 **Magistrate Judge Richard P. Mesa, United States Magistrate Judge, El Paso, Texas, February 2, 1998**

CR-021a **National Association of Criminal Defense Lawyers Committee on Rules of Procedure (Carol A. Brook, William J. Genego, Peter Goldberger), February 15, 1998**

COMMENTS: RULE 6

Judge Hayden W. Head, Jr. (CR-001)
U.S. District Judge
Southern District of Texas
Corpus Christi, Texas
September 19, 1998

Judge Head believes that the proposed amendment which would allow for "interpreters" is overly broad and thus contravenes Title 28 U.S.C.A. §1865(b) which requires that all petit and grand jurors be required to speak English. Even if amendment is only for hearing impaired, he does not support it because he is against the introduction of another person into the inner sanctum of the grand jury proceedings. He further objects because he does not support the rule's proposed distinction between jurors and grand jurors.

John Gregg McMaster, Esq. (CR-002)
Attorney at Law
Tompkins and McMaster
Columbia, South Carolina
September 19, 1998

Mr. McMaster finds the proposed rule change "preposterous." He says that it would be a "travesty of justice" to allow someone "to be indicted by a person who does not understand or speak the language of the country or of the indictment." He reasons that is an immigrant's obligation to learn the language of his new country.

Jack E. Horsley, Esq. (CR-003)
Craig & Craig
Matoon, Illinois
September 23, 1997

Mr. Horsley favors the proposed changes to Rule 6.

James W. Evans (CR-005)
Harrisburg, Pennsylvania
September 25, 1997

Mr. Evans states that the proposed changes seem sensible to him.

Judge George P. Kazen (CR-006)
Chief U.S. District Judge
Southern District of Texas
Laredo, Texas
October 7, 1998

Judge Kazen agrees with his colleague Judge Head about the proposed changes to Rule 6(d). He believes that this proposal is incomprehensible because jurors are required to speak and understand English in order to serve as jurors. He concedes that policy consideration support the narrow exception for deaf jurors.

Judge Cornelia G. Kennedy (CR-008)
Circuit Judge
United States Court of Appeals for the Sixth Circuit
Detroit, Michigan
October 21, 1997

Judge Kennedy believes the proposed change to Rule 6(f) which would allow the grand jury foreperson alone to return the indictment will save some time and avoid some inconvenience, but that it will also distance the grand jury from the court. She believes that having the whole grand jury present the indictment to the court allows members to express concerns and ask questions. She says that it is important for the grand jury to know that it is an "adjunct of the court... not merely votes required by the Assistant United States Attorney." Judge Kennedy also states that grand jury rooms should be in the court house. When they are not, she notes, it is even more important for the members of the grand jury to go before the court and be reminded of their function.

Judge Donald C. Ashmanskas (CR-010)
United States Magistrate Judge
United States District Court for the District of Oregon
Portland, Oregon
October 29, 1997

Magistrate Ashmanskas writes to suggest specific amendments to Rule 6(f). He suggests that the name "presiding grand juror" be substituted for the proposed rule's moniker, "foreperson," and "deputy presiding grand juror" instead of "deputy foreperson." He also suggests that the indictments be permitted to be filed with district clerk, rather than before a

magistrate or judge in open court. As an alternative, he suggests that the indictment be returned to a magistrate or district court judge. In a post script, he notes that he would favor a reduction in the size of the grand jury. He notes that in Oregon the grand jury is composed of seven people and five must concur for an indictment to be returned.

Magistrate Judge Richard P. Mesa (CR-018)
United States Magistrate Judge
Western District of Texas
El Paso, Texas
February 2, 1998

Judge Mesa wholeheartedly supports the proposed changes to Rule 6(f) because the practical result will be that grand jurors will be able to leave the court house at a reasonable hour.

Carol A. Brook (CR-021a)
Chicago, Illinois
William J. Genego
Santa Monica, California
Peter Goldberger
Ardmore, Pennsylvania
Co-Chairs, National Association of Criminal Defense Lawyers
Committee on Rules of Procedure
February 15, 1998

The NACDL believes that the proposal to Rule 6(a) which would allow interpreters into grand jury proceedings should not be adopted at this time because it would not be consistent with 28 U.S.C. §1865 (b) (2,3,4). The NACDL opposes the proposed amendment to Rule 6(f) which would allow the grand jury foreperson to return the indictment alone. They believe that having all of the grand jurors present when an indictment is returned reminds the grand jurors that they are an extension of the court and independent from the prosecutor and make the jurors take the process more seriously. The NACDL concludes by asserting that the "salutary purposes served by Rule 6(f) outweigh whatever minor inconveniences and administrative problems may be encountered in achieving them."

§ 1865. Qualifications for jury service

(a) The chief judge of the district court, or such other district court judge as the plan may provide, on his initiative or upon recommendation of the clerk or jury commission, shall determine solely on the basis of information provided on the juror qualification form and other competent evidence whether a person is unqualified for, or exempt, or to be excused from jury service. The clerk shall enter such determination in the space provided on the juror qualification form and in any alphabetical list of names drawn from the master jury wheel. If a person did not appear in response to a summons, such fact shall be noted on said list.

(b) In making such determination the chief judge of the district court, or such other district court judge as the plan may provide, shall deem any person qualified to serve on grand and petit juries in the district court unless he—

(1) is not a citizen of the United States eighteen years old who has resided for a period of one year within the judicial district;

(2) is unable to read, write, and understand the English language with a degree of proficiency sufficient to fill out satisfactorily the juror qualification form;

(3) is unable to speak the English language;

(4) is incapable, by reason of mental or physical infirmity, to render satisfactory jury service; or

(5) has a charge pending against him for the commission of, or has been convicted in a State or Federal court of record of, a crime punishable by imprisonment for more than one year and his civil rights have not been restored.

(June 25, 1948, c. 646, 62 Stat. 952; Mar. 27, 1968, Pub.L. 90–274, § 101, 82 Stat. 58; Apr. 6, 1972, Pub.L. 92–269, § 1, 86 Stat. 117; Nov. 2, 1978, Pub.L. 95–572, § 3(a), 92 Stat. 2453; Nov. 19, 1988, Pub.L. 100–702, Title VIII, § 803(b), 102 Stat. 4658.)

Agenda Item III-B2

MEMO TO: **Members, Criminal Rules Advisory Committee**

FROM: **Professor D. Schlueter, Reporter**

RE: **Proposed Amendment to Rule 7**

DATE: **March 23, 1998**

The proposed amendment to Rule 7, attached, is a technical change to conform the rule to proposed new Rule 32.2—dealing with criminal forfeiture procedures.

The Committee received no comments on the proposed change to Rule 7

Rule 7. The Indictment and the Information

* * * * *

(c) NATURE AND CONTENTS.

* * * * *

(2) *Criminal Forfeiture.* No judgment of forfeiture may be entered in a criminal proceeding unless the indictment or the information ~~shall allege the extent of the interest or property subject to forfeiture~~ alleges that the defendant has a possessory or legal interest in property that is subject to forfeiture in accordance with the applicable statute.

* * * * *

COMMITTEE NOTE

The rule is amended to reflect new Rule 32.2, which now governs criminal forfeiture procedures.

ADVISORY COMMITTEE ON FEDERAL RULES OF CRIMINAL PROCEDURE

PROPOSED AMENDMENT TO RULE 7

I. SUMMARY OF COMMENTS: Rule 7

The Committee received no comments on the proposed change to Rule 7.

II. LIST OF COMMENTATORS: Rule 7

None

III. COMMENTS: Rule 7

None

Agenda Item III B3

MEMO TO: **Members, Criminal Rules Advisory Committee**

FROM: **Professor Dave Schlueter, Reporter**

RE: **Proposed Amendments to Rule 11**

DATE: **March 23, 1998**

The proposed amendments to Rule 11 cover three issues: First, clarification in Rule 11(a)(1) of the definition of an organizational defendant. No comments were received on this amendment.

The second issue is an amendment to Rule 11(c)(6) which would require the judge to question the defendant's understanding of any provision in the plea agreement dealing with waiver of the right to appeal or collaterally attack the sentence. A majority of the commentators addressing this amendment, including several judges, a committee of the State Bar of Michigan, a committee of the American College of Trial Lawyers, and the NADCL, are opposed to this amendment. The general view is that this provision will signal an approval of such provisions before the Supreme Court has had an opportunity to settle the question of whether such a provision is constitutional. Several commentators cite caselaw to support there opposition. The ABA apparently supports the amendment to Rule 11(c)(6).

With regard to the proposed amendment to Rule 11(e), only several commentators address the change. The ABA is opposed to the changes because of the possibility of binding the court to specific sentencing ranges, etc. Opposition was also expressed by a probation officer and one district judge.

Rule 11. Pleas

(a) ALTERNATIVES.

(1) *In General.* A defendant may plead ~~not~~ guilty, not guilty, or nolo contendere. If a defendant refuses to plead, or if a defendant ~~corporation~~ organization, as defined in 18 U.S.C. § 18, fails to appear, the court shall 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:

* * * * *

(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

(6) the terms of any provision in a plea agreement waiving the right to appeal or to collaterally attack the sentence.

* * * * *

(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 ~~engage in discussions with a view toward reaching an agreement~~ that, upon the defendant's entering ~~of~~ a plea of guilty or nolo contendere to a charged offense, or to a lesser or related offense, the attorney for the government will: ~~do any of the following:~~

(A) move to dismiss ~~for dismissal of~~ other charges; or

(B) recommend, ~~make a recommendation,~~ 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 ~~with the understanding that such~~ recommendation or request is ~~shall~~ not ~~be~~ binding on ~~upon~~ 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 ~~such~~ discussions between the parties concerning any such plea agreement.

* * * * *

COMMITTEE NOTE

Subdivision (a). The amendment deletes use of the term "corporation" and substitutes in its place the term "organization," with a reference to the definition of that term in 18 U.S.C. § 18.

Subdivision (c)(6). Rule 11(c) has been amended specifically to reflect the increasing practice of including provisions in plea agreements which require the defendant to waive certain appellate rights. The increased use of such provisions is due in part to the

increasing number of direct appeals and collateral reviews challenging sentencing decisions. Given the increased use of such provisions, the Committee believed it was important to insure that first, a complete record exists regarding any waiver provisions, and second, that the waiver was voluntarily and knowingly made by the defendant. The amendment provides no specific guidance on the content of the court's advice. That is left to the court's discretion and judgment.

Subdivision (e). Amendments have been made to Rule 11(e)(1)(B) and (C) to reflect the impact of the Sentencing Guidelines on guilty pleas. Although Rule 11 is generally silent on the subject, it has become clear that the courts have struggled with the subject of guideline sentencing vis a vis plea agreements, entry and timing of guilty pleas, and the ability of the defendant to withdraw a plea of guilty. The amendments are intended to address two specific issues.

First, both subdivisions (e)(1)(B) and (e)(1)(C) have been amended to recognize that a plea agreement may specifically address not only what amounts to an appropriate sentence, but also a sentencing guideline, a sentencing factor, or a policy statement accompanying a sentencing guideline or factor. Under an (e)(1)(B) agreement, the government, as before, simply agrees to make a recommendation to the court, or agrees not to oppose a defense request concerning a particular sentence or consideration of a sentencing guideline, factor, or policy statement. The amendment makes it clear that this type of agreement is not binding on the court. And under an (e)(1)(C) agreement, the government and defense have actually agreed on what amounts to an appropriate sentence or have agreed to one of the specified components. The amendment also makes it clear that this agreement is binding on the court once the court accepts it as the sentence to be imposed.

ADVISORY COMMITTEE ON FEDERAL RULES OF CRIMINAL PROCEDURE

PROPOSED AMENDMENTS TO RULE 11

I. SUMMARY OF COMMENTS: Rule 11

The Committee received a total of thirteen comments on the proposed changes to this rule. No comments were received with regard to the proposed amendment to Rule 11(a).

The Federal Public Defenders, the American College of Trial Lawyers, the Standing Committee on the United States Courts of the State Bar of Michigan, and the National Association of Criminal Defense Lawyer all oppose the proposed amendment to Rule 11(c)(6). Two federal judges oppose the proposals and one did not express an opinion but does want an opportunity to testify. A probation officer writes that he is opposed to the proposed amendments.

Two federal judges express support for the proposed amendments. The ABA supports the amendment to Rule 11(c)(6) to the extent that it informs a defendant of the rights that he is waiving. But it opposes the proposed amendment, which would allow courts to be bound to sentencing ranges by party agreements.

The two private practitioners support the changes without any substantive comment.

II. LIST OF COMMENTATORS: Rule 11

CR-003	Jack E. Horsley, Esq., Craig & Craig, Matoon, Illinois, September 23, 1997
CR-004	Judge Paul D. Borman, United States District Judge, Detroit, Michigan, September 24, 1997
CR-005	James W. Evans, Esq., Harrisburg, Pennsylvania, September 25, 1997
CR-006	Judge George P. Kazen, Chief U.S. District Judge, Laredo, Texas, October 7, 1998
CR-009	Judge Malcolm F. Marsh, United States District Judge, Portland, Oregon, October 21, 1997

CR-012	Federal Public Defender, Thomas W. Hillier, II, Chair, Legislative Subcommittee, Seattle, Washington, December 5, 1997
CR-016	Judge Paul L. Friedman, United States District Judge, Washington, D.C., January 5, 1998
CR-017	Mr. Kenneth Laborde, Chief Probation Officer Eastern District of Texas, Beaumont, Texas, January 26, 1998
CR-018	Magistrate Judge Richard P. Mesa, United States Magistrate Judge, El Paso, Texas, February 2, 1998
CR-019	Richard A. Rossman, Chairperson, Standing Committee on United States Courts of the State Bar of Michigan, Detroit, Mich., February 9, 1998
CR-020	American College of Trial Lawyers, (Mr. Robert Ritchie, Chairman, Federal Criminal Procedures Committee) Knoxville, Tennessee, February 11, 1998
CR-021a	National Association of Criminal Defense Lawyers Committee on Rules of Procedure (Carol A. Brook, William J. Genego, Peter Goldberger), February 15, 1998
CR-022	ABA Criminal Justice Section, Committee on Rules of Evidence and Criminal Procedure (Professor Bruce Comly French, Honorable Barbara Jones, Co-Chaipersons) Washington, D.C., February 17, 1998

III. COMMENTS: Rule 11

Jack E. Horsley, Esq. (CR-003)
Craig & Craig
Matoon, Illinois
September 23, 1997

Mr. Horsley favors the proposed changes.

Judge Paul D. Borman (CR-004)
United States District Judge
United States District Court for the Eastern District of Michigan
Detroit, Michigan
September 24, 1997

Judge Borman is interested in testifying about proposed amendments to Rule 11. He does not express an opinion on the proposed amendments.

James W. Evans (CR-005)
Harrisburg, Pennsylvania
September 25, 1997

Mr. Evans summarily states that the proposed changes seem sensible to him.

Judge George P. Kazen (CR-006)
Chief U.S. District Judge
Southern District of Texas
Laredo, Texas
October 7, 1998

Judge Kazen states that the proposed changes to Rule 11 appear to be helpful. He notes that the Committee has still not addressed the problem of Rule 11(e)(4) and the problem of rejected plea agreements and the defendant's opportunity to withdraw a plea.

Judge Malcolm F. Marsh (CR-009)
United States District Judge
United States District Court for the District of Oregon
Portland, Oregon
October 21, 1997

Judge Marsh is opposed to the proposed amendment to Rule 11(E)(1)(c). He is concerned with allowing parties to agree to a specific sentencing range. He fears that this practice will allow parties to agree to offense characteristics regardless of the actual facts of the as found in the Pre-Sentencing Report. He notes that the primary danger is allowing parties to bind the court to certain facts, thus taking away more of the court's discretionary authority and shifting it to the prosecutor's office.

Thomas W. Hillier, II (CR-012)
Chair, Legislative Subcommittee
Federal Public Defender
Western District of Washington
Seattle, Washington
December 5, 1997

Mr. Thomas Hillier, Chair, Legislative Subcommittee of the Federal Public Defender, opposes the proposed amendments Rule 11(c) concerning a defendant's waiver of rights to appeal. He first commends the general purpose of ensuring knowing, voluntary appeal waivers. But, he "strongly disfavors" the proposal. He notes in his initial remarks that if the Committee does go forward with the proposed amendments, the Federal Public Defenders urge cautionary language in the notes that emphasizes the problems associated with appeal waivers. Mr. Hillier cites *United States v. Melancon*, 972 F.2d 566, 569-580 (5th Cir. 1992) for its arguments against appeal waivers. He attaches an article which identifies other judges who believe that appeal waivers should not be used. Mr. Hillier believes that the proposed amendment is premature and states that the Committee should not go forward with any proposal on this issue until the courts have had an opportunity to review all of the problems that appeal waivers present. He notes that the Supreme Court will eventually decide the issue.

Judge Paul L. Friedman (CR-016)
United States District Judge
United States District Court for the District Court of Columbia
Washington, D.C.
January 5, 1998

Judge Friedman is opposed to the proposed changes to Rule 11. He opposes the amendment because in his view there can be no valid waiver of such appellate rights and that the proposed amendment would suggest that such waivers are lawful. He encloses his opinion in *United States v. Raynor*, Crim. No. 97-186 (D.D.C. Dec. 29, 1997) and a copy of Judge Greene's opinion in *United States v. Johnson*, Crim. No. 97-305 (D.D.C. August 8, 1997), to support his position.

Mr. Kenneth Laborde (CR-017)
Chief Probation Officer
Eastern District of Texas
Beaumont, Texas
January 26, 1998

Mr. Laborde is opposed to the proposed changes to Rule 11(e)(1)(c). His primary concern is that a defendant's sentence may be determined by prosecutors and defense counsel before the probation officer has an opportunity to conduct a pre-sentence investigation and apply the sentencing guidelines. He is also concerned that parties "may be tempted to circumvent the guidelines" in order to avoid trial. He emphasizes that the proposed changes to the Rule would deprive the court of probation officers' expertise in this area. Finally, he writes that the intended result of fewer appeals would occur, but that the quality of justice will suffer, and this is too great a cost.

Magistrate Judge Richard P. Mesa (CR-018)
United States Magistrate Judge
Western District of Texas
El Paso, Texas
February 2, 1998

Judge Mesa supports the changes to Rule 11(c) because he anticipates that "many problems and questionable petitions" will be avoided.

Richard A. Rossman (CR-019)
Chairperson, Standing Committee on United States Courts of the State Bar of Michigan
Detroit, Michigan
February 9, 1998

On behalf of the Standing Committee on United States Courts of the State Bar of Michigan, Mr. Rossman, the chair, indicates that his committee is "unanimous in its opposition to the proposed amendment to Rule 11(c)(6). First, the committee believes that waiver provisions have no place in plea agreements and secondly, there is no need to highlight any particular provision in the agreement. Finally, a colloquy itself might raise confusion or inadequate explanations regarding the provision. It has no objection to the other amendments proposed for Rule 11.

Mr. Robert Ritchie (CR-020)
Chairman, Federal Criminal Procedures Committee,
American College of Trial Lawyers
Knoxville, Tennessee
February 11, 1998

Mr. Ritchie writes on behalf of the American College of Trial Lawyers and is opposed to the proposed changes of Rule 11(c)(6) because the changes would institutionalize the practice of requiring criminal defendants to waive rights of appeal and collateral attack of illegal sentences. He notes that "Rule 11(e)(1)(c) already allows agreed-to sentences, which is an appropriate procedure through which to ensure that a sentencing appeal is unnecessary." He states that the proposed practice violates the Due Process Clause because the waiver would not be knowing, voluntary and intelligent when a sentence has not yet been imposed. In support of his rationale he cites *United States v. Johnson*, written by District Court Judge Green (see, *supra*, Judge Friedman) and *United States v. Melancon*, 972 F.2d 566, 570-580 (5th Cir. 1992).

Carol A. Brook (CR-021a)
Chicago, Illinois
William J. Genego
Santa Monica, California
Peter Goldberger
Ardmore, Pennsylvania
Co-Chairs, National Association of Criminal Defense Lawyers
Committee on Rules of Procedure
February 15, 1998

The NACDL strongly oppose the proposed amendment to Rule 11(c)(6) on both procedural and substantive grounds. The NACDL recognizes the purpose of the amendment is to ensure that defendants who are waiving their appellate rights are doing so knowingly. But it believes that this proposed change would signal the Judicial Conference's approval of appeal waivers. The NACDL states that appeal waivers are "so inherently coercive and unfair that they should not be tolerated in our system of justice." The NACDL believes that the amendment is premature because it puts the Committee in the position of making law. This is true in large part, the NACDL notes, because the courts of this country have reached consensus on whether or not appeal waivers are constitutionally permissible. The NACDL also believes that the amendment is premature because the courts do not agree on what an appeal waiver means. The NACDL notes that even courts who accept this practice disagree on what may be waived. The

NACDL expresses its support of the opinion of District Court Judge Friedman and Green in *United States v. Raynor*, Crim. No. 97-186 (D.D.C. Dec. 29, 1997) and *United States v. Johnson*, Crim. No. 97-305 (D.D.C. August 8, 1997). The NACDL states that appeal waivers violate the constitution, violate public policy and invite, and encourage illegal sentences where both parties to an agreement no that their practices will not be subject to review.

Professor Bruce Comly French (CR-022)
Honorable Barbara Jones
Co-Chaipersons
ABA Criminal Justice Section
Committee on Rules of Evidence and Criminal Procedure
Washington, D.C.
February 17, 1998

The ABA supports the proposed change to rule 11(c)(6) that would make a defendant aware of the waiver of any appellate rights. The ABA urges the Committee to consider ABA Standard for Criminal Justice 14.1.4(c) that encourages the court to make the defendant aware of possible collateral consequences of pleading guilty. However, the ABA opposes the proposal to change the second sentence of Rule 11(e)(1)(C) because it mandates the court acceptance of a plea binds the court to specific sentencing ranges. The ABA generally supports the third sentence of (e)(1)(C) that would prohibit court participation in any discussions between the parties concerning plea agreements. However, it notes that ABA Standard 14-3.3 would permit the parties upon agreement to seek the judge's opinion about the acceptability of certain plea agreements.

Agenda Item III B4

MEMO TO: **Members, Criminal Rules Advisory Committee**

FROM: **Professor Dave Schlueter, Reporter**

RE: **Proposed Amendment to Rule 24(c). Alternate Jurors**

DATE: **March 23, 1998**

The proposed amendment to Rule 24(c) was designed to give the trial court the discretion to retain any alternate jurors after the jury has retired to deliberate.

Of the five comments received on the proposed change, three (all private practitioners) support the change. The NADCL and ABA are opposed to the amendment. The NADCL's opposition rests primarily on the argument that there is currently no provision in the Rules to permit an alternate juror to replace a juror after deliberations have commenced.

Rule 24. Trial Jurors

* * * * *

(c) ALTERNATE JURORS.

(1) *In General.* The court may empanel no ~~direct~~ ~~that not~~ more than 6 jurors, in addition to the regular jury, ~~be called and impanelled~~ to sit as alternate jurors. An alternate juror, ~~Alternate jurors~~ in the order ~~in which they are~~ called, shall replace a juror ~~jurors~~ who, ~~prior to the time the jury retires to consider its verdict,~~ becomes or is found ~~become or are found~~ to be unable or disqualified to perform juror ~~their~~ duties. Alternate jurors shall (i) be drawn in the same manner, ~~shall~~ (ii) have the same qualifications, ~~shall~~ (iii) be subject to the same examination and challenges, and ~~shall~~ (iv) take the same oath as regular jurors. An alternate juror has ~~and shall have~~ the same functions, powers, facilities and privileges as a regular juror. ~~the regular jurors. An alternate juror who does not replace a regular juror shall be discharged after the jury retires to consider its verdict.~~

(2) *Peremptory Challenges.* In addition to challenges otherwise provided by law, each ~~Each~~ side is entitled to 1 additional peremptory challenge ~~in addition to those otherwise allowed by law~~ if 1 or 2 alternate jurors are empaneled ~~to be impanelled~~, 2 additional peremptory

challenges if 3 or 4 alternate jurors are ~~to be~~ empaneled ~~impanelled~~, and 3 additional peremptory challenges if 5 or 6 alternate jurors are empaneled ~~to be impanelled~~. The additional peremptory challenges may be used to remove ~~against~~ an alternate juror only, and the other peremptory challenges allowed by these rules may not be used to remove ~~against~~ an alternate juror.

(3) *Discharge.* 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 regular juror during deliberations.

COMMITTEE NOTE

As currently written, Rule 24(c) explicitly requires the court to discharge all of the alternate jurors — who have not been selected to replace other jurors — when the jury retires to deliberate. That requirement is grounded on the concern that after the case has been submitted to the jury, its deliberations must be private and inviolate. *United States v. Houlihan*, 92 F.3d 1271, 1285 (1st Cir. 1996), *citing United States v. Virginia Erection Corp.*, 335 F.2d 868, 872 (4th Cir. 1964).

Rule 23(b) provides that in some circumstances a verdict may be returned by less than twelve jurors. There may be cases, however, where it is better to retain the alternates when the jury retires, insulate them from the deliberation process, and have them available should one or more vacancies occur in the jury. That might be especially appropriate in a long, costly, and complicated case. To that end the Committee believed that the court should have the discretion to decide whether to retain or discharge the alternates at the time the jury retires to deliberate.

In order to protect the sanctity of the deliberative process, the rule requires the court to take appropriate steps to insulate the alternate jurors. That may be done, for example, by separating the

alternates from the deliberating jurors and instructing the alternate jurors not to discuss the case with any other person until they replace a regular juror. *See,* e.g., *United States v. Olano*, 507 U.S. 725 (1993) (not plain error to permit alternate jurors to sit in during deliberations); *United States v. Houlihan*, 92 F.3d at 1286-88 (harmless error to retain alternate jurors in violation of Rule 24(c); in finding harmless error the court cited the steps taken by the trial judge to insulate the alternates). If alternates are used, the jurors must be instructed that they must begin their deliberations anew.

Finally, the rule has been reorganized and restyled.

ADVISORY COMMITTEE ON FEDERAL RULES OF CRIMINAL PROCEDURE

PROPOSED AMENDMENTS TO RULE 24

I. SUMMARY OF COMMENTS: Rule 24

The Committee received five comments on the proposed amendment to Rule 24: Three private practitioners support the proposed amendment. The National Association of Criminal Defense Lawyers and the American Bar Association are opposed to the amendment in it present form.

II. LIST OF COMMENTATORS: Rule 24

CR-003 Jack E. Horsley, Esq., Craig & Craig, Matoon, Illinois, September 23, 1997

CR-005 James W. Evans, Esq., American College of Trial Lawyers, Harrisburg, Pennsylvania, September 25, 1997

CR-011 Prentice H. Marshall, American College of Trial Lawyers, Ponce Inlet, Florida, November 14, 1997

CR-021a National Association of Criminal Defense Lawyers Committee on Rules of Procedure (Carol A. Brook, William J. Genego, Peter Goldberger), February 15, 1998

CR-022 ABA Criminal Justice Section, Committee on Rules of Evidence and Criminal Procedure (Professor Bruce Comly French, Honorable Barbara Jones, Co-Chaipersons) Washington, D.C., February 17, 1998

III. COMMENTS: Rule 24

Jack E. Horsley, Esq. (CR-003)
Craig & Craig
Matoon, Illinois
September 23, 1997

Mr. Horsley favors the proposed changes.

James W. Evans (CR-005)
Harrisburg, Pennsylvania
September 25, 1997

Mr. Evans states that the proposed changes seem sensible to him.

Prentice H. Marshall (CR-011)
Ponce Inlet, Florida
November 14, 1997

Mr. Marshall is very much in favor of the proposed amendment to Rule 24(c) which would allow district judges to retain alternate jurors during deliberations so that they may be substituted for juror who becomes incapacitated during deliberations. He is not opposed to any of the proposed changes.

Carol A. Brook (CR-021a)
Chicago, Illinois
William J. Genego
Santa Monica, California
Peter Goldberger
Ardmore, Pennsylvania
Co-Chairs, National Association of Criminal Defense Lawyers
Committee on Rules of Procedure
February 15, 1998

The NACDL urges that the proposed amendment not be adopted because at the present time there is no provision which would allow an alternate juror to replace a regular juror after deliberations have commenced. It notes that if the Committee's intent is to enable alternates to replace jurors during deliberations, the Committee should propose an amendment which says so forthrightly.

Professor Bruce Comly French (CR-022)
Honorable Barbara Jones
Co-Chaipersons
ABA Criminal Justice Section
Committee on Rules of Evidence and Criminal Procedure
Washington, D.C.

The ABA opposes the proposed change to Rule 24(c) that allows for the retention of alternate jurors once jury deliberations begin. Quoting ABA Standard for Criminal Justice 15-2.9 it notes that allowing this practice increases risks of the

jury returning a verdict based on "a less than thorough evaluation of the evidence."

Agenda Item III B5

MEMO TO: Members, Criminal Rules Advisory Committee

FROM: Professor David A. Schlueter, Reporter

RE: Proposed Amendments to Rule 30

DATE: March 24, 1998

The Committee received only six comments on the proposed change to Rule 30, which would permit the trial court to require the parties to file their requests for instructions before the trial starts. Under the current rule that practice is not permitted. The majority of those commenting support the change. A summary of the comments received is attached, along with a copy of the published rule.

The NADCL opposes the change, largely because in a criminal case the defendant could be required to reveal the theory of his or her case before the trial actually starts, which would give the government another unfair advantage. It proposes that the rule be redrafted to state that a criminal defendant may not be required to submit its proposed instructions until after the government has rested, and that in any event, the defense should have the absolute right to submit additional requests after both sides have rested. The current rule, however, already permits to some extent what the NADCL fears. Under the present rule, a trial judge in a criminal case could require the prosecution and defense to file their requested instructions as soon as the trial commences, *e.g.* in the middle of the government's case.

Also attached is a copy of correspondence from Judge Stotler who notes that in addition to the timing issues addressed in the proposed amendment, there may be other issues--identified by the Civil Rules Committee in its consideration of similar amendments to Civil Rule 51--which may arise with regard to Rule 30. Those materials raise some of the issues discussed at earlier meetings on the proposed amendment to Rule 31, i.e., some of the advantages and disadvantages of requiring pretrial submission of issues. Of course, the point raised by the NADCL concerning the defendant in a criminal case do not arise as such in the civil setting where pretrial discovery and pleadings practice has probably given both sides a good idea what the case will be about. In complex criminal cases,. where such notice is not normally required there may be even a greater benefit for the court to see what the government and defense will be arguing and thus better inform the trial court what the evidence is likely to show. The other issues raised the materials seem to focus on preservation of error issues vis a vis requests and objections to instructions—an issue not addressed at all in the currently proposed amendments to Rule 30.

Rule 30. Instructions

Any party may request in writing that the court instruct the jury on the law as specified in the request. The request may be made ~~At~~ at the close of the evidence, or at ~~during the trial~~ such any earlier time that ~~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, a copy of the request shall be furnished to all other parties. ~~copies of such requests shall be furnished to all parties.~~ Before closing arguments, the ~~The~~ court shall inform counsel of its proposed action on the requests ~~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 appeal from ~~assign as error~~ any portion of the charge or from anything omitted, ~~omission therefrom~~ unless that party objects ~~thereto~~ before the jury retires to consider its verdict and states, ~~stating~~ distinctly the matter to which objection is made ~~that party objects~~ and the grounds for ~~of~~ the objection. An opportunity must ~~Opportunity shall~~ be given to object ~~make the objection~~ out of the jury's hearing ~~of the jury~~ and, on request ~~of any party~~, out of the jury's presence ~~of the jury~~.

COMMITTEE NOTE

The amendment addresses 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 now permits a court to do so in a particular case or as a matter of local practice under local rules promulgated under Rule 57.

ADVISORY COMMITTEE ON
FEDERAL RULES OF CRIMINAL PROCEDURE

PROPOSED AMENDMENT TO RULE 30

II. SUMMARY OF COMMENTS: Rule 30

The Committee received six comments on the proposed changes to Rule 30. A district judge and three practitoners, two of whom are also members of the American College of Trial Lawyers support the proposed amendment. The National Association of Criminal Defense Lawyers is adamantly opposed to the amendment. A circuit executive suggests that the rules allow court to amend their local rules to permit the practice embodied in the proposed changes to Rule 30.

II. LIST OF COMMENTATORS: Rule 30

CR-003	Jack E. Horsley, Esq., Craig & Craig, Matoon, Illinois, September 23, 1997
CR-005	James W. Evans, Esq., Harrisburg, Pennsylvania, September 25, 1997
CR-007	Judge Malcolm Muir, District Court Judge, Williamsport, Pennsylvania, October 10, 1997
CR-011	Prentice H. Marshall, American College of Trial Lawyers, Ponce Inlet, Florida, November 14, 1997
CR-015	Gregory B. Walters, Circuit Executive for United States Courts for the Ninth Circuit, San Fransisco, California, December 4, 1997
CR-021a	National Association of Criminal Defense Lawyers Committee on Rules of Procedure (Carol A. Brook, William J. Genego, Peter Goldberger), February 15, 1998

III. COMMENTS: Rule 30

Jack E. Horsley, Esq. (CR-003)
Craig & Craig
Matoon, Illinois
September 23, 1997

Mr. Horsley favors the proposed changes.

James W. Evans (CR-005)
Harrisburg, Pennsylvania
September 25, 1997

Mr. Evans states that the proposed changes seem sensible to him.

Judge Malcolm Muir (CR-007)
District Court Judge
Middle District of Pennsylvania
Williamsport, Pennsylvania
October 10, 1997

Judge Muir supports the idea of allowing judges to charge the jury before closing arguments because it is better for counsel to know what the charge will be before they begin their arguments. He suggests that if closing arguments are made before the charge, the court should inform counsel before closing arguments of its proposed action on the requests.

Prentice H. Marshall (CR-011)
Ponce Inlet, Florida
November 14, 1997

Mr. Marshall favors the proposed change to Rule 30 which gives the trial court the discretion to require or permit parties to file requested jury instructions before trial.

Judge Gregory B. Walters (CR-015)
Circuit Executive
United States Courts for the Ninth Circuit
San Fransisco, California
December 4, 1997

Judge Walters recommends that Rule 30 be amended to authorize local rules which require that criminal jury instructions be filed before trial. He notes that the benefits are that the court has before it each party's theory and that there is no interruption in the flow of the trial.

Carol A. Brook (CR-021a)
Chicago, Illinois
William J. Genego
Santa Monica, California
Peter Goldberger
Ardmore, Pennsylvania
Co-Chairs, National Association of Criminal Defense Lawyers
Committee on Rules of Procedure
February 15, 1998

The NACDL objects to the proposed amendment which would require parties to file their requested jury instructions before trial. The NACDL is opposed to this amendment because "it appears to authorize the district court to require the defendant to reveal the theory of the defense prior to the commencement of the trial." The NACDL contends that this would give the government another undue advantage in the prosecution of criminal cases. It notes that a criminal defendant is entitled to instructions on the evidence that has been presented, but that a defendant often does not know what this evidence will be until witnesses have taken the stand. This proposed amendment would expand Rule 12 without a showing or informed debate on issues. The NACDL believes that the reasons behind the proposed amendment is convenience for the trial judge and not "any perceived need to promote the administration of justice." The NACDL says that the Rule should make clear that the defendant must never be required to submit its charge before the government has rested its case and that at the very least have the absolute right to submit additional requested instructions after the close of all evidence.

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

ALICEMARIE H. STOTLER
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CHAIRS OF ADVISORY COMMITTEES

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PAUL V. NIEMEYER
CIVIL RULES

W. EUGENE DAVIS
CRIMINAL RULES

FERN M. SMITH
EVIDENCE RULES

MEMORANDUM

March 16, 1998

To: Judge W. Eugene Davis
Professor David A. Schlueter

From: Judge Alicemarie H. Stotler

Re: Overlapping Information from Civil Rules

In reviewing the agenda book for the upcoming Civil Rules meeting, I noted that they are considering an amendment to Civil Rule 51 similar to the amendment to Criminal Rule 30 published for comment last fall. Beyond the question of the timing of the submission of jury instructions, however, Professor Cooper identifies several other issues that may need to be addressed if the rule is amended. In light of the similarities between the two rules, I am enclosing a copy of Professor Cooper's memo on the subject for the consideration of your committee.

Also, John Rabiej may have already forwarded to you the correspondence between Professors Cooper and Capra on the subject of Civil Rule 44. If not, I have enclosed it now for your information. As you can see, Criminal Rule 27 may be implicated.

I look forward to seeing you both next month in Washington.

enclosures

cc (all w/o enc.):
Judge Paul V. Niemeyer
Professor Edward H. Cooper
Professor Daniel J. Capra
Mr. John K. Rabiej

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Rule 51: Requests Before Trial and More

In the wake of its review of local rules, the Ninth Circuit Judicial Council has recommended that Civil Rule 51 be amended "to authorize local rules requiring the filing of civil jury instructions before trial." This recommendation raises at least three distinct questions. The most obvious is whether it is good policy to require that requests for instructions be filed before trial in some cases or in all cases. If pretrial request deadlines are desirable, it must be decided whether this matter should be confided to local rules or instead should be approached in a national rule. On the face of it, there is no apparent reason to relegate this matter to local option. It is difficult to imagine variations in local circumstances that make this policy more desirable in some parts of the country but less desirable in other parts. No more will be said about this question. The third and least obvious question is whether a general change in the Rule 51 request deadline should be the only change proposed for Rule 51. Rule 51 notoriously "does not say what it means, and does not mean what it says." If some part of the request-objection-review question is to be addressed, perhaps the rule should be approached as an integrated whole.

This Memorandum is designed only to introduce the topic. There is little reason to anticipate time for sufficient deliberation at the March, 1998 Advisory Committee meeting. Two questions are posed: Should Rule 51 be approached at all? If some Rule 51 changes are to be studied, should the full range of possibly desirable changes be considered?

Pretrial Instruction Requests

The first sentence of Rule 51 now reads:

> At the close of the evidence or at such earlier time during 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.

This sentence seems to limit the court's authority to directing that requests filed before the close of the evidence be filed "during trial," not before trial. It is difficult to find anything in the generalities of Rule 16 that can be read as an implicit license to direct earlier requests. Local rules that require pretrial requests are at great risk of being held invalid as inconsistent with Rule 51.

Three principal advantages seem to underlie the interest in pretrial jury requests. Pretrial requests will help the court if it wishes to provide preliminary instructions at the beginning of the trial. All parties will have a better idea of the instructions likely to be given, and can shape trial presentations accordingly; this advantage would be enhanced if the court were required to make at least preliminary rulings on the requests before trial. The court will have more time to consider the requests, particularly if it is not required to make final rulings before trial. There may

be incidental advantages as well. The competing requests may focus the dispute in ways that support renewed consideration of motions to dismiss or for summary judgment. The better focus may instead suggest that potentially dispositive issues be tried first, cf. Rules 16(c)(14) and 50(a), or be designated for separate trial. Advantages of this sort are most likely to be realized if the instruction requests are made part of the pretrial conference procedure.

The potential disadvantages of pretrial instruction requests arise from inability to predict just what the evidence will reveal. In smaller part, the problem is that wishful parties may request instructions on issues that will not be supported by trial evidence. In larger part, the problem is that even wishful parties may not anticipate all of the issues that will be supported by trial evidence. It will not do to prohibit requests as untimely when there was good reason to fail to anticipate the evidence that supports the request.

The simplest way to accommodate these conflicting concerns would be to strike the limiting language from Rule 51:

> 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 * * * .

The Committee Note could point to the reasons that may justify a direction that requests be filed before trial, particularly in complex cases. The reasons for caution also should be pointed out. One of the cautions might be a reflection on the meaning of Rule 51's fourth sentence: "No party may assign as error the giving or the failure to give an instruction unless the party objects thereto before the jury retires to consider its verdict * * *." This sentence does not mean that it is enough to make a request for the first time, couched as an "objection," before the jury retires. The objection works only if there was a duty to request, and there is a duty to request only if a timely request is made.

The reason for considering Rule 51 in more general terms is suggested by the cautionary observation that might be written to explain the difference between a request and an objection. It is easy for the uninitiated to misread Rule 51. It can be revised to convey its messages more clearly.

General Rule 51 Revision

Rule 51 can be read easily only by those who already know what it means. A party who wants an issue covered by instructions must do both of two things: make a timely request, and then separately object to failure to give the request as made. The cases that explain the need to renew the request by way of objection suggest that repetition is needed in part to ensure that the court has not simply forgotten the request or its intention to give the instruction, and in part to show the court that it has failed in its attempt to give the substance of a requested instruction in better form. An attempt to address an omitted issue by submissions

to the court after the request deadline fails because it is not an "objection" but an untimely request. Many circuits, moreover, recognize a "plain," "clear," or "fundamental" error doctrine that allows reversal despite failure to comply with Rule 51. This doctrine is explicit in the general "plain errors" provision of Criminal Rule 52; the contrast between this general provision and Rule 51 has led some circuits to reject the plain error doctrine for civil jury instructions.

Although unlikely, it also is possible that the formal requirements of Rule 51 may discourage the timid from making untimely requests that would be granted if made. Requests framed as objections may well be given, despite the risk that tardy requests will seduce the court into error, confuse the jury, or at least unduly emphasize one issue.

Present Rule 51 is set out as a prelude to a revised draft, adding only numbers to indicate the points at which distinct thoughts emerge in the text:

> [1: Requests] 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. The court shall inform counsel of its proposed action upon the requests prior to their arguments to the jury. [2: Instructions] The court, at its election, may instruct the jury before or after argument, or both. [3: Objections] No party may assign as error the giving or the failure to give an instruction unless that party objects thereto before the jury retires to consider its verdict, stating distinctly the matter objected to and the grounds of the objection. Opportunity shall be given to make the objection out of the hearing of the jury.

The following draft Rule 51 is only an approximation that suggests many of the issues that might be addressed by a comprehensive attempt to adopt a rule that better guides parties and courts:

Rule 51. Instructions to Jury: Objection

(a) **Requests.** A party may file written requests that the court instruct the jury on the law as set forth in the requests at the close of the evidence or at an earlier reasonable time directed by the court. The court must inform the parties of its proposed action on the requests before jury arguments. The court may, in its discretion, permit an untimely request [to be] made at any time before the jury retires to consider its verdict.

(b) **Objections.** A party may object to an instruction or the failure to give an instruction before the jury retires to consider its verdict, stating distinctly the matter objected to and the grounds of the objection. Opportunity must be given to make the objection out of the jury's hearing.

(c) **Instructions.** The court may instruct the jury at any time after trial begins. Final instructions must be given to the jury before or after argument, or both.

(d) **Forfeiture; plain error**

(1) A party may not assign as error a mistake in an instruction actually made unless the party made a proper objection under subdivision (b).

(2) A party may not assign as error a failure to give an instruction unless the party made a proper request under subdivision (a), and – unless the court made it clear that the request had been considered and rejected – also made a proper objection under subdivision (b).

(3) A court may set aside a jury verdict for error in the instructions that has not been preserved as required by paragraphs (1) or (2), taking account of the obviousness of the error, the importance of the error, the costs of correcting the error, and the importance of the action to nonparties.

Committee Note

Rule 51 is revised to capture many of the interpretations that have emerged in practice. The revisions in text will make uniform the conclusions reached by a majority of decisions on each point.

Requests. Subdivision (a) governs requests. Apart from the plain error doctrine recognized in subdivision (d)(3), a court is not obliged to instruct the jury on issues raised by the evidence unless a party requests an instruction. The revised rule recognizes the court's authority to direct that requests be submitted before trial. Particularly in complex cases, pretrial requests can help the parties prepare for trial. In addition, pretrial requests may focus the case in ways that invite reconsideration of motions to dismiss or for summary judgment. Trial also may be shaped by severing some matters for separate trial, or by directing that trial begin with issues that may warrant disposition by judgment as a matter of law; see Rules 16(c)(14) and 50(a). The rule permits the court to further support these purposes by informing the parties of its action on their requests before trial. It seems likely that the deadline for pretrial requests will often be connected to a final pretrial conference.

The risk in directing a pretrial request deadline is that unanticipated trial evidence may raise new issues or reshape issues the parties thought they had understood. The need for a pretrial request deadline may not be great in an action that involves well-settled law that is familiar to the court. Courts should avoid a routine practice of directing pretrial requests.

Untimely requests are often accepted, at times by acting on an objection to the failure to give an instruction on an issue that was not framed by a timely request. The revised rule expressly recognizes the court's discretion to act on an untimely request. The most important consideration in exercising discretion is the importance of the issue to the case — the closer the issue lies to the "plain error" that would be recognized under subdivision (d)(3), the better the reason to give an instruction. The cogency of the reason for failing to make a timely request also should be considered — the earlier the request deadline, the more likely it is that good reason will appear for failing to recognize an important issue. Courts also must remain wary, however, of the risks posed by tardy requests. Hurried action in the closing minutes of trial may invite error. A jury may be confused by a tardy instruction made after the main body of instructions, and in any event may be misled to focus undue attention on the issues isolated and emphasized by a tardy instruction.

Objections. No change is intended in the requirements for making objections.

Instructions. Subdivision (c) expressly authorizes preliminary instructions at the beginning of the trial, a device that may be a helpful aid to the jury. In cases of unusual length or complexity, interim instructions also may be made during the course of trial.

Forfeiture and plain error. Many cases hold that a proper request for a jury instruction is not alone enough to preserve the right to appeal failure to give the instruction. The request must be renewed by objection. An objection, on the other hand, is sufficient only as to matters actually stated in the instructions. Even if framed as an objection, a request to include matter omitted from the instructions is just that, a request, and is untimely after the close of the evidence. This doctrine is appropriate when the court may not have sufficiently focused on the request, or may believe that the request has been granted in substance although in different words. This doctrine may also prove a trap for the unwary who fail to add an objection after the court has made it clear that the request has been considered and rejected on the merits. The authority to act on an untimely request despite a failure to object is established in subdivision (a). Subdivision (d)(2) establishes authority to review the failure to grant a timely request, despite a failure to add an objection, when the court has made clear its consideration and rejection of the request.

Many circuits have recognized the power to review errors not preserved under Rule 51 in exceptional cases. The foundation of these decisions is that a district court owes a duty to the parties, to the law, and to the jury to give correct instructions on the fundamental elements of an action. This duty is shaped by at least the four factors enumerated in subdivision (d)(3).

The obviousness of the error reduces the need to rely on the parties to help the court with the law, and also bears on society's obligation to provide a reasonably learned judge. Obviousness turns not only on how well the law is settled, but also on how familiar the particular area of law should be to most judges. Clearly settled but exotic law often does not generate obvious error.

The importance of the error must be measured by the role the issue plays in the specific case; what is fundamental to one case may be peripheral in another. Importance is independent of obviousness. The most obvious example involves law that was clearly settled at the time of the instructions, only to be overruled by the time of appeal.

The costs of correcting an error are affected by a variety of factors. If a complete new trial must be had for other reasons, ordinarily an instruction error at the first trial can be corrected for the second trial without significant cost. A Rule 49 verdict may enable correction without further proceedings.

In a case that seems close to the fundamental error line, account also may be taken of the impact a verdict may have on nonparties. Common examples are provided by actions that attack government actions or private discrimination.

Agenda Item III-36

MEMO TO: **Members, Criminal Rules Advisory Committee**

FROM: **Professor Dave Schlueter, Reporter**

RE: **Proposed Amendments to Rule 31**

DATE: **March 23, 1998**

The proposed amendment to Rule 31 deletes subdivision (c), which related to criminal forfeiture--a subject now covered in proposed new Rule 32.2.

The Committee received no comments on the proposed change.

Rule 31. Verdict

* * * * *

~~(e) CRIMINAL FORFEITURE. If the indictment or the information alleges that an interest or property is subject to criminal forfeiture, a special verdict shall be returned as to the extent of the interest or property subject to forfeiture, if any.~~

COMMITTEE NOTE

The rule is amended to reflect the creation of new Rule 32.2, which now governs criminal forfeiture procedures.

ADVISORY COMMITTEE ON
FEDERAL RULES OF CRIMINAL PROCEDURE

PROPOSED AMENDMENT TO RULE 31

I. SUMMARY OF COMMENTS: Rule 31

The Committee received no written comments on the proposed change to Rule 31.

II. LIST OF COMMENTATORS: Rule 31

None

III. COMMENTS: Rule 32

None

Agenda Item III B7

MEMO TO: **Members, Criminal Rules Advisory Committee**

FROM: **Professor Dave Schlueter, Reporter**

RE: **Proposed Amendment to Rule 32**

DATE: **March 24, 1998**

The proposed change to Rule 32(d), which would delete all of paragraph (d)(2) is a technical amendment. That provision would be replaced by proposed new Rule 32.2.

The Committee received no comments on the proposed amendment.

Rule 32. Sentence and Judgment

* * * * *

(d) JUDGMENT.

* * * * *

(2) *Criminal Forfeiture.* Forfeiture procedures are governed by Rule 32.2. ~~If a verdict contains a finding that property is subject to criminal forfeiture, or if a defendant enters a guilty plea subjecting property to such forfeiture, the court may enter a preliminary order of forfeiture after providing notice to the defendant and a reasonable opportunity to be heard on the timing and form of the order. The order of forfeiture shall authorize the Attorney General to seize the property subject to forfeiture, to conduct any discovery that the court considers proper to help identify, locate, or dispose of the property, and to begin proceedings consistent with any statutory requirements pertaining to ancillary hearings and the rights of third parties. At sentencing, a final order of forfeiture shall be made part of the sentence and included in the judgment. The court may include in the final order such conditions as may be reasonably necessary to preserve the value of the property pending any appeal.~~

* * * * *

COMMITTEE NOTE

The rule is amended to reflect the creation of new Rule 32.2, which now governs criminal forfeiture procedures.

ADVISORY COMMITTEE ON
FEDERAL RULES OF CRIMINAL PROCEDURE

PROPOSED AMENDMENT TO RULE 32

I. SUMMARY OF COMMENTS: Rule 32

The Committee received no written comments on the proposed change to Rule 32.

II. LIST OF COMMENTATORS: Rule 32

None

III. COMMENTS: Rule 32

None

Agenda Item III B8

MEMO TO: **Members, Criminal Rules Advisory Committee**

FROM: **Professor Dave Schlueter, Reporter**

RE: **Proposed Rule 32.2**

DATE: **March 25, 1998**

Attached are copies of Rule 32.2, as it was published for public comment, a summary of the written comments on the new rule, and a copy of a response from the Department of Justice to comments submitted by NADCL.

Judge Davis has appointed a Rule 32.2 subcommittee to focus specifically on the new rule and the written comments submitted to the Committee. That subcommittee consists of Judge Dowd (Chair). Mr. Pauley, Professor Stith, and Mr. Josefsberg. A copy of his appointing letter is also attached.

Finally, I have attached a memo from John Rabiej concerning some possible ambiguities in use of the term "ancillary proceeding" in Rule 32.2(d), and suggests some clarifying language.

Several witnesses will testify on Rule 32.2 at the hearing to be held before the Committee meeting on Monday, April 27th, including representatives from the NADCL and the DOJ..

32.2. Criminal Forfeiture

(a) INDICTMENT OR INFORMATION. No judgment of forfeiture may be entered in a criminal proceeding unless the indictment or information alleges that a defendant has a possessory or legal interest in property that is subject to forfeiture in accordance with the applicable statute.

(b) HEARING AND ENTRY OF PRELIMINARY ORDER OF FORFEITURE. As soon as practicable after entering a guilty verdict or accepting a plea of guilty or nolo contendere on any count in the indictment or information for which criminal forfeiture is alleged, the court shall determine what property is subject to forfeiture because it is related to the offense. The determination may be based on evidence already in the record, including any written plea agreement, or on evidence adduced at a post trial hearing. If the property is subject to forfeiture, the court shall enter a preliminary order directing the forfeiture of whatever interest each defendant may have in the property, without determining what that interest is. Deciding the extent of each defendant's interest is deferred until any third party claiming an interest in the property has petitioned the court to consider the claim. If no such petition is timely filed, and the court finds that a defendant had a possessory or legal interest, the property is forfeited in its entirety.

(c) PRELIMINARY ORDER OF FORFEITURE. When the court enters a preliminary order of forfeiture, the Attorney General may seize the property subject to forfeiture; conduct any discovery as the court considers proper in identifying, locating or disposing of the property; and commence proceedings consistent with any statutory requirements pertaining to 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 whatever conditions are reasonably necessary to preserve the property's value pending any appeal.

(d) ANCILLARY PROCEEDING.

(1) If, as prescribed by statute, a third party files a petition asserting an interest in the forfeited property, the court shall conduct an ancillary proceeding. In that proceeding, the court may consider a motion to dismiss the petition for lack of standing, for failure to state a claim upon which relief can be granted, or for any other ground. For purposes of the motion, the facts set forth in the petition are assumed to be true.

(2) If a Rule 32.2(d)(1) motion to dismiss is denied, or not made, the court may permit the parties to conduct discovery in accordance with the Federal Rules of Civil Procedure to the extent that the court determines such discovery to be necessary or desirable to resolve factual issues before conducting an evidentiary hearing. After discovery ends, either party may ask the court to dispose of the petition on a motion for summary judgment in the manner described in Rule 56 of the Federal Rules of Civil Procedure.

(3) After the ancillary proceeding, the court shall enter a final order of forfeiture amending the preliminary order as necessary to account for the disposition of any third-party petition.

(4) If multiple petitions are filed in the same case, an order dismissing or granting fewer than all of the petitions is not appealable until all petitions are resolved, unless the

court determines that there is no just reason for delay and directs the entry of final judgment on one or more but fewer than all of the petitions.

(e) STAY OF FORFEITURE PENDING APPEAL. If the defendant appeals from the conviction or order of forfeiture, the court may stay the order of forfeiture upon terms that the court finds appropriate to ensure that the property remains available in case the conviction or order of forfeiture is vacated. The stay will not delay the ancillary proceeding or the determination of a third party's rights or interests. If the defendant's appeal is still pending when the court determines that the order of forfeiture shall be amended to recognize a third party's interest in the property, the court shall amend the order of forfeiture but shall refrain from directing the transfer of any property or interest to the third party until the defendant's appeal is final, unless the defendant consents in

writing, or on the record, to the transfer of the property or interest to the third party.

(f) SUBSTITUTE PROPERTY. If the applicable statute authorizes the forfeiture of substitute property, the court may at any time consider a motion by the government to order forfeiture of substitute property. If the government makes the requisite showing, the court shall enter an order forfeiting the substitute property, or shall amend an existing preliminary or final order to include that property.

COMMITTEE NOTE

Rule 32.2 consolidates a number of procedural rules governing the forfeiture of assets in a criminal case. Existing Rules 7(c)(2), 31(e) and 32(d)(2) are also amended to conform to the new rule. In addition, the forfeiture-related provisions of Rule 38(e) are stricken.

Subdivision (a). Subdivision (a) is derived from Rule 7(c)(2) which provides that notwithstanding statutory authority for the forfeiture of property following a criminal conviction, no forfeiture order may be entered unless the defendant was given notice of the forfeiture in the indictment or information. As courts have held, subdivision (a) is not intended to require that an itemized list of the

property to be forfeited appear in the indictment or information itself; instead, such an itemization may be set forth in one or more bills of particulars. *See United States v. Moffitt, Zwerling & Kemler, P.C.*, 83 F.3d 660, 665 (4th Cir. 1996), *aff'g* 846 F. Supp. 463 (E.D. Va. 1994) (*Moffitt* I) (indictment need not list each asset subject to forfeiture; under Rule 7(c), this can be done with bill of particulars). The same applies with respect to property to be forfeited only as "substitute assets." *See United States v. Voigt*, 89 F.3d 1050 (3rd Cir. 1996) (court may amend order of forfeiture at any time to include substitute assets).

Subdivision (b). Subdivision (b) replaces Rule 31(e) which provides that the jury in a criminal case must return a special verdict "as to the extent of the interest or property subject to forfeiture." *See United States v. Saccoccia*, 58 F.3d 754, 785 (1st Cir. 1995) (Rule 31(e) only applies to jury trials; no special verdict required when defendant waives jury right on forfeiture issues). After the Rule was promulgated in 1972, changes in the law created several problems.

The first problem concerns the role of the jury. When Rule 31(e) was promulgated, it was assumed that criminal forfeiture was akin to a separate criminal offense on which evidence would be presented and the jury would have to return a verdict. In *Libretti v. United States*, 116 S. Ct. 356 (1995), however, the Supreme Court held that criminal forfeiture constitutes an aspect of the sentence imposed in a criminal case and that the defendant has no constitutional right to have the jury determine any part of the forfeiture. The special verdict requirement in Rule 31(e), the Court said, is in the nature of a statutory right that can be modified or repealed at any time.

Even before *Libretti*, lower courts had determined that criminal forfeiture is a sentencing matter and concluded that criminal trials therefore should be bifurcated so that the jury first returns a verdict on guilt or innocence and then returns to hear evidence regarding the forfeiture. In the second part of the bifurcated proceeding, the jury is instructed that the government must establish the forfeitability of the property by a preponderance of the evidence. *See United States v. Myers*, 21 F.3d 826 (8th Cir. 1994) (preponderance standard applies because criminal forfeiture is part of the sentence in money laundering cases); *United States v. Voigt*, 89 F.3d 1050 (following *Myers*); *United States v. Smith*, 966 F.2d 1045, 1050-53 (6th Cir. 1992) (same for drug cases); *United States v. Bieri*, 21 F.3d 819 (8th Cir. 1994) (same).

In light of *Libretti*, it is questionable whether the jury should have any role in the forfeiture process. Traditionally, juries do not have a role in sentencing other than in capital cases, and elimination of that role in criminal forfeiture cases would streamline criminal trials. Undoubtedly, it may be confusing for a jury to be instructed regarding a different standard of proof in the second phase of the trial, and it is burdensome to have to return to hear additional evidence after what may have been a contentious and exhausting period of deliberation regarding the defendant's guilt or innocence.

For these reasons, the proposal replaces Rule 31(e) with a provision that requires the court alone, as soon as practicable after the verdict in the criminal case, to hold a hearing to determine if the property was subject to forfeiture, and to enter a preliminary order of forfeiture.

The second problem with Rule 31(e) concerns the scope of the determination that must be made prior to entering an order of

forfeiture. This issue is the same whether the determination is made by the court or by the jury.

As mentioned, the current Rule requires the jury to return a special verdict "as to the extent of the interest or property subject to forfeiture." Some courts interpret this to mean only that the jury must answer "yes" or "no" when asked if the property named in the indictment is subject to forfeiture under the terms of the forfeiture statute — e.g. was the property used to facilitate a drug offense? Other courts also ask the jury if the defendant has a legal interest in the forfeited property. Still other courts, including the Fourth Circuit, require the jury to determine the "extent" of the defendant's interest in the property vis a vis third parties. *See United States v. Ham*, 58 F.3d 78 (4th Cir. 1995) (case remanded to the district court to empanel a jury to determine, in the first instance, the extent of the defendant's forfeitable interest in the subject property).

The notion that the "extent" of the defendant's interest must be established as part of the criminal trial is related to the fact that criminal forfeiture is an *in personam* action in which only the defendant's interest in the property may be forfeited. *United States v. Riley*, 78 F.3d 367 (8th Cir. 1996). When the criminal forfeiture statutes were first enacted in the 1970's, it was clear that a forfeiture of property other than the defendant's could not occur in a criminal case, but there was no mechanism designed to limit the forfeiture to the defendant's interest. Accordingly, Rule 31(e) was drafted to make a determination of the "extent" of the defendant's interest part of the verdict.

The problem, of course, is that third parties who might have an interest in the forfeited property are not parties to the criminal case. At the same time, a defendant who has no interest in property

has no incentive, at trial, to dispute the government's forfeiture allegations. Thus, it was apparent by the 1980's that Rule 31(e) was an inadequate safeguard against the inadvertent forfeiture of property in which the defendant held no interest.

In 1984, Congress addressed this problem when it enacted a statutory scheme whereby third party interests in criminally forfeited property are litigated by the court in an ancillary proceeding following the conclusion of the criminal case and the entry of a preliminary order of forfeiture. *See* 21 U.S.C. § 853(n); 18 U.S.C. § 1963(l). Under this scheme, the court orders the forfeiture of the defendant's interest in the property — whatever that interest may be — in the criminal case. At that point, the court conducts a separate proceeding in which all potential third party claimants are given an opportunity to challenge the forfeiture by asserting a superior interest in the property. This proceeding does not involve relitigation of the forfeitability of the property; its only purpose is to determine whether any third party has a legal interest in the property such that the forfeiture of the property from the defendant would be invalid.

The notice provisions regarding the ancillary proceeding are equivalent to the notice provisions that govern civil forfeitures. *Compare* 21 U.S.C. § 853(n)(1) *with* 19 U.S.C. § 1607(a); *see United States v. Bouler*, 927 F. Supp. 911 (W.D.N.C. 1996) (civil notice rules apply to ancillary criminal proceedings). Notice is published and sent to third parties who have a potential interest. *See United States v. BCCI Holdings (Luxembourg) S.A. (In re Petition of Indosuez Bank)*, 916 F. Supp. 1276 (D.D.C. 1996) (discussing steps taken by government to provide notice of criminal forfeiture to third parties). If no one files a claim, or if all claims are denied following a hearing, the forfeiture becomes final and the United States is deemed to have clear title to the property. 21 U.S.C. § 853(n)(7);

United States v. Hentz, 1996 WL 355327 (E.D. Pa. 1996) (once third party fails to file a claim in the ancillary proceeding, government has clear title under § 853(n)(7) and can market the property notwithstanding third party's name on the deed).

Thus, the ancillary proceeding has become the forum for determining the extent of the defendant's forfeitable interest in the property. It allows the court to conduct a proceeding in which all parties can participate and which ensures that the property forfeited actually belongs to the defendant.

Since the enactment of the ancillary proceeding statutes, the requirement in Rule 31(e) that the court (or jury) determine the extent of the defendant's interest in the property as part of the criminal trial has become an unnecessary anachronism that leads more often than not to duplication and a waste of judicial resources. There is no longer any reason to delay the conclusion of the criminal trial with a lengthy hearing over the extent of the defendant's interest in property when the same issues will have to be litigated a second time in the ancillary proceeding if someone files a claim challenging the forfeiture. For example, in *United States v. Messino*, 921 F. Supp. 1231 (N.D. Ill. 1996), the court allowed the defendant to call witnesses to attempt to establish that they, not he, were the true owners of the property. After the jury rejected this evidence and the property was forfeited, the court conducted an ancillary proceeding in which the same witnesses litigated their claims to the same property.

A more sensible procedure would be for the court, once it determines that property was involved in the criminal offense for which the defendant has been convicted, to order the forfeiture of whatever interest a defendant may have in the property without

having to determine exactly what that interest is. If third parties assert that they have an interest in all or part of the property, those interests can be adjudicated at one time in the ancillary proceeding.

This approach would also address confusion that occurs in multi-defendant cases where it is clear that each defendant should forfeit whatever interest he may have in the property used to commit the offense, but it is not at all clear which defendant is the actual owner of the property. For example, suppose A and B are co-defendants in a drug and money laundering case in which the government seeks to forfeit property involved in the scheme that is held in B's name but of which A may be the true owner. It makes no sense to invest the court's time in determining which of the two defendants holds the interest that should be forfeited. Both defendants should forfeit whatever interest they may have. Moreover, to the extent that the current rule forces the court to find that A is the true owner of the property, it gives B the right to file a claim in the ancillary proceeding where he may attempt to recover the property despite his criminal conviction. *United States v. Real Property in Waterboro*, 64 F.3d 752 (lst Cir. 1995) (co-defendant in drug/money laundering case who is not alleged to be the owner of the property is considered a third party for the purpose of challenging the forfeiture of the other co-defendant's interest).

The new Rule resolves these difficulties by postponing the determination of the extent of the defendant's interest until the ancillary proceeding. Under this procedure, the court, as soon as practicable after the verdict in the criminal case, would determine if the property was subject to forfeiture in accordance with the applicable statute, e.g., whether the property represented the proceeds of the offense, was used to facilitate the offense, or was involved in the offense in some other way. The determination could be made by

the court alone based on the evidence in the record from the criminal trial or the facts set forth in a written plea agreement submitted to the court at the time of the defendant's guilty plea, or the court could hold a hearing to determine if the requisite relationship existed between the property and the offense. It would not be necessary to determine at this stage what interest any defendant might have in the property. Instead, the court would order the forfeiture of whatever interest each defendant might have in the property and conduct the ancillary proceeding. If someone files a claim, the court would determine the respective interests of the defendants versus the third party claimants and amend the order of forfeiture accordingly. On the other hand, if no one files a claim in the ancillary proceeding, the court would enter a final order forfeiting the property in its entirety only after the court makes a finding that one of the defendants had a possessory or legal interest in the property. This corresponds to the requirement under current law, at least as it is interpreted in some courts, in instances where Rule 31(e) applies.

Subdivision (c). Subdivision (c) replaces Rule 32(d)(2) (effective December 1996). It provides that once the court enters a preliminary order of forfeiture directing the forfeiture of whatever interest each defendant may have in the forfeited property, the government may seize the property and commence an ancillary proceeding to determine the interests of any third party. Again, if no third party files a claim, the court, at the time of sentencing, will enter a final order forfeiting the property in its entirety. If a third party files a claim, the order of forfeiture will become final as to the defendant at the time of sentencing but will be subject to amendment in favor of a third party pending the conclusion of the ancillary proceeding.

Because it is not uncommon for sentencing to be postponed for an extended period to allow a defendant to cooperate with the

government in an ongoing investigation, the Rule would allow the order of forfeiture to become final as to the defendant before sentencing, if the defendant agrees to that procedure. Otherwise, the government would be unable to dispose of the property until the sentencing took place.

Subdivision (d). Subdivision (d) sets forth a set of rules governing the conduct of the ancillary proceeding. When the ancillary hearing provisions were added to 18 U.S.C. § 1963 and 21 U.S.C. § 853 in 1984, Congress apparently assumed that the proceedings under the new provisions would involve simple questions of ownership that could, in the ordinary case, be resolved in 30 days. *See* 18 U.S.C. § 1963(l)(4). Presumably for that reason, the statute contains no procedures governing motions practice or discovery such as would be available in an ordinary civil case.

Experience has shown, however, that ancillary hearings can involve issues of enormous complexity that require years to resolve. *See United States v. BCCI Holdings (Luxembourg) S.A.*, 833 F. Supp. 9 (D.D.C. 1993) (ancillary proceeding involving over 100 claimants and $451 million); *United States v. Porcelli*, CR85-00756 (CPS), 1992 U.S. Dist. LEXIS 17928 (E.D.N.Y Nov. 5, 1992) (litigation over third party claim continuing 6 years after RICO conviction). In such cases, procedures akin to those available under the Federal Rules of Civil Procedure should be available to the court and the parties to aid in the efficient resolution of the claims.

Because an ancillary hearing is part of a criminal case, it would not be appropriate to make the Civil Rules applicable in all respects. The amendment, however, describes several fundamental areas in which procedures analogous to those in the Civil Rules may be followed. These include the filing of a motion to dismiss a claim,

conducting discovery, disposing of a claim on a motion for summary judgment, and appealing a final disposition of a claim. Where applicable, the amendment follows the prevailing case law on the issue. *See,* e.g., *United States v. Lavin*, 942 F.2d 177 (3rd Cir. 1991) (ancillary proceeding treated as civil case for purposes of applying Rules of Appellate Procedure); *United States v. BCCI Holdings (Luxembourg) S.A. (In re Petitions of General Creditors)*, 919 F. Supp. 31 (D.D.C. 1996) ("If a third party fails to allege in its petition all elements necessary for recovery, including those relating to standing, the court may dismiss the petition without providing a hearing"); *United States v. BCCI (Holdings) Luxembourg S.A. (In re Petition of Department of Private Affairs)*, 1993 WL 760232 (D.D.C. 1993) (applying court's inherent powers to permit third party to obtain discovery from defendant in accordance with civil rules). The provision governing appeals in cases where there are multiple claims is derived from Fed. R. Civ. P. 54(b).

Subdivision (e). Subdivision (e) replaces the forfeiture provisions of Rule 38(e) which provide that the court may stay an order of forfeiture pending appeal. The purpose of the provision is to ensure that the property remains intact and unencumbered so that it may be returned to the defendant in the event the appeal is successful. Subdivision (e) makes clear, however, that a district court is not divested of jurisdiction over an ancillary proceeding even if the defendant appeals his or her conviction. This allows the court to proceed with the resolution of third party claims even as the appeal is considered by the appellate court. Otherwise, third parties would have to await the conclusion of the appellate process even to *begin* to have their claims heard. *See United States v. Messino*, 907 F. Supp. 1231 (N.D. Ill. 1995) (the district court retains jurisdiction over forfeiture matters while an appeal is pending).

Finally, subdivision (e) provides a rule to govern what happens if the court determines that a third-party claim should be granted but the defendant's appeal is still pending. The defendant, of course, is barred from filing a claim in the ancillary proceeding. *See* 18 U.S.C. § 1963(l)(2); 21 U.S.C. § 853(n)(2). Thus, the court's determination, in the ancillary proceeding, that a third party has an interest in the property superior to that of the defendant cannot be binding on the defendant. So, in the event that the court finds in favor of the third party, that determination is final only with respect to the government's alleged interest. If the defendant prevails on appeal, he or she recovers the property as if no conviction or forfeiture ever took place. But if the order of forfeiture is affirmed, the amendment to the order of forfeiture in favor of the third party becomes effective.

Subdivision (f). Subdivision (f) makes clear, as courts have found, that the court retains jurisdiction to amend the order of forfeiture to include substitute assets at any time. *See United States v. Hurley*, 63 F.3d 1 (lst Cir. 1995) (court retains authority to order forfeiture of substitute assets after appeal is filed); *United States v. Voigt*, 89 F.3d 1050 (following *Hurley*). Third parties, of course, may contest the forfeiture of substitute assets in the ancillary proceeding. *See United States v.Lester*, 85 F.3d 1409 (9th Cir. 1996).

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ADVISORY COMMITTEE ON
FEDERAL RULES OF CRIMINAL PROCEDURE

PROPOSED RULE 32.2

I. SUMMARY OF COMMENTS: Rule 32.2

The Committee received five responses to the proposed changes for Rule 32. Two of the responses came from the National Association of Criminal Defense Lawyers. The NACDL submitted a lengthy comment in which it expressed its strong opposition to the changes proposed for Rule 32. It did state, however, that it is in favor of providing third parties rights to ancillary proceedings in forfeiture cases. Three private practitioners support the proposed changes to 32.2.

II. LIST OF COMMENTATORS: Rule 32.2

CR-003 Jack E. Horsley, Esq., Craig & Craig, Matoon, Illinois, September 23, 1997

CR-005 James W. Evans, Esq., Harrisburg, Pennsylvania, September 25, 1997

CR-013 National Association of Criminal Defense Lawyers, Legislative Director and Counsel (Ms. Leslie Hagin), December 12, 1997

CR-014 Mr. Ronald F. Waterman, Gough, Shanahan, Johnons, & Waterman, Helena, Montana, December 16, 1997

CR-021b National Association of Criminal Defense Lawyers Committee on Rules of Procedure (Peter Goldberger), February 15, 1998

III. COMMENTS: Rule 32.2

Jack E. Horsley, Esq. (CR-003)
Craig & Craig
Matoon, Illinois
September 23, 1997

Mr. Horsley favors all of the proposed changes.

James W. Evans (CR-005)
Harrisburg, Pennsylvania
September 25, 1997

Mr. Evans supports the proposed amendment.

Ms. Leslie Hagin (CR-013)
National Association of Criminal Defense Lawyers
Legislative Director and Counsel
December 12, 1997

Ms. Hagin states that his organization is submitting several significant proposed rule changes being considered by the committee. She requests permission to testify about the proposed changes to Rule 32.2.

Mr. Ronald F. Waterman (CR-014)
Gough, Shanahan, Johnons, & Waterman
Helena, Montana
December 16, 1997

Mr. Waterman writes that lenders and third parties have concerns about the procedures followed in forfeiture of a criminal defendant's interest in property, whether justified or not. He says that there exists a concern that a third party can lose legal interest in property without a meaningful opportunity to appear and defend title to the property. He adds that the adoption on Rule 32.2 is good because it resolves concerns raided by lenders and others immersing people in ancillary proceedings unless there is a finding that a criminal defendant has an interest in the property.

Peter Goldberger (CR-021b)
Ardmore, Pennsylvania
Co-Chair, National Association of Criminal Defense Lawyers
Committee on Rules of Procedure
February 15, 1998

The NACDL is adamantly opposed to the continuing efforts to abolish the right to jury trial on government claims for criminal forfeiture, and to undermine procedural rights associated with such claims. The NACDL states that the proposed amendment is "undemocratic, disrespectful of our legal culture and history, and flawed in numerous particulars." The NACDL contends that the proposal appears to breach the Rules Enabling Act wall between procedural reform and substantive rights. It recommends that the Advisory Committee reject the proposed rule changes almost completely. The NACDL states that there is no good reason to abolish the historically-grounded right to a jury trial in criminal forfeiture allegations and that such practice is unconstitutional, despite the Supreme Court's decision in *Libretti v. United States*, 516 U.S. 29 (1995). The NACDL notes that the right to jury trial in criminal forfeiture cases was not the formal question presented to the court in that case and it maintains that eliminating juries will not streamline the process. It also suggests that juries will not be confused by varying standards of proof if the standard "beyond a reasonable doubt" is carried over into forfeiture proceedings. The organization contends that the jury's collective conscience should be preserved, allowing it to

protect the citizens from overreaching prosecutors. It states that it believes the proposed reform has nothing to do with procedural reform, but everything to do with the desire to punish and the desire to win.

The NACDL also maintains that the proposed amendment to Rule 32.2(b) would eliminate the requirement of 31(e) requiring a fact-finder to determine the extent of the interest or property subject to forfeiture. The NACDL states that the proposed changes to 32.2(a) would "further devastate the fairness of the criminal forfeiture process by destroying" the grand jury's and trial jury's respective functions. The NACDL urges the Committee to clarify, despite contrary judicial decisions, that "only property or interests in property specifically named in the indictment may be forfeited criminally." The NACDL writes that Proposed Rule 32.2(f) should safeguard the defendant's and interested third parties' rights to be heard on the issue.

The NACDL states that the creation of rules to ensure fairness in ancillary forfeiture proceedings is an excellent idea. It notes that the rights of "third parties" should not be less than the rights of anyone making a claim in a civil forfeiture proceeding. The NACDL attached a copy of Petitioner's Brief in *Libretti v. United States*.

U.S. Department of Justice

Criminal Division

Washington, D.C. 20530

March 20, 1998

Honorable W. Eugene Davis
United States Circuit Judge
556 Jefferson Street, Suite 300
Lafayette, Louisiana 70501

Dear Judge Davis:

Enclosed please find our response to the comments of the National Association of Criminal Defense Lawyers on proposed Rule 32.2. We look forward to seeing you and the other Committee members soon in Washington D.C.

Sincerely,

Mary Frances Harkenrider

Mary Frances Harkenrider

Roger A. Pauley

Roger A. Pauley

cc: Professor David A. Schlueter

Response to NACDL Comments on Proposed Rule 32.2

The Department of Justice proposed Rule 32.2 to bring together in one place a comprehensive set of procedures governing the criminal forfeiture process. The Rule is intended to provide procedural guidance where none is presently given, to eliminate ambiguities in the existing procedures, and to conform the criminal forfeiture procedures with Supreme Court and appellate court decisions regarding the nature of a criminal forfeiture and of the statutory ancillary proceeding relating thereto . We disagree with the criticisms set forth by NACDL, and find that most of them are based on misunderstandings of, or disagreements with, current law.

Nature of Criminal Forfeiture / Burden of Proof

NACDL's opposition to Rule 32.2 is premised on a fundamental misconception with respect to the nature of a criminal forfeiture. In NACDL's view, a criminal forfeiture is akin to a substantive offense or element thereof to which the right to a jury trial and other procedural protections – such as the right to be charged by a grand jury, and the right to have the case proven beyond a reasonable doubt – attach. All of NACDL's criticisms of the proposed Rule follow from this premise. However, that issue has now been fully litigated and the view espoused by NACDL has been rejected by the Supreme Court.

It is now well-settled that criminal forfeiture is not an element of a substantive offense to which Fifth and Sixth Amendment rights apply. To the contrary, an order of forfeiture is imposed in a criminal case as part of the defendant's sentence. Libretti v. United States, 516 U.S. 29, 116 S. Ct. 356 (1995). Thus, just as a court can impose a period of incarceration, order the defendant to pay a fine, or order him to make restitution to a victim as part of his sentence, so may the court order the defendant to forfeit whatever property was involved in, derived from, or used to facilitate the crime for which the defendant was convicted. The jury is not properly involved in this process. We appreciate that NACDL thinks that the Supreme Court decided Libretti "incorrectly." NACDL Letter at 2. But the issue has nevertheless been resolved and the present Rules should be changed to reflect this reality.

Buttressing the proper understanding of a criminal forfeiture as part of the defendant's sentence is the large number of court of appeals decisions holding that the standard of proof for determining criminal forfeiture is "preponderance of the evidence," as it is for all other aspects of sentencing, and not "proof beyond a reasonable doubt," as it is for the elements of a criminal offense. Recognizing the force of this argument, NACDL devotes much of its opposition to Rule 32.2 to an attempt to characterize these decisions as "a handful of incorrectly decided cases," NACDL Letter at 6, and as nothing more than a set of "misleading citations about the government's burden." *Id. at* 7. Of course, nothing in proposed Rule 32.2 addresses the burden of proof. But

because NACDL's submission attaches so much importance to this issue, we are constrained to point out that it is NACDL's discussion of this issue that is misleading.

NACDL cites two appellate cases holding that the burden of proof on criminal forfeiture is "beyond a reasonable doubt." NACDL Letter at 6, citing United States v. Pelullo, 14 F.3d 881, 902-06 (3rd Cir. 1994), and United States v. Cauble, 706 F.2d 1322, 1347 (5th Cir. 1983). But only Pelullo, a pre-Libretti decision, stands for this proposition. In Cauble, the Court of Appeals noted only that the trial judge "read the forfeiture provision, § 1963(a), to the jury and added: '[I]f you find beyond a reasonable doubt that the Defendant is guilty of any of the offenses charged in Counts 1, 2 or 3 of the Indictment, it will be your duty to determine whether the government has proven beyond a reasonable doubt that Rex C. Cauble's interest in Cauble Enterprises is subject to forfeiture to the United States.'" In other words, the court noted only that the trial judge had assumed the standard of proof was beyond a reasonable doubt. There is no discussion of whether that assumption was correct, or whether the government even opposed that instruction. Certainly, the case contains no holding on the point.

In contrast, what NACDL characterizes as "misleading citations" to a "handful of incorrectly decided cases" consists of over a dozen opinions by almost all of the courts of appeals all holding that the burden of proof in criminal forfeiture cases is "preponderance of the evidence." *See* United States v. DeFries, 129 F.3d 1293 (D.C. Cir. 1997) (in light of Libretti, burden of proof for forfeiture in RICO case is preponderance of the evidence); United States v. Patel, 131 F.3d 1195 (7th Cir. 1997) (burden of proof for forfeiture in § 853 cases is preponderance of the evidence because criminal forfeiture is part of the sentence under Libretti); United States v. Rogers, 102 F.3d 641 (1st Cir. 1996) (same); United States v. Myers, 21 F.3d 826 (8th Cir. 1994) (criminal forfeiture for money laundering is part of the sentence); United States v. Voight, 89 F.3d 1050 (3rd Cir. 1996) (following Myers); United States v. Rutgard, 108 F.3d 1041 (9th Cir. 1997) (same); United States v. Smith, 966 F.2d 1045, 1050-53 (6th Cir. 1992) (forfeiture is part of sentencing which is governed by the preponderance standard; same standard applies to forfeiture of proceeds and facilitating property); United States v. Bieri, 21 F.3d 819 (8th Cir. 1994) (same); United States v. Elgersma, 971 F.2d 690 (11th Cir. 1992) (due process does not bar Congress from permitting sentencing issues to be resolved by the preponderance standard; because forfeiture is part of sentencing, a preponderance standard is unobjectionable if that is what Congress intended; Congress intended to apply the preponderance standard to the forfeiture of proceeds under § 853(a)(1), but judgment reserved as to whether the same rule would apply to other forfeitures under other statutes); United States v. Ben-Hur, 20 F.3d 313 (7th Cir. 1994) (government must establish, by a preponderance of the evidence, that the defendant, as a matter of state law, held an ownership interest in the property at the time the offense was committed); United States v. Tanner, 61 F.3d 231 (4th Cir. 1995); United States v. Herrero, 893 F.2d 1512, 1541-42 (7th Cir.), cert. denied, 110 S. Ct. 2623 (1990); United States v. Hernandez-Escarsega, 886 F.2d 1560, 1576-77 (9th Cir. 1989), cert. denied, 110 S. Ct. 3237 (1990); United States v. Sandini, 816 F.2d 869, 875-76 (3d Cir. 1987).

As these cases indicate, long before the Supreme Court decided Libretti, the appellate courts recognized the nature of a criminal forfeiture as part of the defendant's sentence. The Supreme Court has now affirmed that view. The issue, then, is how to tailor the procedural rules to accord with the correct understanding of the nature of the forfeiture proceeding.

Role of the Jury

In NACDL's view, Rule 32.2 would "scrap[] the wisdom of more than three centuries" regarding the jury's role in criminal forfeitures. NACDL Letter at 3. The fact is, of course, that criminal forfeiture was unknown in federal law until 1970, and the only thing being "scrapped" is Rule 31(e) which was promulgated in that year to provide procedural guidance for applying the newly enacted criminal forfeiture statutes.[1] As previously noted in the government's explanation of the new Rule, Rule 31(e) has proven both inefficient and unnecessary and should be replaced by a new rule that takes into account the proper role of the court in sentencing a defendant, and the role of the statues enacted in 1984 that govern the determination of third-party rights in the forfeited property.

First, the authors of Rule 31(e) may not have foreseen that it would become necessary to bifurcate jury trials involving forfeiture allegations and require the jury to return to the courtroom after rendering their verdict on guilt or innocence to hear additional evidence and instructions, and to retire a second time to return a special verdict of forfeiture. *See* Cauble, *supra* at 1347. This procedure is burdensome to juries and unpopular with many trial judges who have told our attorneys that they sense the jurors' unhappiness at being informed that their duty is not complete even though they have found the defendant guilty after what are often protracted and contentious deliberations.

Second, it is now generally recognized that the government does not have to list the property subject to forfeiture in the indictment. It is sufficient, for example, for the indictment to put the defendant on notice that the "proceeds" of the criminal offense and any interest the defendant has in property involved in, or used to facilitate the offense, will be forfeited. *See* United States v. DeFries, 129 F.3d 1293 (D.C. Cir. 1997) (to comply with Rule 7(c), government need only put defendant on notice that it would seek to forfeit everything subject to forfeiture under the applicable statute, such as all property "acquired or maintained" as a result of a RICO violation); United States v. Cleveland, 1997 WL 537707 (E.D. La. 1997) (property government intends to forfeit as proceeds need not be explicitly listed in the indictment). Once the trial is concluded, of course, the government may seek to have specific assets forfeited pursuant to Rule 31(e). But this need not be the case.

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[1] Rule 32.2 would also replace current Rule 32(d)(2) which took effect December 1, 1996, and would alter the language of Rule 7(c).

Frequently, a court will enter a forfeiture order in more general terms. For example, a criminal forfeiture order may take the form of a money judgment in which the defendant is ordered to forfeit an amount of money equal to the value of the property involved in, or derived from, the criminal offense. *See* United States v. Voight, 89 F.3d 1050 (3rd Cir. 1996) (government is entitled to a personal money judgment equal to the amount of money involved in the money laundering offense); United States v. Ginsburg, 773 F.2d 798, 801 (7th Cir. 1985) (en banc)(same), cert. denied, 475 U.S. 1011 (1986); United States v. Conner, 752 F.2d 566, 576 (11th Cir.)(same), cert. denied, 474 U.S. 821 (1985). Or the court may order the defendant to forfeit "all interests" in a given enterprise, or all property traceable to the proceeds of the offense, and leave it to post-trial investigation to determine what specific assets might fall within the general terms of the order. In such cases, the determination that a given asset is related to the offense for which the defendant was convicted is necessarily made long after the jury is dismissed.

For example, in United States v. BCCI Holdings (Luxembourg) S.A. (Petition of Chawla), 46 F.3d 1185, 1190 (D.C. Cir.), cert. denied, 115 S. Ct. 2613 (1995), the court ordered the defendant to forfeit "all assets in the United States" and then amended the order on five occasions over a period of six years as specific assets were located and added to the Order of Forfeiture. *See also* United States v. BCCI Holdings (Luxembourg) S.A. (Petition of Bank of California International), 980 F. Supp. 522 (D.D.C. 1997) (the preliminary order may be amended as often as necessary to include additional property subject to forfeiture that the government may identify through post-trial discovery). Similarly, in United States v. Saccoccia, 58 F.3d 754 (1st Cir. 1995), the government used the discovery authority set forth in 18 U.S.C. § 1963(k) to conduct a lengthy post-conviction investigation to determine the location of property subject to forfeiture under the court's sentencing order. Years after the conviction was final, the government found gold bars buried in the defendant's mother's garden, and added these to the order of forfeiture.

In such cases, it simply is not practical to have a jury remain on call for months or years to determine, when necessary, whether the government has established the requisite nexus between the offense of conviction and the newly discovered property. Amending the order of forfeiture to incorporate such property must be the responsibility of the court. Yet the present Rule 31(e) seems to suggest that only the jury can determine whether an asset subject to forfeiture was involved in, or derived from, the criminal offense.

Multiple Defendants and Third Parties

Another unforeseen problem with Rule 31(e) is that the special verdict form can become extraordinarily unwieldy in cases involving multiple defendants and multiple assets. If the jury must determine not only whether a given asset bears the appropriate nexus to the offense, but also whether a given defendant has an interest in that asset,

the special verdict form must be styled as a two-dimensional matrix where the jury is asked a series of questions about each defendant's interest in each asset. It makes much more sense to limit the forfeiture determination at this stage to the nexus between the offense and the asset, and to leave any determination regarding any defendant's interest to the ancillary proceeding. If a defendant has no rights in a particular asset, he cannot possibly be harmed by including that asset in the order of forfeiture. And if he does have such property rights, they are properly extinguished upon the court's determination that the requisite nexus has been established.

More important, the present Rule 31(e) seems to require the jury to determine the extent of the defendant's interest in a given asset *vis a vis* third parties when those same third parties will have ample opportunity in the ancillary proceeding to litigate their interest in the property. Again, the defendant loses nothing if the court orders the forfeiture of property in which the defendant has no interest. The appropriate concern is to ensure that the rights of third parties are not inadvertently extinguished in the process. Whatever role Rule 31(e) may have had in protecting third parties when it was first enacted in 1970, it has been rendered superfluous by the ancillary proceeding statutes that were enacted in 1984. Now, any third party asserting an interest in the forfeited asset may file a claim and establish that interest pursuant to 21 U.S.C. § 853(n). Requiring the court (or jury) to make the same determination regarding the third party's interest in both the trial and the ancillary proceeding is redundant and a waste of judicial resources. *See* United States v. Messino, 917 F. Supp. 1303 (N.D. Ill. 1996), appeal dismissed, 122 F.3d 427 (7th Cir. 1997) (pursuant to Rule 31(e), jury heard and rejected evidence that property really belonged to third parties; same third parties then filed claims in the ancillary proceeding and relitigated same issues).

NACDL says that the present Rule 31(e), or something very like it, is necessary to comply with the fundamental rule that criminal forfeitures are *in personam* actions and that therefore only the defendant's interest in the property may be forfeited. NACDL Letter at 10. But that fundamental premise of criminal forfeiture is already embodied in the ancillary proceeding statute, 21 U.S.C. § 853(n)(6)(A), which provides that anyone asserting that the property was vested in him, not the defendant, at the time of the offense shall recover the property — whether or not such third party had any knowledge of the criminal offense. *See* United States v. Lester, 85 F.3d 1409 (9th Cir. 1996) (§ 853(n)(6) is not an innocent owner statute; it requires only a showing of superior ownership; because only the defendant's interest is forfeitable in a criminal case, an innocent owner defense is unnecessary). There is simply no reason to litigate issues of state property law to determine whether the defendant or a third party is the true owner of an asset as part of the criminal trial pursuant to Rule 31(e) when the same issues will be played out in the ancillary proceeding.

The only ground on which a defendant may oppose a criminal forfeiture is that the government has failed to establish the necessary nexus between the property and the criminal offense. Accordingly, the court should be required to address that issue, and that issue only, in the forfeiture phase of the trial.

Procedure in the Ancillary Proceeding

NACDL's final criticism is leveled at the proposed procedural rules governing the ancillary proceeding itself. They suggest that the procedures should be modified to conform with those that apply in civil forfeiture cases where the third party's property may be "condemned and seized." NACDL Letter at 13. The problem, of course, is that NACDL totally misapprehends the nature of the ancillary proceeding. It is not a forum that can result in the forfeiture of a third party's property. It is not a civil forfeiture proceeding. If the third party is the true owner of the property, he will prevail in the ancillary proceeding; if he is not the true owner, he will not prevail, but he will have lost nothing in which he had a legal interest.

If the government wants to forfeit the third party's rights in the property, it must file a separate civil forfeiture proceeding in which the third party has a Seventh Amendment right to a jury trial and can contest the forfeitability of the property and raise affirmative defenses. *See* United States v. One 1978 Piper Cherokee Aircraft, 91 F.3d 1204 (9th Cir. 1996) (after obtaining criminal forfeiture verdict, government abandons criminal forfeiture and revives parallel civil case to perfect interest against third parties); United States v. Jimerson, 5 F.3d 1453 (11th Cir. 1993) (the government may not use the ancillary proceeding to forfeit the interests of third parties).

It is for this reason that courts that have examined the nature of the ancillary proceeding have determined that it is really a quiet title action in which the only issue is the ownership of the property. The government may not forfeit a third party's interest, and accordingly the third party has no reason to raise any issue other than his superior ownership of the property. In that case, the third party has none of the Fifth, Sixth and Seventh Amendment rights that would apply in a civil or criminal forfeiture case. *See* United States v. Holmes, 1998 WL 13538 (4th Cir. Jan. 15, 1998) (Table Case) (because, under *Libretti*, criminal forfeiture is an *in personam* punishment of the defendant, third party property rights are not implicated and there is no right to a jury trial to protect them; third party's right to make sure his property is not forfeited is adequately protected by hearing provisions of § 853(n) where he can establish his superior ownership); United States v. Messino, 122 F.3d 427 (7th Cir. 1997) (citing the unpublished decisions and summarizing reasons why there is no jury right in the ancillary proceeding; but not deciding the Seventh Amendment issue); United States v. Duboc (Petition of F. Lee Bailey), No. GCR 94-01009-MMP (N.D. Fla. May 9, 1996) (because the ancillary proceeding amounts to a proceeding against the United States and is essentially an action to quiet title, which is equitable in nature, there is no constitutional right to a jury trial); United States v. Henry, 64 F.3d 664 (6th Cir. 1995) (Table Case) (same).

Accordingly, it would not be appropriate to amend the provisions of Rule 32.2 dealing with the ancillary proceeding to provide for a right to a jury trial. Nor would it be appropriate, as NACDL suggests, to provide for one-sided discovery by the third-party

claimant. The ownership issues — which are the only issues that may be properly raised in the ancillary proceeding — are generally not part of the grand jury's investigation, nor are they part of the government's proof at trial, except to the extent necessary to show that the defendant had at least some legal or possessory interest in the forfeited property. When a third party, such as the defendant's spouse, asserts a property interest arising under state law for the first time in the ancillary proceeding, the government must have the opportunity to conduct discovery to determine the merits of that assertion. All courts that have considered the issue have agreed with the fairness of this proposition. *See* United States v. BCCI Holdings (Luxembourg) S.A. (Petition of BCP), 169 F.R.D. 220 (D.D.C. 1996) (court dismisses third-party claim for failure to comply with government's discovery requests; "because the failure to produce discovery blocks the U.S.'s ability to litigate the merits of [the claim], a less severe sanction would not be effective"); United States v. BCCI Holdings (Luxembourg) S.A. (Petition of Department of Private Affairs), 1993 WL 760232 (D.D.C. 1993) (gov't may take discovery from claimant); United States v. Infelise, 938 F. Supp. 1352 (N.D. Ill. 1996) (noting, without discussion, that the parties "engaged in extensive discovery" in the ancillary proceeding").

Conclusion

NACDL's opposition to Rule 32.2 is based on two false assumptions: that a criminal forfeiture allegation is akin to a criminal charge, and that the ancillary proceeding is akin to a civil forfeiture action in which third party interests in property may be forfeited. Neither premise is correct. Criminal forfeiture orders are imposed as part of the defendant's sentence, and the ancillary proceeding is an equitable action concerned only with determining the true owner of the forfeited property. Accordingly, the Fifth, Sixth and Seventh Amendment rights that apply to the adjudication of criminal charges and the civil forfeiture of property do not apply in this context.

The current Rule 31(e) has proven inadequate as a means of resolving the issues presented in criminal forfeiture proceedings. To the extent that it involves the jury in the sentencing process and requires the court (or jury) to resolve issues regarding the ownership of property in the criminal trial, it is at odds with the current understanding of a criminal forfeiture and the statutory scheme enacted in 1984, and often leads to unnecessarily complicated and redundant proceedings.

Proposed Rule 32.2 conforms criminal forfeiture procedures to the Supreme Court's Libretti decision, while protecting the due process rights of defendants and third parties, simplifying criminal forfeiture procedure, and conserving judicial resources. It therefore merits the Committee's approval.

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

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CHAIR

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February 16, 1998

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Re: Rule 32.2, Fed. R. Crim. P.

Dear Friends:

The purpose of this letter is to ask that you serve as a subcommittee (with Judge Dowd as Chair) to take the lead at our Spring meeting in discussing the proposed change to Rule 32.2 relating to forfeiture. As you know, this proposed amendment has been out for comment and will be back before us at the next meeting to decide whether to recommend to the Standing Committee that it be adopted.

We have received a few comments on this amendment which I have asked John Rabiej to send you. We have a hearing scheduled as the first order of business at our spring meeting on April 27, 1998. We will have at least one witness from the National Association of Criminal Defense Lawyers and a representative of the Justice Department testifying on this proposed rule change. At my request, John Rabiej has asked both witnesses to submit an advanced, written account of their expected testimony which should be in your hands two or three weeks before our meeting. John Rabiej has furnished me with transcripts of the testimony of these witnesses before Congressional committees on pending legislation relating to forfeiture that may be helpful as background information. John will furnish these transcripts to you as well. He will also furnish you with copies of the pending bills on which these witnesses were testifying.

I ask that you review the written submissions of our expected witnesses and be prepared to take the lead in examining these witnesses at the hearing so we can all get as much as possible from them. Following the hearing, I also ask that you identify the issues you believe we should focus on and give us your thoughts and/or recommendations on the resolution of these issues.

I appreciate very much your assistance. Your hard look at the material will certainly increase my comfort level in dealing with this specialized subject matter.

Sincerely,

W. Eugene Davis

cc: Honorable Alicemarie H. Stotler
Professor David A. Schlueter
John Rabiej, Chief, Rules Support Office

LEONIDAS RALPH MECHAM
Director

CLARENCE A. LEE, JR.
Associate Director

ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS

WASHINGTON, D.C. 20544

JOHN K. RABIEJ
Chief
Rules Committee Support Office

November 12, 1997
Via Fax

MEMORANDUM TO PROFESSOR DAVID A. SCHLUETER

SUBJECT: *Comment on Proposed New Rule 32.2*

We will be sending to you about 10 comments submitted on the proposed amendments, most of them dealing with Rule 6.

I reread proposed new Rule 32.2. I had some difficulty understanding subdivision (d), which deals with the ancillary proceeding. Subdivision (d) describes the "ancillary proceeding." I believe that the reference to ancillary proceeding includes: (1) the initial proceeding under paragraph (1) at which the court may consider a motion to dismiss; and (2) an evidentiary proceeding under subparagraph (2) following the initial proceeding and after discovery, if approved by the court, to consider a summary judgment or to rule on the question.

On my first reading of subdivision (d)(1), the reference to "In that proceeding" in the second sentence juxtaposed with the words "an ancillary proceeding" at the end of the first sentence led me to believe that the initial proceeding dealing with a motion to dismiss was the "ancillary proceeding." It was not until subdivision (d)(3) that I was certain that "ancillary proceeding" also referred to the later evidentiary hearing conducted after discovery.

It would have been easier for me to understand the provision if "ancillary proceeding" clearly covered both the initial motion to dismiss proceeding and the later evidentiary hearing. You may wish to consider the following clarification suggestion to address my problem:

(d) Ancillary Proceeding.

(1) If, as prescribed by statute, a third party files a petition asserting an interest in the forfeited property, the court shall conduct an ancillary proceeding.

(i) ~~In that proceeding, t~~ The court may consider a motion to dismiss the petition for lack of standing, for failure to state a claim upon which relief

can be granted, or for any other ground. For purposes of the motion, the facts set forth in the petition are assumed to be true.

~~(2)~~ (ii) If a Rule 32.2 (d)(1) (ii) motion to dismiss is denied, or not made, the court may permit the parties to conduct discovery in accordance with the Federal Rules of Civil Procedure to the extent that the court determines such discovery to be necessary or desirable to resolve factual issues before conducting an evidentiary hearing. After discovery ends, either party may ask the court to dispose of the petition on a motion for summary judgment in the manner described in Rule 56 of the Federal Rules of Civil Procedure.

~~(3)~~ (2) After the ancillary proceeding, the court shall enter ....

* * * * *

~~(4)~~ (3) If multiple petitions are filed....

The advantage of the suggested reformatting of subdivision (d) is that it eliminates the possible reader miscue that the ancillary proceeding pertains to only a single proceeding.

Please do not hesitate to disregard this suggestion if you see no problem with the original version.

John K. Rabiej

Forfeiture Procedure in Federal Court: An Overview

prepared for the

Honorable Alicemarie Stotler

and the

Committee on Rules of Practice and Procedure
of the
Judicial Conference of the United States

by

David Pimentel
Judicial Fellow
Administrative Office of the United States Courts

March 19, 1998

Forfeiture Procedure in Federal Court: An Overview

Forfeiture Procedure in Federal Court: An Overview

David Pimentel[1]

I. Introduction

Over the last several years, increased attention has been drawn to the government's pursuit of civil forfeitures, in both state and federal court. Although civil forfeiture filings in federal court fell off considerably after the boom years of the Bush administration, there are signs that they are on the rise again.[2] Moreover, they remain a subject of attention and concern, with the Supreme Court taking significant forfeiture cases in recent years,[3] and with Congress

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[1]Judicial Fellow (1997-98), Administrative Office of the U.S. Courts.

[2]Civil "forfeiture and penalty" filings have plummeted since the start of the Clinton administration:

Year	Civil Forfeiture Filings	Proportion of All Civil Filings
1988	4,348	1.81%
1989	5,823	2.59%
1990	5,950	2.81%
1991	5,368	2.47%
1992	5,434	2.38%
1993	4,173	1.81%
1994	3,081	1.29%
1995	2,362	0.91%
1996	2,322	0.88%
1997	2,353	0.86%

Figures drawn from Table C-2A, Administrative Office of the U.S. Courts. Data on criminal forfeitures are not available at the AO, because such forfeitures are sought as part of the larger criminal case.

The decrease in civil forfeiture proceedings, according to sources at the F.B.I., is attributable to the circuit court decisions in the early 1990s that civil forfeiture could bar subsequent criminal prosecution under the double-jeopardy clause. Those decisions have now been reversed, *see* discussion of double jeopardy *infra*, and in the Spring of 1996, the Attorney General issued a statement urging more active pursuit of civil forfeitures. The filings picked up a little in 1997 and should be expected to continue their rebound.

[3]*See, e.g.*, discussion of cases *infra* at section IV.B.6,. Civil Forfeiture Procedures; Defenses.

considering various legislative proposals to curtail or expand the use of forfeitures.[4]

Both liberal and libertarian voices are calling present civil forfeiture practice a grave threat to the private property rights of the innocent, as well as the not-so-innocent.[5] Prosecutors and law-and-order conservatives, as well as some "new Democrats," hail it as a powerful tool in combating crime. At a time when it is politically expedient to be "tough on crime," it can be difficult to distill a reasoned and reasonable debate on such a topic.

This paper, prepared at the request of Judge Alicemarie Stotler, Chair of the Judicial Conference's Standing Committee on Rules of Practice and Procedure, is intended to provide an overview of federal forfeiture procedure. It begins with historical background on the law of forfeitures and proceeds to discuss some of the practical aspects of forfeiture procedure as it now functions in federal court.

II. Historical Background

The hoary history of forfeitures begins with some elaborate legal fictions. Forfeiture practice has roots in Biblical precepts, under which an ox that gores a person to death will be stoned "and his flesh shall not be eaten."[6] Also, pre-Christian Europeans practiced "noxal surrender," under which the instrument of accidental injury or death was surrendered to the victim or his kin.[7] Both practices, while not entirely reflective of the modern practice, embody

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[4]As of February 19, 1998, there were 87 bills pending in Congress referencing forfeitures. Several of them are advanced as significant reform of forfeiture law. *E.g.,* H.R. 1745 (Rep. Schumer's bill "to reform asset forfeiture laws"), H.R. 428 (Rep. Pickett's bill "to provide that the property of innocent owners is not subject to forfeiture"), H.R. 1835 & 1965 (Rep. Hyde's bills "to provide a more just and uniform procedure for Federal civil forfeitures"). Most are more specific laws imposing or promoting forfeiture as a remedy or penalty. *E.g.,* S. 1148 (Sen. D'Amato's bill "to require the forfeiture of counterfeit access devices"), H.R. 2112 (Rep. Franks' bill "to increase the forfeiture penalty for telephone service slamming"), H.R. 1176 (Rep. Lowey's bill "to end the use of steel jaw leghold traps on animals" including forfeiture provisions for illegal traps and illegally trapped animals), and S. 263 (Sen. McConnell's bill "to prohibit the import, export, sale, purchase, possession . . . of bear viscera" providing for forfeiture of the viscera).

[5]Representative Henry Hyde (R-IL), Chair of the House Judiciary Committee has broken ranks with law-and-order conservatives on this point. He has published a book critical of current forfeiture law and practice, and is among those who have introduced legislation to curb the "abuses" of the government in its pursuit of civil forfeitures. Hyde, Henry, *Forfeiting Our Property Rights: Is* Your *Property Safe from Seizure?* (Cato Institute, 1995).

[6]Exodus 2:28 (KJV).

[7]Finkelstein, *The Goring Ox: Some Historical Perspectives on Deodands, Forfeitures, Wrongful Death and the Western Notion of Sovereignty,* 46 Temp. L.Q. 169, 181 (1973).

the essential principle of forfeiture: not just the person but the "thing," the *res*, that violates legal and social standards may be subject to legal proceedings and consequences.

A. Deodands

The doctrines evolved over time. In English common law, the value of an object causing the death of a subject of the King was forfeited to the Crown as a deodand. Although the term "deodand" specifically means "given to God," the Crown functioned as the representative of deity. At the very least, the Crown was in a position to use the deodand to purchase Masses for the soul of the deceased.[8] The practice endured over the years, but the rationales evolved. By the nineteenth century, the surrender of such property was justified on an entirely different ground: as a deterrent to negligence. Because there was no traditional remedy for wrongful death, the threat of forfeiture provided an incentive for the owner of a dangerous res to exercise a higher duty of care.[9]

B. Statutory Forfeiture

Forfeitures were a part of the statutory law of admiralty as early as the Navigation Acts of the seventeenth century, which governed maritime shipping. Penalties for violation of these laws included the forfeiture not only of the illegally shipped goods, but of the vessel itself.[10] Vicarious liability applied in these cases, as well, so the offense of a solitary sailor could result in the forfeiture of the entire ship, even if the sailor was acting against the owner's wishes.[11]

The first U.S. Congress enacted customs laws patterned after the Navigation Acts, prescribing penalties including the forfeiture of both cargo and ship. The Supreme Court upheld these procedures in deciding that a ship could be forfeited even without a criminal conviction.[12] The Court reasoned that this was an *in rem* proceeding: "The thing is here primarily considered as the offender."[13] In another case not too many years later, the Court upheld a forfeiture notwithstanding the owner's innocence, justifying it on the grounds that forfeiture was the "only

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[8]Reed & Gill, *RICO Forfeitures, Forfeitable "Interests," and Procedural Due Process,* 62 N.C. L. Rev. 57, 64 (1983).

[9]*Id.*

[10]Doyle, *Crime and Forfeiture*, CRS Report for Congress, CRS-3 (rev. 1993).

[11]Note, *Bane of American Forfeiture Law--Banished at Last?,* 62 Cornell L. Rev. 768, 774 (1977).

[12]*The Palmyra*, 25 U.S. (12 Wheat.) 1 (1827) (involving charges of, but no conviction for, piracy).

[13]*Id.* at 14.

adequate means of suppressing the offense or wrong, or insuring an indemnity to the injured party."[14]

C. Forfeiture of Estate (Common Law)

Forfeiture of estate, unlike deodands and statutory forfeiture under the Navigation Acts and their progeny, focused on the offender rather than on the property itself. At common law, anyone convicted of a felony forfeited all his lands and personal property. Such forfeitures were rare in America. The Constitution prohibited such extreme penalties in treason cases, and Congress soon restricted its use for other crimes.[15]

III. Modern Forfeitures

Notwithstanding antecedents in the common law, all modern-day forfeitures, both civil and criminal, are carried out under statutory authorizations. The patchwork of applicable statutes establishes varying standards and procedures for different types of forfeitures. It may be helpful to break them down into several broad categories.

A. Types of Forfeitable Property

In his dissent in *Bennis v. Michigan*,[16] Justice Stevens classifies forfeitable property into three categories: (1) "pure contraband," (2) "tools of the criminal's trade," and (3) "proceeds of criminal activity." This categorization is helpful in coming to an understanding of the origins and rationales of modern forfeiture procedure. Each will be considered in turn.

1. Contraband

The simplest forfeitures, both conceptually and practically, are forfeitures of contraband, that is, property the mere possession of which is illegal. Justification for this type of forfeiture is self-evident: because the individual was legally prohibited from possessing the property in the first place, forfeiture is an essential element of the remedy. This is particularly true when the contraband is a threat to public health or morals--*e.g.*, obscene material, sawed-off shotguns, adulterated food, or illegal drugs. Seizure of these materials serves the important function of removing them from public circulation where they may do damage. Because there can be no

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[14] *United States v. Brig Malek Adhel,* 43 U.S. (2 How.) 210, 233 (1844); *but see* Reed & Gill at 66 & n. 81 (suggesting that the procedures were employed and upheld, at least in part, based on the importance of the revenues generated by such forfeitures, and observing that 70-80% of federal revenue was generated through customs duties and seizures).

[15] Doyle, *Crime and Forfeiture*, CRS Report for Congress, CRS-3 (rev. 1993).

[16] 116 S. Ct. 994, 1004 (1996).

legitimate claim to such property, procedural rights of "owners" in confiscation proceedings are not a significant concern. Contraband seizures are also, by their nature, unlikely to result in significant revenues for the government.

2. Instrumentalities/Tools of Crime

Property used in the commission of a crime may also be subject to forfeiture. Vehicles are often confiscated under these provisions, as well as real property used for the manufacture or cultivation of illegal narcotics. This type of forfeiture has been justified on two separate grounds: (1) it provides greater deterrence for the wrongdoer by prescribing an additional penalty for the crime, and (2) it provides an incentive to the property owner to take precautions to prevent his property from being used by others for criminal activity.

3. Proceeds of Crime

Congress has also, in some circumstances, authorized the forfeiture of property generated by illegal activity.[17] More recently, it has authorized--in the case of criminal forfeiture at least--the forfeiture of substitute assets when the actual proceeds normally subject to confiscation are no longer available.[18] These forfeitures are justified on the principle of avoiding unjust enrichment; the wrongdoer should not be permitted to profit from his crime. This type of forfeiture, which started with RICO, has been aimed primarily at those activities likely to generate a large payoff for the perpetrators.

B. Offenses that Subject Property to Forfeiture

Although forfeitures may be pursued either as part of a criminal prosecution or as a separate civil proceeding, the forfeiture itself is always triggered by criminal activity. The range of activities that could prompt a forfeiture is considerable,[19] and various legislative initiatives seek to broaden it further.[20]

Notwithstanding the variety of statutes that carry forfeiture provisions, the overwhelming majority of the forfeitures carried out by the U.S. Department of Justice are executed under one of two statutes.[21] Section 981 of Title 18 prescribes civil forfeiture as a remedy for violation of a wide range of criminal statutes, including counterfeiting, smuggling, money laundering, and

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[17] *E.g.*, 18 U.S.C. § 981(a)(1)(B)-(F).

[18] 21 U.S.C. § 853(p) (as amended in 1986).

[19] *See* Appendix A, listing nearly 200 of the more commonly used forfeiture provisions.

[20] *See supra* note 4.

[21] 18 U.S.C. § 981; 21 U.S.C. § 881. Both statutes are discussed in some detail *infra.*

crimes against financial institutions.[22] In addition, 21 U.S.C. § 881 allows civil forfeiture of just about everything associated with the manufacture, sale, and distribution of controlled substances, including firearms used in conjunction with such activities.[23] Criminal forfeitures, representing a

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[22]Section 981(a)(1)(A) calls for the forfeiture of any property involved in financial transactions which violate the laws governing (1) the reporting of such transactions, 31 U.S.C. § 5313(a), (2) structuring transactions to evade reporting requirements, 31 U.S.C. § 5324(a), (3) money laundering, 18 U.S.C. § 1956, and (4) engaging in monetary transactions with criminally derived property, 18 U.S.C. § 1957. Section 981(a)(1)(B) renders forfeitable the proceeds of any offense against a foreign nation involving manufacture, sale or distribution of controlled substances. Section 981(a)(1)(C) provides for the civil forfeiture of proceeds traceable to a violation of 18 U.S.C. §§ 215 (loan kickbacks), 471-74, 476-81, 485-88, 501, or 502 (counterfeiting securities, currency, and postal stamps), 510 (forging signatures on U.S. checks, securities or bonds), 542 (false statements in customs), 545 (smuggling), 656 or 657 (bank embezzlement), 842 or 844 (trafficking in explosives), 1005, 1006 or 1007 (falsifying bank records), 1014 (false statement in loan applications), 1028 (false identification of documents), 1029 (trafficking in access devices), 1030 (computer hacking), 1032 (asset concealment), 1341 or 1343 (mail and wire fraud, forfeiture limited to fraud against financial institutions), or 1344 (bank fraud). Section 981(a)(1)(D) governs forfeiture of property traceable to the gross receipts obtained, even indirectly, from violations of 18 U.S.C. §§ 666(a)(1) (federal program fraud), 1001 (false statements), 1031 (major fraud against the U.S.), 1032 (asset concealment), 1341 and 1343 (mail and wire fraud) when arising out of the sale of assets by a federal conservator or receiver (*e.g.*, FDIC). Finally, section 981(a)(1)(F) calls for forfeiture of property traceable to the gross receipts obtained, even indirectly, from violations of 18 U.S.C. §§ 511 (altering or removing motor vehicle ID numbers), 553 (import/export of motor vehicles), 2119 (car-jacking), 2312 or 2323 (trafficking in stolen motor vehicles).

[23] **(a) Subject property**

The following shall be subject to forfeiture to the United States and no property right shall exist in them:

(1) All controlled substances which have been manufactured, distributed, dispensed, or acquired in violation of this subchapter.

(2) All raw materials, products, and equipment of any kind which are used, or intended for use, in manufacturing, compounding, processing, delivering, importing, or exporting any controlled substance or listed chemical in violation of this subchapter.

(3) All property which is used, or intended for use, as a container for property described in paragraph (1), (2), or (9).

(4) All conveyances, including aircraft, vehicles, or vessels, which are used, or are intended for use, to transport, or in any manner to facilitate the transportation, sale, receipt, possession, or concealment of property described in paragraph (1), (2), or (9), except . . . [against certain innocent owners].

(5) All books, records, and research, including formulas, microfilm, tapes, and data which are used, or intended for use, in violation of this subchapter.

(6) All moneys, negotiable instruments, securities, or other things of value furnished or intended to be furnished by any person in

smaller proportion of the overall forfeiture picture, and carried out only as part of a criminal prosecution, are authorized for essentially these same crimes.[24]

In addition to these, however, separate statutory provisions provide for forfeitures in a remarkable array of contexts, including, among others, immigration (Title 8, forfeiting vessels, vehicles, aircraft, etc.), hazardous and deceptive products (Title 15, forfeiting the products themselves), fish and wildlife (Title 16, forfeiting guns, traps, fishing vessels, etc.), racketeering[25]

> exchange for a controlled substance or listed chemical in violation of this subchapter, all proceeds traceable to such an exchange, and all money negotiable instruments, and securities used or intended to be used to facilitate any violation of this subchapter, except . . . [against certain innocent owners].
>
> (7) All real property, including any right, title, and interest (including any leasehold interest) in the whole of any lot or tract of land and any appurtenances or improvements, which is used, or intended to be used, in any manner or part, to commit, or to facilitate the commission of, a violation of this subchapter punishable by more than one year's imprisonment, except . . . [against certain innocent owners].
>
> (8) All controlled substances which have been possessed in violation of this subchapter.
>
> (9) All listed chemicals, all drug manufacturing equipment, all tableting machines, all encapsulating machines, and all gelatin capsules, which have been imported, exported, manufactured, possessed, distributed, dispensed, acquired, or intended to be distributed, dispensed, acquired, imported, or exported, in violation of this subchapter or subchapter II of this chapter.
>
> (10) Any drug paraphernalia (as defined in section 857 of this title).
>
> (11) Any firearm (as defined in section 921 of Title 18) used or intended to be used to facilitate the transportation, sale, receipt, possession, or concealment of property described in paragraph (1) or (2) and any proceeds traceable to such property.

21 U.S.C. § 881(a).

[24]18 U.S.C. § 982 (a list of offenses closely tracking the list of crimes prompting civil forfeiture under Section 981 listed in the previous footnote, with some additions to include immigration offenses; see the summary of section 982 in Appendix A); 21 U.S.C. § 881.

[25]The RICO statute reads, at 18 U.S.C. § 1963(a):

> Whoever violates any provision of section 1962 of this chapter shall be fined under this title or imprisoned not more than 20 years . . . , or both, and shall forfeit to the United States, irrespective of any provision of State law--

(Title 18, forfeiting instrumentalities and proceeds), customs (Title 19, forfeiting contraband, as well as vessels, vehicles, aircraft, etc.), internal revenue (Title 26, forfeiting alcohol, tobacco and firearms), trading with the enemy (Title 50, forfeiting goods offered for trade).[26] Many of these provide for both civil and criminal forfeiture.

IV. Procedure--Criminal v. Civil

Today, forfeitures may be classified into two categories: (1) criminal (in personam) forfeitures, and (2) civil (or in rem) forfeitures. The former function explicitly as a punishment for the offender that follows a criminal conviction. The latter proceed against the "offending" property itself; the innocence of the owner is not necessarily a defense. The procedures employed in each type of forfeiture must be considered separately.

A. Criminal Forfeiture Procedure

The essential condition precedent for a criminal forfeiture is a criminal conviction. Typically, the criminal conviction and the criminal forfeiture are pursued simultaneously in a single proceeding: the criminal trial.

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(1) any interest the person has acquired or maintained in violation of section 1962;

(2) and--

(A) interest in;

(B) security of;

(C) claim against; or

(D) property or contractual right of any kind affording a source of influence over;

any enterprise which the person has established, operated, controlled, conducted, or participated in the conduct of, in violation of section 1962; and

(3) any property constituting, or derived from, any proceeds which the person obtained, directly or indirectly from racketeering activity or unlawful debt collection in violation of section 1962.

The court, in imposing sentence on such person shall order, in addition to any other sentence imposed pursuant to the section, that the person forfeit to the United States all property described in the subsection. In lieu of a fine otherwise authorized by this section, a defendant who derives profits or other proceeds from an offense may be fined not more than twice the gross profits or other proceeds.

[26] *See* Appendix A, listing more commonly used forfeiture provisions.

1. Jurisdiction

Seizure of the property is not necessary in order to assert jurisdiction for a criminal forfeiture, since the jurisdiction is over the person rather than over the property. However, in some cases the court may restrain the use or transfer of the property pending the outcome of the trial.[27]

2. Statutes and Rules Governing Criminal Forfeitures

The procedures for criminal forfeiture, at least for most of the Title 18 crimes that allow for forfeiture, are dictated by statute.[28] The statute details, among other things, the methods and standards for issuing a seizure warrant,[29] how the warrant is executed,[30] how the property is disposed of,[31] and the Attorney General's discretion to grant mitigation or remission.[32]

After returning a conviction, the jury (or trier-of-fact) must determine, by special verdict, which of the property described in the indictment is actually subject to forfeiture, as provided in Criminal Rule 31(e).[33] Following the special verdict (or guilty plea), Criminal Rule 32(d)(2) provides that the court may enter a preliminary order of forfeiture and allow discovery to identify and locate the property,[34] conduct any hearings on third party claims,[35] before entering the final

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[27]21 U.S.C. § 853(e)(1)-(2); *see also* 18 U.S.C. § 1963(d)(1)-(2) (RICO).

[28]21 U.S.C. § 853 (controlled substances); 18 U.S.C. § 982(a)(6)(B) & (b)(1) (explicitly invoking the procedures of 21 U.S.C. § 853 for other forfeitures under Title 18); 18 U.S.C. § 1963 (RICO).

[29]21 U.S.C. § 853(f).

[30]21 U.S.C. § 853(g).

[31]21 U.S.C. § 853(h); *see also* 18 U.S.C. § 1963(f) (RICO).

[32]21 U.S.C. § 853(i); *see also* 18 U.S.C. § 1963(g) (RICO).

[33]"If the indictment or the information alleges that an interest or property is subject to criminal forfeiture, a special verdict shall be returned as to the extent of the interest or property subject to forfeiture, if any." Criminal Rule 31(e).

[34]21 U.S.C. § 853(m); *see also* 18 U.S.C. § 1963(k) (RICO).

[35]21 U.S.C. § 853(n); *see also* 18 U.S.C. § 1963(*l*) (RICO); *see also* discussion of third party claims *infra*.

order of forfeiture.[36] The rules also allow the court to include in its order any conditions necessary to protect the value of the property pending appeal.[37]

3. Procedural Due Process

In criminal cases, the procedural rights of the defendant/owner--notice, counsel, speedy trial, etc.--are protected in the context of the trial itself. Rights to notice of the forfeiture are formalized in Criminal Rule 7(c)(2),[38] which requires that in the case of a criminal forfeiture, the indictment itself must identify the property to be forfeited. In the course of the trial, the defendant has the right to present the case and evidence not only against his or her conviction, but also against the forfeiture of his or her property.

4. Burden of Proof (Criminal)

The criminal conviction, of course, must be found beyond a reasonable doubt; otherwise, there can be no criminal forfeiture. The special verdict, the finding that property is subject to confiscation, however, is made under a subtle burden-shifting scheme established by the statute.[39] If the government shows, by a preponderance of the evidence, that the convicted felon acquired the property at or soon after the time of the felony, and there was no likely source for such property other than the violation, the prosecution enjoys a "rebuttable presumption" of

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[36] If a verdict contains a finding that property is subject to a criminal forfeiture, or if a defendant enters a guilty plea subjecting property to such forfeiture, the court may enter a preliminary order of forfeiture after providing notice to the defendant and a reasonable opportunity to be heard on the timing and form of the order. The order of forfeiture shall authorize the Attorney General to seize the property subject to forfeiture, to conduct any discovery that the court considers proper to help identify, locate, or dispose of the property, and to begin proceedings consistent with any statutory requirements pertaining to ancillary hearings and the rights of third parties. At sentencing, a final order of forfeiture shall be made part of the sentence and included in the judgment. The court may include in the final order such conditions as may be reasonably necessary to preserve the value of the property pending any appeal.

Criminal Rule 32(d)(2).

[37] *Id.*

[38] "No judgment of forfeiture may be entered in a criminal proceeding unless the indictment or the information shall allege the extent of the interest or property subject to forfeiture." Criminal Rule 7(c)(2)

[39] 21 U.S.C. § 853(d).

forfeitability.[40] Once the presumption is established, the burden is on the claimant to prove, again by a preponderance, that the property is *not* subject to forfeiture.

5. Third Party Claims

Because the legal action in criminal forfeitures focuses on the defendant rather than the property, it is clear that only the *defendant's* interest in the property is forfeitable. Legitimate third party interests should not be extinguished in such proceedings. To protect these interests, the statutes under which most criminal forfeitures are sought require published notice, after entry of an order of forfeiture, of the government's intent to dispose of the property.[41] Third parties with claims to the property have 30 days in which to petition the court for a hearing.[42]

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[40] *Id.*; *cf.* discussion of civil forfeitures, Section IV.B.5, *infra*, (civil forfeitures can be effected based on a showing of mere probable cause).

[41] 18 U.S.C. § 1963(*l*)(1); 21 U.S.C. § 853(n)(1). The government is also permitted--but not required--to serve notice directly on parties known to have some claim to the property:

> Following the entry of an order of forfeiture under this section, the United States shall publish notice of the order and of its intent to dispose of the property in such manner as the Attorney General may direct. The Government may also, to the extent practicable, provide direct written notice to any person known to have alleged an interest in the property that is the subject of the order of forfeiture as a substitute for published notice as to those persons so notified.

Id.

[42] 18 U.S.C. § 1963(*l*)(2); 21 U.S.C. § 853(n)(2):

> Any person, other than the defendant, asserting a legal interest in the property . . . may, within thirty days of the final publication of notice or his receipt of notice under paragraph (1), whichever is earlier, petition the court for a hearing to adjudicate the validity of his alleged interest in the property. The hearing shall be held before the court alone, without a jury.

Once a petition is filed, the hearing must be held within 30 days.[43] The hearing is conducted before the judge alone, without a jury.[44] The third-party claimant and the government can introduce evidence and cross-examine witnesses at the hearing, and the court also considers any relevant portions of the record of the underlying criminal case.[45]

The petitioner bears the burden of proof, by a preponderance of the evidence, (1) that his or her right or title to the property is vested and/or superior to the defendant's, or (2) that he or she was a bona fide purchaser, who acquired the property for value, reasonably without cause to believe the property was subject to forfeiture.[46] Based on such a showing, the statute permits the

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[43]18 U.S.C. § 1963(*l*)(4); 21 U.S.C. § 853(n)(4):

> The hearing on the petition shall, to the extent practicable and consistent with the interests of justice, be held within thirty days of the filing of the petition. The court may consolidate the hearing on the petition with a hearing on any other petition filed by a person other than the defendant under this subsection.

[44]18 U.S.C. § 1963(*l*)(2); 21 U.S.C. § 853(n)(2).

[45]18 U.S.C. § 1963(*l*)(5); 21 U.S.C. § 853(n)(5):

> At the hearing, the petitioner may testify and present evidence and witnesses on his own behalf, and cross-examine witnesses who appear at the hearing. The United States may present evidence and witnesses in rebuttal and in defense of its claim to the property and cross-examine witnesses who appear at the hearing. In addition to testimony and evidence presented at the hearing, the court shall consider the relevant portions of the record of the criminal case which resulted in the order of forfeiture.

[46]18 U.S.C. § 1963(*l*)(6); 21 U.S.C. § 853(n)(6):

> If, after the hearing, the court determines that the petitioner has established by a preponderance of the evidence that--
>
> (A) the petitioner has a legal right, title, or interest in the property, and such right, title, or interest renders the order of forfeiture invalid in whole or in part because the right, title, or interest was vested in the petitioner rather than the defendant or was superior to any right, title, or interest of the defendant at the time of the commission of the acts which gave rise to the forfeiture of the property under this section; or
>
> (B) the petitioner is a bona fide purchaser for value of the right, title, or interest in the property and was at the time of purchase reasonably without cause to believe that the property was subject to forfeiture under this section;

court to amend its order of forfeiture, and the rule contemplates any such amendment will be made in a final forfeiture order issued at sentencing.[47]

These procedures are detailed in Title 18 and apply primarily to a defined set of Title 18 offenses. There are many other statutes that provide for forfeiture as a criminal penalty or as a remedy available "upon conviction" of a crime, which include no third-party claim adjudication procedure.[48] Presumably these can be carried out as directed by the court. The statutory procedures for the Title 18 cases detailed above, however, may provide a useful guide to a court seeking to fashion appropriate procedures when the statute specifies none. At the very least, the court can be assured that these procedures have passed Constitutional muster.

B. Civil Forfeiture Procedure

Unlike criminal forfeitures, civil forfeitures proceed *in rem*: "The property is the defendant in the case and burden of proof rests on the party alleging ownership."[49] This fundamental difference has very significant implications, for jurisdiction, for notice, for burdens of proof, and for third party rights.

1. Jurisdiction

Because the proceeding is *in rem*, the court must seize the property before it can exercise jurisdiction. Traditionally, jurisdiction was available only in the district where the res was located. However, in 1992, Congress expanded jurisdiction in forfeiture actions to include the district "in which any of the acts of omission giving rise to the forfeiture occurred."[50] The statute recognizes several permissible venues, including (1) the district in which the forfeiture "accrues," (2) the district where the property is found, as well as (3) any district into which the property is brought.[51]

> the court shall amend the order of forfeiture in accordance with its determination.

See also 18 U.S.C. § 1963(c) and 21 U.S.C. § 853(c) for the bona fide purchaser exception.

[47]18 U.S.C. § 1963(*l*)(6); 21 U.S.C. § 853(n)(6); Criminal Rule 32(d)(2).

[48]Many of the statutes governing endangered species and fish and wildlife resources, for example, provide for forfeiture of guns, traps, nets, vehicles, and vessels, *upon conviction*. *E.g.*, 16 U.S.C. §§ 26, 670j(c), 707, inter alia. *See* Appendix A for further listings.

[49]*United States (Drug Enforcement Administration) v. One Jeep Wrangler,* 972 F.2d 472, 476 (2d Cir. 1992).

[50]28 U.S.C. § 1355(b)(1)(A).

[51]28 U.S.C. § 1395.

The Rules Committees recently took note of Congress' expansion of jurisdiction, and approved an amendment to Supplemental Rule E(3)(a) authorizing service outside the district.[52] This makes the rule consistent with the corresponding statutory provision at 28 U.S.C. § 1355(d).

2. Administrative Forfeiture

In customs cases, and those cases that use customs procedures--*i.e.* most forfeitures, *see* section IV.B.3 *infra*--uncontested forfeitures can often be handled administratively, without involving the court at all. The procedure requires that notice be given to anyone with an interest in the property, who is then given an opportunity to contest the forfeiture in court proceedings.[53]

In order to contest the administrative forfeiture, the claimant must respond within strict time deadlines, posting a bond equal to 10% of the value of the property or requesting a waiver based on indigence. As a practical matter, the waivers are easy to obtain. Once a claim is filed, the matter loses its "administrative" character and becomes a court proceeding.

3. Statutes and Rules--Customs and Admiralty Procedures Apply

As noted above, the overwhelming majority of civil forfeitures are carried out under one of two statutes: 18 U.S.C. § 981 and 21 U.S.C. § 881. Both statutes specifically invoke, for process purposes, the "Supplemental Rules for Certain Admiralty and Maritime Claims" appended to the Federal Rules of Civil Procedure.[54] In addition, a separate catch-all statute makes admiralty procedure applicable by default in all forfeiture actions, absent a Congressional provision to the contrary:

> Unless otherwise provided by Act of Congress, whenever a forfeiture of property is prescribed as a penalty for violation of an Act of Congress and the seizure takes place on the high seas or in navigable waters within the admiralty and maritime jurisdiction of the United States, such forfeiture may be enforced by libel in admiralty *but in cases of seizures on land the forfeiture may be enforced by a proceeding by libel which shall conform as near as may be to proceedings in admiralty.*[55]

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[52]Minutes (January 1998), Standing Committee on Rules of Practice and Procedure, Judicial Conference of the United States.

[53]19 U.S.C. §§ 1607-08. Similar provisions for administrative forfeiture exist under the revenue laws as well. 26 U.S.C. § 7325.

[54]18 U.S.C. § 981(b)(2); 21 U.S.C. § 881(b).

[55]28 U.S.C. § 2461(b) (emphasis added).

Beyond the specific invocation of admiralty rules, these two laws governing forfeitures specifically incorporate customs procedure at 18 U.S.C. § 981(d)[56] and at 21 U.S.C. § 881(d)[57] respectively. Therefore, courts and practitioners find themselves referring to 19 U.S.C. § 1602 *et seq.*, the customs statutes, for law and procedure in a wide variety of cases.[58]

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[56] For purposes of this section, the provisions of the customs laws relating to the seizure, summary and judicial forfeiture, condemnation of property for violation of the customs laws, the disposition of such property or the proceeds from the sale of this section, the remission or mitigation of such forfeitures, and the compromise of claims (19 U.S.C. § 1602 et seq.), insofar as they are applicable and not inconsistent with the provisions of this section, shall apply to seizures and forfeitures incurred, or alleged to have been incurred, under this section, except that such duties as are imposed upon the customs officer or any other person with respect to the seizure and forfeiture of property under the customs laws shall be performed with respect to seizures and forfeitures of property under this section by such officers, agents, or other persons as my be authorized or designated for that purpose by the Attorney General, the Secretary of the Treasury, or the Postal Service, as the case may be. The Attorney General shall have sole responsibility for disposing of petitions for remission or mitigation with respect to property involved in a judicial forfeiture proceeding.

18 U.S.C. § 981(d).

[57] The provisions of law relating to the seizure, summary and judicial forfeiture, and condemnation of property for violation of the customs laws; the disposition of such property or the proceeds from the sale thereof; the remission or mitigation of such forfeitures; and the compromise of claims shall apply to seizures and forfeitures incurred, or alleged to have been incurred, under any of the provisions of this subchapter, insofar as applicable and not inconsistent with the provisions hereof . . ..

21 U.S.C. § 881(d).

[58]The relevant sections of the customs laws--explained in more detail in Appendix A--are summarized here by title:

1602	Seizure; report to customs officer
1603	Seizure; warrants and reports
1604	Seizure; prosecution
1605	Seizure; custody; storage
1606	Seizure; appraisement
1607	Seizure; value $500,000 or less, prohibited articles, transporting conveyances

The internal revenue code also details some forfeiture procedures, primarily directed at alcohol, tobacco, and firearms violations.[59] Even these, however, directly reference the customs laws for remission and mitigation procedures.[60]

4. Procedural Due Process--Notice

Notice, particularly to potential third party claimants, is a sensitive issue in civil forfeitures. The matter never reaches court at all unless someone files a timely claim and a bond. Absent such filing, the forfeiture is perfected administratively, without any judicial proceeding at all. Less than adequate notice will result in extinguishing even the most meritorious of claims against the forfeiture.

The stringent notice requirements probably have their origins, once again, in ancient admiralty law. In an early U.S. Supreme Court case known simply as *The Mary*, Chief Justice John Marshall held that the only notice required in an *in rem* admiralty case was service upon the res.[61] By today's standards, particularly as applied to property other than a ship, such notice appears inadequate.

1608	Seizure; claims; judicial condemnation
1609	Seizure; summary forfeiture and sale
1610	Seizure; judicial forfeiture proceedings
1611	Seizure; sale unlawful
1612	Seizure; summary sale
1613	Disposition of proceeds of forfeited property
1614	Release of seized property
1615	Burden of proof in forfeiture proceedings
1616a	Disposition of forfeited property
1618	Remission or mitigation of penalties
1619	Award of compensation to informers

[59]26 U.S.C. § 7321-27. The sections of Title 18 that deal with liquor trafficking and cigarette trafficking incorporate these forfeiture procedures from the internal revenue laws, rather than the procedures detailed elsewhere in Title 18. *E.g.*, 18 U.S.C. §§ 2344(c) & 3667.

[60]26 U.S.C. § 7327.

[61]*The Mary*, 13 U.S. (9 Cranch) 126 (1815).

Accordingly, notwithstanding the Court's holding in *The Mary,* Supplemental Rule C(4)[62] requires notice not only by service on the property itself, but also by publication in a newspaper of general circulation in the district. The specifics of such notice by publication are usually the subject of local rule, often requiring publication in a local newspaper for three successive weeks, the same notice requirement that applies to administrative forfeitures.[63]

Until recently, Supplemental Rule C(6)[64] allowed claimants only 10 days "after process has been executed" in which to file a claim, and 20 days more to file an "answer." This conflicted with customs forfeiture law at 19 U.S.C. § 1608, which allows 20 days after first publication to file a claim. In January 1998, the Standing Committee approved amendments to

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[62] **Notice.** No notice other than the execution of the process is required when the property that is the subject of the action has been released in accordance with Rule E(5). If the property is not released within 10 days after execution of process, the plaintiff shall promptly or within such time as may be allowed by the court cause public notice of the action and arrest to be given in a newspaper of general circulation in the district, designated by order of the court. Such notice shall specify the time within which the answer is required to be filed as provided by subdivision (6) of this rule. This rule does not affect the requirements of notice in actions to foreclose a preferred ship mortgage pursuant to the Act of June 6, 1920, ch. 250, § 30 as amended.

Rule C(4), Supplemental Rules for Certain Admiralty and Maritime Claims.

[63] *See also* 19 U.S.C. § 1607(a) (notice of customs seizures must be published for three consecutive weeks); 26 U.S.C. § 7325(2) (notice of internal revenue seizures must be published for three consecutive weeks).

[64] **Claim and Answer; Interrogatories.** The claimant of property that is the subject of an action in rem shall file a claim within 10 days after process has been executed, or within such additional time as may be allowed by the court, and shall serve an answer within 20 days after the filing of the claim. The claim shall be verified on oath or solemn affirmation, and shall state the interest in the property by virtue of which the claimant demands its restitution and the right to defend the action. If the claim is made on behalf of the person entitled to possession by an agent, bailee, or attorney, it shall state that the agent, bailee, or attorney is duly authorized to make the claim. At the time of answering, the claimant shall also serve answers to any interrogatories served with the complaint. In actions in rem, interrogatories may be so served without leave of court.

Rule C(6), Supplemental Rules for Certain Admiralty and Maritime Claims.

Supplemental Rule C(6) expanding response time for non-admiralty forfeitures,[65] bringing the rule into line with the statute. In so doing, the Committee, for the first time, drew a formal distinction between traditional admiralty proceedings, which remain subject to the 10-day limit, and the much more common non-admiralty forfeitures, for which the greater time was allowed.

Even as amended, however, the time to respond is short. Because the property rights of innocent third parties at stake, the adequacy of notice and time to respond deserve particular attention. Ancient admiralty principles--*e.g.*, that execution of process on the ship is sufficient notice to anyone with an interest in it--are clearly inadequate as applied to modern civil forfeiture practice.

5. Burden of Proof (Civil)

In the court proceedings for a civil forfeiture, the government need only establish *probable cause* to believe that the property is subject to forfeiture. The government need not prove even that a crime was committed; probable cause will suffice for civil forfeiture purposes. Once the government has met this burden, the burden shifts to the claimant to prove *by a preponderance of the evidence* that his or her interest in the property is not subject to a declaration of forfeiture.[66] He or she may do so by establishing either (1) that the predicate offense was never committed, or (2) that the property lacks a sufficient nexus to the crime to qualify for forfeiture under the statute.

6. Defenses

a. Innocent Owner

Except when the relevant statute provides otherwise, the innocence of the owner is not typically a defense to civil forfeiture.[67] The absence of constitutional protections for innocent owners was reaffirmed recently by the U.S. Supreme Court in *Bennis v. Michigan*,[68] in which an innocent owner of an automobile--used by her husband for a liaison with a prostitute--challenged the forfeiture of her interest in the car not only as an unconstitutional taking but also as a due

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[65]Minutes (January 1998), Standing Committee on Rules of Practice and Procedure, Judicial Conference of the United States.

[66]19 U.S.C. § 1615.

[67]*Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 683 (1974) ("[T]he innocence of the owner of property subject to forfeiture has almost uniformly been rejected as a defense."); *United States (Drug Enforcement Administration) v. One Jeep Wrangler*, 972 F.2d 472, 476 (2d Cir. 1992) ("The innocence of the owner is irrelevant--it is enough that the property was involved in a violation to which forfeiture attaches.").

[68]116 S. Ct. 994 (1996).

process violation. She relied on the Court's comment in *Calero-Toledo* that "it would be difficult to reject the constitutional claim of . . . an owner who proved not only that he was uninvolved in and unaware of the wrongful activity, but also that he had done all that reasonably could be expected to prevent the proscribed use of his property."[69] But that statement was dismissed in *Bennis* as mere dictum.[70] The Court concluded with a ringing endorsement of civil forfeiture, even from innocent owners, as "too firmly fixed in the punitive and remedial jurisprudence of the country to be now displaced."[71]

The *Bennis* case, of course, arose out of a state forfeiture law, but nonetheless clarified the constitutional limits, or lack thereof, on civil forfeiture. Although the constitution may not protect an innocent owner, some of the federal forfeiture statutes do, barring confiscation absent the owner's knowledge or consent to the illegal use of his property.[72] These statutory exceptions have not always been interpreted generously to "innocent" claimants. The "lack of consent" defense has been interpreted to require proof that the owner has done all that reasonably could be expected to prevent the proscribed use; the "lack of knowledge" defense may, in some circuits, be unavailable if the owner *should have* known of the illegal use of the property.[73]

b. Double Jeopardy

The Supreme Court has now rejected the conclusion, previously reached by at least two circuits, that civil forfeitures under 18 U.S.C. § 981 and 21 U.S.C. § 881 could constitute punishment for double jeopardy purposes.[74] At present, therefore, double jeopardy is not a bar to civil forfeiture after a criminal sentence has been imposed, or to criminal prosecution after a civil forfeiture has been ordered.

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[69] 416 U.S. at 689.

[70] 116 S. Ct. at 999.

[71] *Id.* at 1001 (quoting *J.W. Goldsmith Jr.-Grant Co. v. United States,* 254 U.S. 504, 511 (1921)).

[72] *E.g.,* 18 U.S.C. § 981(a)(2) (in money laundering cases, "[n]o property shall be forfeited . . . to the extent of the interest of an owner or lienholder by reason of any act or omission established by that owner or lienholder to have been committed without [his or her] knowledge"); 21 U.S.C. § 881(a)(4) (in controlled substance cases, vehicles and vessels are not forfeitable if operated by an innocent common carrier, or if the actions prompting forfeiture were without "the knowledge, consent or willful blindness of the owner"); 21 U.S.C. § 881(a)(7) (in controlled substance cases, "no [real] property shall be forfeited . . . to the extent of an interest of an owner, by reason of any act or omission established by that owner to have been committed or omitted without [his or her] knowledge or consent").

[73] *E.g., United States v. 755 Forest Road,* 985 F.2d 70 (2d Cir. 1993) (defense is unavailable to the willfully blind); *but see United States v. 6960 Miraflores Ave.*, 995 F.2d 1558 (11th Cir. 1993) (defense is available if the claimant can prove absence of "actual knowledge").

[74] *United States v. Ursery*, 116 S. Ct. 2135 (1996).

c. Excessive Fines

The Supreme Court has held that a forfeiture, even a civil forfeiture, may be so great as to violate the Eighth Amendment's excessive fines clause.[75] The Court has not yet articulated a test for when a forfeiture runs afoul of the Eighth Amendment, although it may do so shortly in a case argued earlier this term.[76]

7. Return of the Property

If the claimant succeeds in proving by a preponderance of the evidence that the forfeiture was improper, the government must return the property.[77] The government is not required to make compensation for depreciation or damage to the property sustained while in government custody, however.[78] If the forfeiture stands, the property is disposed of as dictated by the applicable statute.

V. Conclusions and Recommendations

The long and peculiar history of forfeitures in English and American law has yielded procedural constructs that are less than intuitive. It may defy common sense to look to customs laws or admiralty rules for guidance when confiscating illegal drugs from an urban crack house. When considering proposals for forfeiture procedure, therefore, it is particularly important to keep the larger picture in mind.

Civil forfeiture procedures are pretty well established by the customs laws and the admiralty rules. These procedures are not necessarily well-suited to the typical civil forfeiture case, however. The recent amendments to the admiralty rules governing notice of civil forfeitures, for example, were based, at least in part, on the recognition that traditional rules of admiralty do not necessarily accommodate the legitimate interests of the parties in modern forfeiture actions. Because the statutes specifically invoke customs procedures and admiralty rules, however, the Rules Committees are, at least for now, required to consider forfeiture procedure issues in the context of the Supplemental Rules for Certain Admiralty and Maritime Claims. Preserving procedures that make sense for admiralty cases may require development of two "tracks" for cases under the admiralty rules: (1) one for the traditional admiralty cases, and

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[75] *Alexander v. United States,* 113 S. Ct. 2766 (1993); *Austin v. United States*, 113 S. Ct. 2801 (1993).

[76] *United States v. Bajakajian*, (No. 96-1847, argued Nov. 4, 1997).

[77] 28 U.S.C. § 2465.

[78] *United States v. Lewis*, 987 F.2d 1349, 1357 (8th Cir. 1993).

(2) one for the non-admiralty forfeitures. The Standing Committee is already heading this direction. It appears to be a promising approach.

Criminal forfeiture proceedings, in contrast, do not always have well-defined procedures prescribed. The statute governing most cases under Title 18 lays out some detailed procedures, but the criminal rules do little to clarify them. Moreover, criminal forfeitures under many of the other statutes have neither statutory nor rule-based procedures prescribed for them. It may be appropriate to establish some rules, perhaps reflecting the procedures set by Congress for Title 18 and Title 26 cases, that would apply generally to criminal forfeitures wherever they may arise. Perhaps once a set of such rules is in place, Congress will be willing to defer to the rule-based procedures, and will not feel the need to impose procedures statutorily as it has for most of the Title 18 criminal forfeitures.

It may well be time for a legislative overhaul of forfeiture procedure, given the somewhat tortured procedural landscape for such proceedings now. In the meantime, the admiralty rules may need some attention to assure that they function appropriately for non-admiralty forfeitures while still addressing the legitimate concerns of admiralty cases. At the same time, the criminal rules should be amended to set forth detailed criminal forfeiture procedures--not inconsistent with current statutory ones--to fill a procedural void for those cases that are outside the scope of the statutory procedures.

Appendix A

More commonly used forfeiture and forfeiture-related statutes

Title 7	**Agricultural Products**
608a(5)	Exceeding quota. Persons exceeding agricultural quota or allotment (or those aiding) "shall forfeit" the market value of such excess; recoverable in a "civil suit brought in the name of the U.S."
608e-1(a)	Imports violating marketing order. Importation of certain products is prohibited when Secretary has issued a marketing order regulating the grade, size, quality of the products. Property is forfeitable to the extent permitted by section 608a(5).
2024(g)	Illegal food stamp operation. Property involved in the operation (money or securities exchanged for coupons) is subject to forfeiture; procedures to be determined by USDA regulations.
2156(f)	Animal fighting venture. Animals involved are "liable to be proceeded against and forfeited at any time . . . on complaint filed in any U.S. District Court." Animal to be disposed of humanely.
Title 8	**Immigration**
1324(b)	Transporting aliens. Conveyance (vessel, vehicle, aircraft, etc.) used for bringing in or harboring aliens can be seized without warrant if there is probable cause. Customs procedures apply "insofar as not inconsistent with provisions herein." Once probable cause is shown, the claimant to the property has the burden of proof.
Title 15	**Trade and Commerce**
6	Conspiracy in restraint of trade. Property owned by an illegal combination or pursuant to a conspiracy may be forfeited under the customs procedures.
77	Unfair competition. The president may detain foreign vessels in time of war if the other country discriminates against Americans in trade. Any detained vessel that attempts to depart shall be forfeited to the U.S. The president may deploy military to effect forfeiture.

1195	Flammable fabrics. Fabrics are forfeitable by libel process conforming as nearly as possible to "proceedings in rem in admiralty", except that on demand of any party and in the discretion of court, issues of fact shall be tried by jury. Disposal by destruction, return to claimant (on payment of all costs) or sale, the latter two conditioned on posting of bond to assure that the fabric will be treated to make it lawful.
1265	Misbranded hazardous substance or banned substance. Substance is forfeitable under provisions tracking the language of Section 1195.
2071(b)	Consumer product which fails an applicable safety rule. Product is forfeitable under provisions tracking the language of Section 1195, except there is no right to a jury trial.
2104	Hobby protection (coins, political items, etc.). Counterfeits and unlabeled imitations, when imported, are subject to seizure and forfeiture under the customs laws.
Title 16	**Endangered Species and Wildlife Resources**
26	Yellowstone. Guns, traps, horses, etc. used to hunt illegally may be seized and, upon conviction of persons using them, shall be forfeited. Seized property is disposed of by authority of the Secretary of Interior.
470gg(b)	Unauthorized excavation/trafficking in archeological resources from public/Indian lands. Vehicle and equipment used in connection with violation may be subject to forfeiture upon (1) conviction of the person violating the law; (2) assessment of civil penalty again such person; or (3) determination by court that resources or equipment were used in the violation. When violation involves Indian lands, forfeited property is returned to the Indian or the Indian tribe affected.
668b(b)&(c)	Bald/golden eagle. Guns and vehicles, etc. used to take/sell a bird, part, nest or egg is subject to forfeiture. Customs laws apply "insofar as applicable and not inconsistent with this chapter," except that duties of customs officers shall be carried out by Interior Department personnel.
668dd(f)	National Wildlife Refuge System. Property, fish, birds, etc. unlawfully taken shall be seized, and upon conviction of the person, shall be forfeited. Forfeited property shall be disposed of by the Secretary in accordance with law.
670j(c)	Public lands subject to conservation and rehabilitation programs. Guns, traps, etc. used in unauthorized hunting and fishing on such lands may be seized. Upon

	conviction, forfeiture may be adjudicated as a penalty. Customs laws apply, but shall be carried out by Interior or Agriculture Department personnel.
690(e)	Bear River Refuge. Birds, animals, and natural growths removed from the refuge shall be summarily seized. Upon conviction or judgment by U.S. Court that they were killed or captured contrary to law, they shall be forfeited. Seized property is disposed of by authority of the Secretary of Interior in accordance with law.
706	Migratory birds. Birds, parts, nests, and eggs taken are seized and forfeited according to language tracking that of Section 690(e).
707	Migratory birds. Guns, traps, nets, vehicles, and vessels used to violate Section 706 may be seized and, upon conviction, shall be forfeited as a penalty. Seized property is disposed of by authority of the Secretary of Interior.
742j-1	Airborne hunting. Birds, fish, and animals shot or captured, and guns, aircraft and other equipment used are subject to forfeiture. Customs laws apply, but shall be carried out by Interior Department personnel.
773h	North Pacific halibut. Fishing vessel, gear, and fish shall be forfeited pursuant to a civil proceeding under this section. Attorney General may seize property "upon judgment." Customs laws apply unless "inconsistent with the provisions, policies, or purposes of this subchapter." Rebuttable presumption that fish on board were taken in violation of law.
916f	Whaling. Court may order whales or monetary value thereof forfeited and disposed of at the direction of court.
1030	North Pacific fisheries. Fishing vessel, gear, and fish shall be forfeited pursuant to a civil proceeding under this section. Attorney General may seize property "upon judgment." Customs laws apply unless "inconsistent with the provisions, policies, or purposes of this subchapter." Rebuttable presumption that fish on board were taken in violation of law.
1171	North Pacific fur seals. Vessels and equipment, as well as seals, or the monetary value thereof, shall be forfeited. Customs laws apply to seizure, summary and judicial forfeiture, condemnation, sale, proceeds, remission or mitigation, insofar as "applicable and not inconsistent."
1376	Marine mammal protection. If a vessel is employed in taking marine mammals, its cargo, or the monetary value thereof, shall be forfeited. Customs law procedures for seizure, forfeiture, condemnation, disposition of forfeited property,

	proceeds of sale, remission or mitigation, apply insofar as "applicable and not inconsistent."
1540(e)	Endangered species. Fish, wildlife, or plants taken, sold, or shipped shall be subject to forfeiture. Customs law procedures for seizure, forfeiture, condemnation, disposition of forfeited property, proceeds of sale, remission or mitigation, apply insofar as "applicable and not inconsistent."
1860	Fishery conservation. Vessel, equipment, cargo, as well as fish (or fair market value thereof) shall be subject to forfeiture in a civil proceeding. Customs law procedures for disposition, proceeds, remission or mitigation, and compromise of claims apply unless "inconsistent with the provisions, policies, or purposes of this subchapter." Posting a bond stays the seizure. Fish cannot be sold for less than market value. Rebuttable presumption that fish on board were taken in violation of law.
2409	Antarctic conservation. Animal or plant, guns, traps, equipment, vessels, vehicles, and aircraft are subject to forfeiture. Customs law applies insofar as "applicable and not inconsistent."
2439	Antarctic Convention. Antarctic marine living resources, guns, traps, equipment, vessels, vehicles, and aircraft are subject to forfeiture. Customs law applies insofar as "applicable and not inconsistent."
3374	Illegally taken fish and wildlife. Fish, wildlife, and plants illegally trafficked in are subject to forfeiture notwithstanding any culpability requirements for civil penalty or criminal prosecution. Vehicles, vessels, etc. are subject to forfeiture if owner was consenting party or privy thereto or should have known. Customs law procedures for seizure, forfeiture, condemnation, disposition, proceeds, remission or mitigation apply insofar as they are "applicable and not inconsistent." Any warrant for search and seizure must be issued in accordance with Criminal Rule 41.
3606	North Atlantic salmon. Vessel, as well as fish (or their fair market value) are subject to civil forfeiture as under Section 1860.
Title 17	**Copyright Protection**
506(a)	Infringing copies and equipment. Upon conviction for criminal copyright infringement, the court shall order forfeiture and destruction of infringing copies, as well as the equipment used to make them.

603	Importation prohibition. Infringing articles imported are subject to seizure and forfeiture in the same manner as property imported in violation of "customs revenue laws." Articles are destroyed as directed by the Secretary of the Treasury or the court, or may be returned to foreign country if the Secretary is persuaded that the importer had no reason to know it was a violation of law.
910	Semi-conductor chip products. Same standards as provided in Section 603.
Title 18	**Criminal Code**
492	Counterfeiting. Counterfeit coins, obligations and securities, as well as material and equipment for their manufacture "shall be forfeited." Interested persons can petition the Secretary of the Treasury (or the Attorney General if other crimes are involved) for remission or mitigation.
542	Entry of Goods by False Statements. Treated under section 981 (below).
544	Relanding of Goods. Any merchandise entered or withdrawn for exportation without the payment of export duties, that is then relanded in the U.S. without entry having been made, is considered to be illegally imported property and shall be forfeited.
545	Smuggling. Treated under section 981 (below).
548	Bonded Warehouse Goods. Fraudulently concealed, removed, or repacked merchandise in a bonded warehouse, as well as merchandise whose numbers and markings have been altered or defaced, "shall be forfeited."
550	False Claims for Refunds of Duties. Whoever files such a false claim for refund of duties on exported merchandise shall forfeit the merchandise or the value thereof.
844(c)	Explosive Materials. Treated under section 981 (below).
924(d)	Firearms. Firearms or ammunition used in any criminal violation shall be subject to seizure and forfeiture as provided in the Internal Revenue Code (26 U.S.C. § 5845(a)). Forfeiture proceedings must begin within 120 days of seizure. The property must be returned, however, upon acquittal of--or dismissal of charges against--the owner or possessor.
962-967	Neutrality Laws. Arming a vessel against a friendly nation, delivering an armed vessel to a belligerent nation, departure of a vessel detained in aid of neutrality by

the president, etc., results in forfeiture of the vessel, equipment, and cargo. In the case of arming a vessel, half is forfeited to the U.S., the other half to the informer.

981 "White Collar" Transactions (Civil Forfeiture). Discussed at some length in the text of the paper to which this is appended, this section specifies forfeiture as a civil remedy for criminal wrongdoing and identifies procedures therefor. The criminal statutes for which the civil forfeiture is available are listed in footnote 22 of the text. They are summarized again here, all sections coming from Title 18 except where otherwise noted:

215	Loan kickbacks. Forfeiture of property derived from proceeds traceable to the crime.
471-74, 476-81, 485-88, & 501-02	Counterfeiting securities, currency, and postal stamps currency, and postal stamps. Forfeiture of property derived from proceeds traceable to the crime.
510	Forging signatures on U.S. checks, securities and bonds. Forfeiture of property derived from proceeds traceable to the crime.
511	Altering or removing motor vehicle ID numbers. Forfeiture of gross receipts traceable to the crime.
542	False statements made in customs. Forfeiture of property derived from proceeds traceable to the crime.
545	Smuggling. Forfeiture of property derived from proceeds traceable to the crime.
553	Importing or exporting stolen vehicles. Forfeiture of gross receipts traceable to the crime.
656-57	Bank embezzlement. Forfeiture of property derived from proceeds traceable to the crime.
666(a)(1)	Federal program fraud. Forfeiture of gross receipts traceable to the crime if related to a sale by a federal receiver.
842, 844	Trafficking in explosives. Forfeiture of property derived from proceeds traceable to the crime.
1001	False statements. Forfeiture of gross receipts traceable to the crime if related to a sale by a federal receiver.
1005-07	Falsifying bank records. Forfeiture of property derived from proceeds traceable to the crime.
1014	False statement in loan applications. Forfeiture of property derived from proceeds traceable to the crime.
1028	False identification of documents. Forfeiture of property derived from proceeds traceable to the crime.
1029	Trafficking in access devices. Forfeiture of property derived from proceeds traceable to the crime.
1030	Computer hacking. Forfeiture of property derived from proceeds traceable to the crime.

1031	Major fraud against the U.S. Forfeiture of gross receipts traceable to the crime if related to a sale by a federal receiver.
1032	Asset concealment. Forfeiture of property derived from proceeds or gross receipts (related to a sale by a federal receiver) traceable to the crime.
1341 & 1343	Mail and wire fraud. Forfeiture of property derived from proceeds or gross receipts (related to a sale by a federal receiver) traceable to the crime.
1344	Bank fraud. Forfeiture of property derived from proceeds traceable to the crime.
1956	Money laundering. Forfeiture of property involved.
1957	Monetary transactions in criminally derived property. Forfeiture of property involved.
2119	Carjacking. Forfeiture of gross receipts traceable to the crime.
2312-13	Possessing, selling or transporting stolen vehicle. Forfeiture of gross receipts traceable to the crime.
31 U.S.C. § 5313(a)	Reporting certain financial transactions. Forfeiture of property involved in transactions that are not reported as required.
31 U.S.C. § 5324(a)	Structuring transactions to evade reporting requirements. Forfeiture of property involved in the structured transactions.

982 "White Collar" Transactions (Criminal Forfeiture). Also discussed in the text, this provision calls for the forfeiture of property "derived from or traceable to the proceeds of" the crime, as well as property "used to facilitate the commission of," or the conspiracy to commit, the crime. Forfeiture is made part of the sentence, upon criminal conviction for any of the crimes listed above under Section 981, as well as convictions under the following statutes (all sections are from Title 18 except where otherwise noted):

8 U.S.C. § 1324a(a)	Employment of illegal aliens.
1425	Unlawful procurement of citizenship.
1426	Reproduction of citizenship or naturalization papers.
1427	Sale of citizenship or naturalization papers.
1541	Unauthorized issuance of passport.
1542	False statement in application and use of passport.
1543	Forgery or false use of passport.
1544	Misuse of passport.
1546	Fraud and misuse of visas, permits, and other documents.
1960	Illegal money transmitting business.
31 U.S.C. § 5316	Reporting on import and export of monetary instruments.

1165 Indian Land Protection. In addition to imprisonment, "all game, fish, and peltries in his possession" shall be forfeited.

1467	Obscene Materials. Person convicted shall forfeit (1) obscene material, (2) proceeds of the offense, and (3) any property used to commit the offense which, in the court's discretion, is proportional to the offense. This statute goes on at some length to detail protections for third parties, as well as seizure, execution, and disposition procedures.
1762	Illegal Transportation of Prison-Made Goods. Violator shall be fined and goods shall be forfeited "by like proceedings as those provided by law for the seizure and forfeiture of" illegally imported property.
1963	Racketeer Influenced and Corrupt Organizations (Criminal RICO penalties). Criminal forfeiture substance and procedure set forth in detail; tracking closely the parallel provisions at 21 U.S.C. § 853; discussed at in the text at pp. 10-14 and quoted at footnote 25.
2274	Misuse of Vessel. If misuse is with the knowledge of the owner or master, the vessel and its equipment "shall be subject to seizure and forfeiture in the same manner as merchandise is forfeited for violation of the customs revenue laws."
2318(d)	Counterfeit Labels. Upon conviction, the court shall order forfeiture of all counterfeit labels and all articles to which such labels were, or were to be, affixed.
2344(c)	Trafficking in Cigarettes. Contraband cigarettes shall be subject to forfeiture under the provisions of the Internal Revenue Code that apply to seizure and forfeiture of firearms.
2513	Intercepting devices. Devices used to violate laws against interception may be seized and forfeited under customs laws relating to seizure, disposition, remission and mitigation, compromise of claims, and awards to informers "insofar as applicable and not inconsistent with the provisions of this section." Although customs laws apply, they shall be carried out by Justice Department personnel.
3665	Possession of firearms during felony. The judgment of conviction may order the confiscation and disposal of firearms and ammunition found in the possession of the defendant. The court may direct delivery of the firearm to the law-enforcement agency which apprehended the defendant for its use or disposal.
3667	Liquor trafficking. All liquor involved in any violation, as well as vehicles and vessels used in transporting it, shall be forfeited in accordance with the internal revenue laws governing forfeitures.

Title 19	Customs
130	Importation in vessels of the U.S. or of the country of origin. All goods, wares, and merchandise illegally imported, as well as vessels, cargo, tackle and furniture, "shall be forfeited" under the procedures and regulations established by the "several revenue laws."
467-69	Marks, brands, or stamps on imported distilled spirits. Any container of imported spirits without such marks, brands, or stamps shall be, with its contents, forfeited. Stamps shall be removed upon emptying the container, otherwise, the container is forfeited. Anyone dealing in or using empty, but still stamped, containers shall forfeit both containers and contents.
1305	Prohibition on importation of immoral materials (obscene materials, materials advocating treason or threatening physical harm, etc.). Statute specifies enforcement procedures, initiated by the U.S. Attorney in federal district court. Any interested party may demand a jury trial.
1322(b)	International (U.S.-Mexico) traffic and rescue work. Equipment brought into the country to do rescue and relief work are excepted from otherwise applicable customs laws; but if the equipment is used for other purposes, or not exported in a timely way, it shall be forfeited.
1338	Discrimination in trade by foreign countries. The president has power to impose trade restrictions and additional duties to address such discrimination. Imports that violate the president's restrictions are forfeitable under the procedures and regulations established by the "several revenue laws."
1453	Lading and unlading of merchandise or baggage. If lading is done without special license or permit, the master of the vessel or vehicle is liable to the value of the merchandise, and the merchandise shall be subject to forfeiture. If the value is $500 or more, the vehicle or vessel shall also be subject to forfeiture.
1461-62	Baggage inspections. If the owner/agent of the baggage fails to submit to the customs officer's inspection, the officer can retain and open the container or vehicle. If the officer finds anything prohibited or subject to duty, the container and its entire contents are subject to forfeiture.
1463-64	Sealed vehicles and vessels. Violation of the regulations of the Secretary of the Treasury is a felony, punishable by imprisonment and fine, and the vessel or vehicle an its contents shall be forfeited.

1466(a)	Equipment and repairs of vessels. If purchased in a foreign country, 50% ad valorem duty is due on return to U.S. Willful evasion results in seizure and forfeiture of the vessel, or a monetary amount up to the value thereof, as determined by the Secretary of the Treasury.
1497	Failure to declare. Penalties for failure to declare include forfeiture of the undeclared article, and a penalty equal to the value of the article (except controlled substances bring a penalty of 1000% of the value of the article).
1510(b)	Failure to comply with summons to examine books. The Secretary of the Treasury may order customs officers to withhold delivery of merchandise imported by the person or for his account. If person remains in contempt for more than one year, withheld property may be sold at public auction.
1526	Import of merchandise bearing counterfeit trademark. Merchandise shall be seized and, absent written consent from the trademark owner, shall be forfeited for violation of customs laws. Upon seizure, the trademark owner is notified, then either the merchandise is destroyed, or, where feasible, the counterfeit trademark is obliterated and the merchandise is given to (1) government use (including state and local), (2) charitable interests, or (3) public auction, if no government or charitable use is found in one year's time.
1527	Wild mammals and birds (dead or alive) imported in violation of foreign law. Animals shall be subject to seizure and forfeiture under the customs laws. In the discretion of the Secretary of the Treasury, forfeited animals shall be placed with federal or state governments, societies or museums for exhibition or scientific purposes, or (in some cases) sold.
1584	Falsity or lack of manifest. Merchandise that is not included in a valid manifest is subject to forfeiture, in addition to criminal penalties against the master, owner or other responsible party.
1586	Unlawful unlading or transshipment. If any vessel unloads cargo before receiving a permit to do so, or transfers contraband or alcoholic beverages intended for the U.S. to a U.S. vessel on the high seas, criminal penalties apply and the vessel and merchandise shall be seized and forfeited.
1587	Examination of hovering vessels. If dutiable merchandise destined for the U.S. is found, the vessel and its cargo shall be seized and forfeited.
1588	Transportation between American ports via foreign ports. If done by a foreign vessel for the purpose of evading provisions for the transportation of merchandise

between American ports, the vessel shall pay a tonnage duty and the merchandise shall be seized and forfeited.

1592(c)(6) Introducing merchandise into U.S. commerce by false documents or material omissions. If the Secretary of the Treasury has "reasonable cause" to believe this has been violated and that the person is insolvent or beyond U.S. jurisdiction, the merchandise may be seized and, unless the monetary penalty is paid, forfeited. The Secretary must return seized property if a deposit is made.

1594 Seizure of conveyances. Any vehicle, vessel, or aircraft used to violate customs laws may be held for the payment of the penalty, and may be seized, forfeited and sold in accordance with the customs laws. The proceeds of sale, beyond the penalty and the expenses, shall be held for the account of any interested party.

1595a Illegal imports. Conveyances and items used to facilitate illegal imports may be seized and forfeited.

1602-06 Procedures for customs seizures. Every seizure must be reported; search warrants under Fed. R. Crim. P are required; prosecution is by the Department of Justice; customs officers shall take custody of property and appraise it.

1607 Seizure of property valued at $500,000 or less, prohibited articles (controlled substances) and their transporting conveyances. These may be seized with notice given by publication for three weeks.

1608-10 Administrative forfeiture. If no claim is filed in 20 days, the property is automatically forfeited. Upon filing of a timely claim, the matter is referred to the U.S. Attorney and judicial proceedings begin. Also, seized property that is not under section 1607 is referred to the U.S. Attorney.

1611-12 Summary sale. If the property is perishable it may be sold on an expedited schedule. The Secretary may transfer property to another customs district for sale.

1613 Disposition of proceeds of forfeited property. After sale, the monetary penalty and expenses are paid, and any excess is returned to the person against whom the penalty was assessed. Claimant may make application for remission of forfeiture.

1613b Customs Forfeiture Fund. A special fund is created in the U.S. Treasury for proceeds of forfeited property, which can be drawn upon by customs officials for various expenses of customs enforcement operations.

1614	Release of seized property. If a person with a substantial interest in the property offers to pay its value, the Secretary of the Treasury may release the property to that individual.
1615	Burden of proof in forfeiture proceedings. Once probable cause is shown, by one of various prima facie showings, the burden is on the claimant.
1616a	Disposition of forfeited property. Forfeiture proceedings may be discontinued in favor of State proceedings. Forfeited property may be retained for official use, transferred to another federal agency, to cooperating state law enforcement agencies, or (for non-jet-powered aircraft) to the Civil Air Patrol.
1617	Compromise of claims. Such compromise may be made by the Secretary of the Treasury.
1618	Mitigation and remission of penalties. This may be made if there is no "willful negligence" or wrongful intent on the part of the claimant.
1619-20	Compensation of informers. Informers may get up to 25% of net recovery, not to exceed $250,000. It is a felony for a federal officer to take a kickback on such compensation.
1621	Statute of limitations. Forfeitures under the customs laws must commence within five years after discovery of the alleged offense.
1703	Seizure and forfeiture of vessels. If used for smuggling or to defraud the U.S. of revenue, the "vessel and its cargo shall be seized and forfeited."
2093	Pre-Columbian monumental or architectural sculptures and murals. Unlawful imports "shall be seized and subject to forfeiture under the customs laws."
Title 21	Drugs and Controlled Substances
334	Adulterated or misbranded food or drugs. Such property "shall be liable to be proceeded against on libel of information" and subject to judicial condemnation. Procedures for addressing multiplicity of pending proceedings, for disposition of goods after decree of condemnation, and for remission or mitigation.
467b	Poultry products. Such products that are adulterated, misbranded, or otherwise unlawfully introduced into commerce, shall be "liable to be proceeded against and seized and condemned." Proceedings shall conform, as nearly as may be, to admiralty proceedings, except there is a right to jury trial. Condemned poultry

may be given to charitable or government operations that distribute food free of charge.

673 Meat products. Similar provisions to section 467b.

824(f) Controlled substances. When the Attorney General suspends or revokes a registration, the substances held under the revoked registration "shall be forfeited."

848(a) Continuing Criminal Enterprises. Imposes criminal penalties including "the forfeiture prescribed in section 853."

853 Drug Felonies--Criminal Forfeitures. Procedures set forth in detail; discussed at in the text at pp. 10-14.

881 Controlled Substances--Civil Forfeitures. Procedures set forth in detail; discussed in the text at pp. 15-16.

Title 22 Foreign Relations and Intercourse

401 Illegal export of war materials. If there is an attempt, or probable cause to believe someone intends to illegally export arms or munitions, the Secretary of the Treasury may seize it. All such materials, as well as vehicles, vessels, and aircraft used for such attempt, "shall be forfeited." Customs laws apply "insofar as applicable and not inconsistent." Disposition of forfeited property is by the Secretary of Defense.

1978 Importation of fish and wildlife products. The illegally imported products shall be forfeited. Customs laws apply "insofar as applicable and not inconsistent."

Title 26 Taxation

5607 Unlawful use or concealment of distilled spirits. Prescribes criminal penalties including forfeiture of all personal property used in connection with the business, as well as the real property where the offense was committed.

5608 Fraudulent claim for drawback on distilled spirits or for relanding exported spirits. Prescribes criminal penalties, including forfeiture of triple the amount sought to be fraudulently obtained, and the ship or vessel where the shipment was made shall be forfeited "in admiralty by libel" whether or not there is a criminal conviction.

5612	Taxpaid distilled spirits remaining on bonded premises. If taxpaid spirits are allowed to remain on the premises, they will be forfeited as a penalty.
5613	Distilled spirits. Spirits not closed, marked, or branded as required by law shall be forfeited.
5614	Burden of proof. A claimant seeking return of seized spirits has the burden of proving that no fraud was committed and that the tax law has been complied with.
5615	Property subject to forfeiture. Unregistered still, distilling apparatus removed or set up without notice, distilled spirits produced in a vinegar plant, spirits unlawfully removed from place of manufacture, and spirits tainted with fictitious proof are all subject to forfeiture, as well as all spirits, materials, equipment, real property used, and personal property on the premises, when the distilling is done without giving bond or with intent to defraud.
5661(a)	Violations relating to wine. Criminal penalties include forfeiture of "all products and materials used in any such violation."
5671	Evasion of beer tax. Criminal penalties include forfeiture of beer and the equipment used to make it.
5681(c)	No sign on distilled spirits plant. If the required sign is absent, anyone who works there and/or conveys spirits or materials therefor to or from the premises is guilty of a misdemeanor, and the vehicles, vessels, or aircraft used shall be forfeited.
5683	Removal of liquor under improper brands. Violation is a misdemeanor, which includes among penalties the forfeiture of spirits, wine, beer and casks or packages.
5685(c)	Firearms. Those possessed while violating liquor laws are forfeitable under section 5872.
5763	Tobacco operations. Improperly packaged tobacco products, or products held with intent to defraud shall be forfeited. When there is an intent to defraud, the personal property on the premises of the manufacturer or warehouse shall be forfeited. Illicit operators forfeit not only personal property but real property as well.
5872	Firearms involved in the violation of revenue laws. Such firearms are forfeitable under the provisions of internal revenue laws governing forfeiture of unstamped

articles. Disposal is not by public sale, but by destruction, by sale to state or local authorities, or by transfer to federal authorities.

7301	Property held to defraud the U.S. Any property hel for the purpose of sale or removal to defraud the U.S. of taxes legally owed shall be forfeited. This includes to raw materials, equipment, packaging and conveyances (vehicles, vessels, aircraft and draft animals) associated with the scheme to defraud.
7302	Property used in violation of internal revenue laws. It is unlawful to possess such property and no property rights vest in it. Search may be had under Title 18 and the Fed. R. Crim. P. Procedures for seizure and forfeiture are those of the internal revenue laws.
7303	Other property. Also subject to forfeiture are counterfeit stamps, falsely stamped packages, and fraudulent bonds and permits.
7321-22	Procedures for forfeitures under Internal Revenue Code. Authorizes seizure of forfeitable property and delivery to U.S. Marshal.
7323-24	Enforcement of forfeitures. Enforcement is by in rem action in District Court. Cost of seizure is taxable. Perishable goods may be sold, or returned on posting of a bond. Sale proceeds, after costs, are deposited with the court pending final decision.
7325-26	Personal property valued at $100,000 or less. Property shall be appraised, and notice of seizure shall be published for three weeks. Any claimants to the property must post a $2500 bond, upon which the matter is referred to the U.S. Attorney. If no claimants come forward, the property may be sold at public auction after giving reasonable notice of the sale. Coin-operated gaming devices may be destroyed.
7327	Remission and Mitigation. Customs laws apply.

Title 27	**Distilled Spirits**
206	Illegal bulk sales and bottling. Violation is a misdemeanor, but among the penalties is the forfeiture of spirits involved in the violation and their containers.

Title 28	**Civil Procedure**
2461	Mode of recovery. Admiralty procedure applies to all civil forfeitures unless Congress indicates to the contrary; quoted in the text at p. 15.
Title 30	**Mining and Minerals**
184(h)	Leases and Prospecting Permits. Unlawful leases may be canceled and the interest under the lease forfeited. Rights of bona fide purchasers are protected.
1466	Deep Seabed Mineral Resources. Vessels, equipment, and cargo involved in a violation shall be subject to forfeiture. Customs procedures apply "insofar as applicable and not inconsistent." Attorney General may seize forfeited property. Post of bond will stay process. Rebuttable presumption that anything on board the vessel is implicated.
Title 31	**Money and Currency**
5111	Coins. Coins that are exported, melted or treated shall be forfeited. Forfeitures enforced under Internal Revenue Code (26 U.S.C. § 7321, *et seq.*).
5317	Unreported monetary instruments. The instrument and any interest traceable to it may be seized and forfeited. Any property, real and personal, involved in the transaction or traceable to it may also be seized and forfeited.
Title 39	**Seized Mail**
606	Concealed letters. Packages containing unlawfully concealed letters shall be forfeited. Revenue laws apply.
Title 46 App.	**Coast Guard and Documenting Vessels**
808(d)	Unlawful charter, sale, or foreign registry. Vessel may be seized and forfeited.
835	Transfer of shipping facilities in time of war. If transfer is done without approval of Secretary of Commerce, the vessel, shipyard, dry-dock, etc. shall be forfeited.

883	Transportation of merchandise between points in the United States. Must be done in a U.S. vessel "on penalty of forfeiture of the merchandise (or a monetary amount up to the value thereof . . .)."
883-1	Vessel documentation requirements. If a vessel transports merchandise in violation of this section, the merchandise shall be forfeited.
883a	Reports of vessels rebuilt abroad. If the report is not made as required, the vessel and all tackle and equipment shall be forfeited. Remission and mitigation can be granted by the Secretary.

Title 47 Communications Devices

510	Electronic devices. Devices intended to violate the laws governing radio transmission may be seized and forfeited. Admiralty procedure applies, except that seizure without such process may be made if incident to lawful arrest or search. Sale of forfeited property according to customs laws "insofar as applicable and not inconsistent." Proceeds go to the general fund of the U.S. Treasury.

Title 48 Territories and Possessions

1504	Alien land conveyances. Where an alien is not permitted to hold land, he may convey it; but if he attempts to convey the land "in trust" or otherwise tries to evade the prohibition on alien land holding, the conveyance shall be null and void and the lands shall be forfeited and escheat.

Title 50 App. Trading with the Enemy

5	Wartime transactions. During time of war, the President my regulate, compel, void, or prohibit any transaction with foreign entities, and the property involved shall be held, used, or disposed of for the benefit of the U.S.
6 & 12	Alien Property Custodian. All money owed to an enemy shall go to the alien property custodian, who, with the power of a trustee, may liquidate property by public sale, with proceeds deposited in the U.S. treasury.
16	Forfeiture of property. Property, funds, or vessels concerned in a violation of the Trading with the Enemy Act "shall be forfeited" to the U.S. upon direction of the

Secretary of the Treasury after an agency hearing, with judicial review provided under 5 U.S.C. § 702. Also, upon conviction, they may be forfeited.

Agenda Item III B9

MEMO TO: **Members, Criminal Rules Advisory Committee**

FROM: **Professor D. Schlueter, Reporter**

RE: **Proposed Amendment to Rule 38**

DATE: **March 24, 1998**

The proposed change to Rule 38, Stay of Execution, is designed to conform the rule to new Rule 32.2.

The Committee has received no written comments on the proposed change

Rule 38. Stay of Execution

* * * * *

(e) ~~CRIMINAL FORFEITURE,~~ NOTICE TO VICTIMS~~,~~ AND RESTITUTION. A sanction imposed as part of the sentence pursuant to 18 U.S.C. ~~3554;~~ §§ 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.

* * * * *

COMMITTEE NOTE

The rule is amended to reflect the creation of new Rule 32.2, which now governs criminal forfeiture procedures.

ADVISORY COMMITTEE ON FEDERAL RULES OF CRIMINAL PROCEDURE

PROPOSED AMENDMENT TO RULE 38

I. SUMMARY OF COMMENTS: Rule 38

The Committee received no comments on the proposed change to Rule 38.

II. LIST OF COMMENTATORS: Rule 38

None

III. COMMENTS: Rule 38

None

Agenda Item III B10

MEMO TO: **Members, Criminal Rules Advisory Committee**

FROM: **Professor Dave Schlueter, Reporter**

RE: **Proposed Change to Rule 54(a).**

DATE: **March 24, 1998**

The proposed amendment to Rule 54 is a conforming amendment--to reflect that the fact that the court in the Canal Zone no longer exists.

The Committee received no comments on the published version of Rule 54, which is attached.

Rule 54. Application and Exception

(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; ~~and (except as otherwise provided in the Canal Zone) in the United States District Court for the District of the Canal Zone;~~ 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.

* * * * *

COMMITTEE NOTE

The amendment to Rule 54(a) is a technical amendment removing the reference to the court in the Canal Zone, which no longer exists.

ADVISORY COMMITTEE ON FEDERAL RULES OF CRIMINAL PROCEDURE

PROPOSED AMENDMENT TO RULE 54

I. SUMMARY OF COMMENTS: Rule 54

The Committee received no comments on the proposed change to Rule 54.

II. LIST OF COMMENTATORS: Rule 54

None

III. COMMENTS: Rule 54

None

Agenda-Item III C 1

MEMO TO: **Members, Criminal Rules Advisory Committee**

FROM: **Professor Dave Schlueter, Reporter**

RE: **Proposed Amendment to Rule 5(c)--On Remand from the Judicial Conference**

DATE: **March 24, 1998**

A proposed amendment to Rule 5(c) which would permit magistrate judges to grant continuances where the defendant objects was initially considered by the Committee at its April 1997 meeting. The original proposal, as the attached materials indicate, originated in the Federal Magistrate Judges Association who pointed out that under the current version of Rule 5(c), during an initial appearance before a magistrate judge, that judge is not authorized to grant a continuance over an objection by the defendant; that authority rests only in a federal district judge. The rule mirrors 18 U.S.C. § 3060(c) (attached).

At the April 1997 meeting, the Committee decided to recommend to the Standing Committee that it first propose legislative changes to § 3060(c). That Committee, however, believed it more appropriate to for the Advisory Committee to propose a change to Rule 5(c) through the Rules Enabling Act and remanded the issue to this Committee. At its October 1997 meeting, this 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 presented to the Judicial Conference during its recent meeting. As noted in the attached 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(c) consistent with the amendment 18 U.S.C. § 3060 which has been proposed by the Magistrate Judges Committee."

I have attached a draft of a proposed amendment to Rule 5(c) and a tentative Committee Note.

This matter is on the agenda for the April 1998 meeting in Washington.

LEONIDAS RALPH MECHAM
Director

CLARENCE A. LEE, JR.
Associate Director

ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS

WASHINGTON, D.C. 20544

March 13, 1998

MEMORANDUM TO ALL: UNITED STATES JUDGES
CIRCUIT EXECUTIVES
FEDERAL PUBLIC/COMMUNITY DEFENDERS
DISTRICT COURT EXECUTIVES
CLERKS, UNITED STATES COURTS
CHIEF PROBATION OFFICERS
CHIEF PRETRIAL SERVICES OFFICERS
SENIOR STAFF ATTORNEYS
CHIEF PREARGUMENT/CONFERENCE ATTORNEYS
BANKRUPTCY ADMINISTRATORS
CIRCUIT LIBRARIANS

SUBJECT: Preliminary Report of the Actions Taken by the Judicial Conference of the United States, in session, March 10, 1998 **(INFORMATION)**

Attached is a summary of the actions taken at the March 10, 1998, session of the Judicial Conference of the United States. The formal Report of the Proceedings is in preparation and will be forthcoming.

Implementation of any Conference action that requires the expenditure of funds is subject to the availability of funds and to whatever priorities the Conference might establish for the use of available resources.

Leonidas Ralph Mecham

Attachment

cc: The Chief Justice
Mr. James Duff

Authorized the provision of courtroom deputy clerk staffing credit and associated funding based on judicial vacancies when an active district judge leaves the court without taking senior status.

Amended the salary matching/advanced in-step appointment policy to allow setting the starting salary of a newly hired Court Personnel System employee at any step of the classification level in any situation where an applicant has unusually high or unique qualifications directly pertinent to the position being filled and/or because of a special need of the court unit for the applicant's services.

Approved revised staffing ceilings for circuit executives' offices, increasing the authorized staffing levels from 221.5 to 240.2 for fiscal year 2000; and authorized the Director of the Administrative Office to approve new work units within these revised ceilings, beginning in fiscal year 2000, based on the availability of funding.

Agreed to seek legislation to provide the Director of the Administrative Office the discretion to establish a program of supplemental benefits for judicial officers and employees in order to continue to attract and retain a competent workforce.

Agreed to seek an amendment to include coverage of the judicial branch in section 636 of Public Law No. 104-201 that authorizes reimbursement of any qualified employee for not to exceed one-half the costs incurred by such employee for professional liability insurance.

Agreed to seek legislation to include the judiciary in 5 U.S.C. § 3102 so as to give the judiciary explicit authority, comparable to the executive branch, to hire personal assistants for employees with disabilities.

Agreed to support the establishment of dependent care assistance programs for federal employees as provided in H.R. 2213, 105th Congress, but with the modification that the Director of the Administrative Office be given the authority to establish a dependent care assistance program for the Third Branch.

Committee on the Administration of the Magistrate Judges System

Agreed to refer to both the Magistrate Judges Committee and the Committee on Rules of Practice and Procedure the issue of giving magistrate judges the authority to grant a continuance of a preliminary examination without the consent of the accused, with instructions to the Rules Committee to propose an amendment to Criminal Rule 5(c) consistent with the amendment to 18 U.S.C. § 3060 which has been proposed by the Magistrate Judges Committee.

Rule 5. Initial Appearance Before the Magistrate Judge

* * * * *

(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, a federal magistrate judge may extend the 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~~ a federal magistrate judge or ~~by~~ a judge of the United States may extend the time limits only upon a showing that extraordinary circumstances exist and that delay is indispensable to the interests of justice.

ADVISORY COMMITTEE NOTE

The amendment expands the authority of a United States Magistrate Judge to determine whether to grant a continuance for a preliminary examination conducted under the Rule. Currently, the magistrate judge's authority to do so is limited to 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 court judge, usually on the same day. That procedure can lead to needless consumption of judicial resources and the consumption of time by counsel, staff personnel, marshals, and other personnel.

The proposed amendment currently conflicts with 18 U.S.C. § 3060, which tracks the original language of the rule and permits only district court judges to grant continuances where the defendant objects. But the current distinction between continuances granted with or without the consent is an anomaly. While the magistrate judge is charged with making probable cause determination and other decisions regarding the defendant's liberty interests, the current rule prohibits the magistrate judge from making a decision regarding a continuance unless the defendant consents. On the other hand, it seems clear that the role of the magistrate judge has developed toward a higher level of responsibility for pre-indictment matters. Furthermore, the Committee believes that the change in the rule will provide greater judicial economy.

FEDERAL MAGISTRATE JUDGES ASSOCIATION

35th Annual Convention – Denver, Colorado
July 8-11, 1997

October 28, 1996

96-CV-C

96-CR-[redacted]
F

Peter McCabe, Secretary
Committee on Rules of Practice and Procedure
of the Judicial Conference of the United States
Thurgood Marshall Federal Judiciary Building
Washington, DC 20544

RE: **Proposed Amendment to Rule 68 of the Federal Rules of Civil Procedure and Rule 5(c) of the Federal Rules of Criminal Procedure.**

Dear Pete:

The Federal Magistrate Judges Association (FMJA) submits two proposed rules changes to the Rules Advisory Committee. These matters were first considered by the Rules Committee of the FMJA chaired by Hon. Carol E. Heckman. The committee members are: Hon. Nancy Stein Nowak, Hon. Anthony Battaglia, Hon. Paul Komives, Hon. Andrew Wistrich, Hon. Thomas Phillips, Hon. Patricia Hemann, Hon. John L. Carroll, and Hon. B. Waugh Crigler. The committee members come from several kinds of districts and have varying types of duties. Many of them consulted with their colleagues in the course of preparing these proposals. The proposals were then reviewed and approved by the Officers and Directors of the FMJA. They reflect the considered position of the magistrate judges as a whole.

The first proposal is an amendment to Rule 68 of the Federal Rules of Civil Procedure, which relates to offers of judgment. The proposal allows the rule to be equally available to plaintiffs and claimants, adds expert witness fees and expenses to costs recoverable under the rule, and advances the timing from more than 10 days before the trial to more than 30 days before trial to reduce last minute settlements.

The second proposal is to amend Rule 5(c) of the Federal Rules of Criminal Procedure as well as 18 U.S.C. § 3060(c). These amendments relate to the ability of a magistrate judge to continue a preliminary examination absent the consent of the defendant. Currently, both of these provisions require a district court, and not a magistrate judge, to make such determinations.

Comments are included with both proposals. We are pleased to have this opportunity to present our proposals for your committee's consideration.

Sincerely,

Ervin S. Swearingen
United States Magistrate Judge
President, FMJA

ESS/gmc
enclosures

Committee Note Re: Proposed Amendments to Rule 5(c), Fed. R. Crim. P, and 18 U.S.C. § 3060 (c)

The proposed amendments to Criminal Rule 5(c) and 18 U.S.C. § 3060 (c) relate to the ability of a magistrate judge to continue the preliminary examination absent the consent of the defendant.

Rule 5 of the Federal Rules of Criminal Procedure entitles a defendant in a felony case to a preliminary examination before a magistrate judge, within a specified period of time. The time for the examination can be continued by a magistrate judge on the consent of the defendant, or in the alternative, upon the order of a district judge showing that extraordinary circumstances exist and that the delay is indispensable to the interests of justice.

Magistrate judges in most districts are frequently called upon to extend the time for the preliminary hearing to allow the parties to discuss pre-indictment disposition. In fact, in many districts, very few preliminary examinations are actually conducted. Under the current statutory provisions, in the circumstances where a defendant is unwilling to consent to a continuance of the hearing date, and the prosecution moves to continue the hearing, the magistrate judge is required to transfer the matter to a district judge for purposes of the contested motion. The motion to continue typically arises on the date set for the preliminary hearing. As a result, a district judge must address the matter that same day. This procedure results in a great consumption of time for the judges, the judicial staff, the marshals, the attorneys, the court interpreters, and the pre-trial service officers. Realistically, providing magistrate judges jurisdiction to hear and determine the contested motion to continue will facilitate the handling of Rule 5 proceedings and conserve the resources of the judiciary and the associated individuals and agencies.

While the committee found no case law specifically limiting magistrate judges from exercising jurisdiction to grant the contested motion to continue, contemporary federal jurisprudence seems to indicate that the decision is outside the jurisdiction of the magistrate judge. This premise is supported by the notes of the Advisory Committee on Rules regarding the 1972 amendments to Fed. R. Crim. P. 54(c)[1] stating that the phrase "judge of the United States" does not include an United States magistrate. This premise is also reflected in The Legal Manual for United States Magistrate Judges, Vol. 1, § 7.02.b, published by the Administrative Office of the Courts, Magistrate Judges Division. Citing 18 U.S.C. § 3060(c) and Fed. R. Crim. P. 5(c), the Legal Manual states, "absent the defendant's consent, the preliminary examination may be continued only upon the order of a United States district judge. The district judge must find that extraordinary circumstances exist and that the delay of the preliminary examination is indispensable to the interests of justice."

The Legal Manual does point out that by local rules a district court could empower a magistrate judge to conduct the hearing on a request for a continuance of the preliminary examination and submit a report and recommendation to a district judge. This, of course, does nothing to save the resources of the involved entities and agencies, or expedite the process, and is not a practical solution to the problem.

In terms of other published works, Kent Sinclair, Jr., Practice Before Federal Magistrates (1995) confirms the contemporary position that "in the absence of defendants consent, a district judge may no less extend these dates" (for preliminary examination). Id. at §409. The cited authority in this instance is again, Fed. R. Crim. P. 5(c). The current statutory framework for this issue has been in effect since 1968. In 1968, 18 U.S.C. § 3060 (c) was amended[2] to clarify procedures with regard to the preliminary examination. Prior to that time, the only statutory

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[1] Fed. R. Crim. P. 54 deals with the application of these rules. Paragraph (c) defines many of the terms used throughout the rules including "federal magistrate judge," "magistrate judge," and "judge of the United States."

[2] The amendment was part of a bill to amend the Federal Magistrates Act, 28 U.S.C. § 631 et seq., with a stated purpose to "abolish the office of U.S. Commissioner and reform the first echelon of the Federal Judiciary into an effective component of a modern scheme of justice by establishing a system of U.S. Magistrates. H.R. 90-1629, 1968 U.S.C.C.A.N. 4252, 1968 W.L. 5307 [Leg. Hist. at *2].

guidance regarding the time for preliminary examination was the reference in Fed. R. Crim. P. 5 which provided that the preliminary examination must be held "within a reasonable time following the initial appearance of an accused". HR 90-1629, 1968 U.S.C.C.A.N. 4252, 1968 WL 5307 [Leg. Hist., at *13 ("House Report")]. The 1968 amendment to 3060(c) introduced the specific outside time limits of 10 (for defendants in custody) and 20 (for defendants on bond or otherwise released) days from the initial appearance for holding the preliminary examination. At that time the amendment also added the provisions with regard to continuances.

The 1968 amendment to 18 U.S.C. § 3060(c) was the subject of discussion in the case of United States v. Green, 305 F. Supp. 125 (S.D.N.Y. 1969).[3] In Green, the Court highlighted that the amendment was precipitated by the routine continuances of the preliminary examination by commissioners (the predecessor of the magistrate judge), under the "reasonable time" standard. Congress moved to insure that a determination on probable cause is made soon after a person is taken into custody.

Review of 18 U.S.C. § 3060 (c) shows a distinction in contrasting the circumstances concerning a continuance by the magistrate judge with the defendant's consent and a continuance absent consent only on an order of a "judge of the appropriate United States district court". This distinction in the statutory language may well be the genesis of the current interpretation. Viewed in light of the 1972 amendments to Fed. R. Crim. P. 54(c) and its definitions, this premise is provided support.

In 1972, in concert with amendments to the Federal Magistrates Act (28 U.S.C. § 631 et seq.), Rule 54(c), Rule 5 was amended to be consistent with 18 U.S.C. §3060(c) concerning the timing of the preliminary examination. As amended in 1972, Rule 5(c) also, specifically discusses the role of the magistrate judge regarding a continuance of the preliminary examination with defendant's consent versus disposition absent consent by "a judge of the United States," supporting the distinction and the limitation in the power of the magistrate judge to grant the opposed continuance.

Interestingly, however, the published Advisory Committee Notes regarding the 1972 amendment to Rule 5 state that the time limits of Rule 5(c) were taken directly from Section 3060 with two exceptions:

> The new language allows delay to be consented to by the defendant only if there is 'a showing of good cause, taking into account the public interest and the prompt disposition of criminal cases'...*The second difference between the new rule and 18 U.S.C.A. §3060 is that the rule allows the decision to grant a continuance to be made by United States magistrate as well as by a judge of the United States.* This reflects the view of the advisory committee that the United States magistrate should have sufficient judicial competence to make decisions such as that contemplated by subdivision (c).

While an argument can be made that the 1972 amendments to Rule 5, and as explained by the Advisory Committee Notes, did confer full jurisdiction to the magistrate judge to continue the preliminary examination, with or without the defendant's consent, this statement is in conflict with the 1972 Advisory Committee notes to Rule 54(c) and the legal culture has maintained the distinction in the authority between magistrate judges and district judges regarding Rule 5(c).

This is an anomaly since the magistrate judge sets the preliminary examination on his or her calendar at the initial appearance in each case,[4] and is the judicial officer rendering the determination of probable cause resulting in the defendant's release or requirement that the defendant proceed

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[3] This case involved an appeal of the district courts dismissal of a criminal complaint for failure of the government to afford the defendant an opportunity for preliminary examination under the former "reasonable time" standard for the hearing of a preliminary examination.

[4] Fed. R. Crim. P. 5(c).

toward trial in the case.[5] While the magistrate judge is empowered to hear and determine probable cause[6] as well as other liberty interest issues[7], this same judicial officer cannot make the decision with regard to the extraordinary circumstances or the interests of justice in an issue where the need for the continuance of a proceeding on this judicial officer's calendar is disputed. Like the Preliminary Examination itself, the magistrate judges order would be reviewable by a district judge.[8]

For all of the foregoing reasons, the proposed amendments would be consistent with the utilization of magistrate judges envisioned by the Congress, would serve in the best interests of judicial economy, and would be consistent with the pre-indictment management of criminal proceedings envisioned in developing the role of United States Magistrate Judge.

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[5] Fed. R. Crim. P. 5.1.

[6] "This procedure is designed to insure that a determination of probable cause is made—by either the magistrate, some other judicial officer, or the grand jury— soon after a person is taken into custody. No citizen should have his liberty restrained, even to the limited extent of being required to post bail or meet other conditions of release, unless some independent judicial determination has been made that the restraint is justified." U.S. v. Green, 305 F. Supp. 125, 132, fn.5 (S.D.N.Y. 1969).

[7] This would include bail determinations and pre-trial detention, 18 U.S.C. § 3142 et. seq.

[8] See United States v. Florida, 165 F. Supp. 318, 331 (E.D.Ark. 1958) and United States v.Vassallo, 282 F. Supp. 928, 929(E.D. Pa. 1968).

§ 3060. Preliminary examination.

(c) With the consent of the arrested person, the date fixed by the judge or magistrate judge[9] for the preliminary examination may be a date later than that prescribed by subsection (b), or may be continued one or more times to a date subsequent to the date initially fixed therefor. In the absence of such consent of the accused, the date fixed for the preliminary hearing may be a date later than that prescribed by subsection (b), or may be continued to a date subsequent to the date initially fixed therefor, only upon the order of a United States magistrate judge or other judge of the appropriate United States district court after a finding that extraordinary circumstances exist, and that the delay of the preliminary hearing is indispensable to the interests of justice. . . .

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[9] This statute was last amended in 1968, prior to the change of name of United States Magistrate to United States Magistrate Judge, effective December 1, 1990. The proposed amendment to section (c) should also include correction so that the term United States magistrate judge is replaced whereever the former term magistrate is used in section (c) and throughout Rule 5.

RULE 5. Initial Appearance Before the Magistrate Judge

(c) Offenses Not Triable by the United States Magistrate Judge. . . . 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 United States magistrate judge or other judge of the United States only upon a showing that extraordinary circumstances exist and that delay is indispensable to the interests of justice.

§ 3060. Preliminary examination

(a) Except as otherwise provided by this section, a preliminary examination shall be held within the time set by the judge or magistrate pursuant to subsection (b) of this section, to determine whether there is probable cause to believe that an offense has been committed and that the arrested person has committed it.

(b) The date for the preliminary examination shall be fixed by the judge or magistrate at the initial appearance of the arrested person. Except as provided by subsection (c) of this section, or unless the arrested person waives the preliminary examination, such examination shall be held within a reasonable time following initial appearance, but in any event not later than—

(1) the tenth day following the date of the initial appearance of the arrested person before such officer if the arrested person is held in custody without any provision for release, or is held in custody for failure to meet the conditions of release imposed, or is released from custody only during specified hours of the day; or

(2) the twentieth day following the date of the initial appearance if the arrested person is released from custody under any condition other than a condition described in paragraph (1) of this subsection.

(c) With the consent of the arrested person, the date fixed by the judge or magistrate for the preliminary examination may be a date later than that prescribed by subsection (b), or may be continued one or more times to a date subsequent to the date initially fixed therefor. In the absence of such consent of the accused, the date fixed for the preliminary hearing may be a date later than that prescribed by subsection (b), or may be continued to a date subsequent to the date initially fixed therefor, only upon the order of a judge of the appropriate United States district court after a finding that extraordinary circumstances exist, and that the delay of the preliminary hearing is indispensable to the interests of justice.

(d) Except as provided by subsection (e) of this section, an arrested person who has not been accorded the preliminary examination required by subsection (a) within the period of time fixed by the judge or magistrate in compliance with subsections (b) and (c), shall be discharged from custody or from the requirement of bail or any other condition of release, without prejudice, however, to the institution of further criminal proceedings against him upon the charge upon which he was arrested.

(e) No preliminary examination in compliance with subsection (a) of this section shall be required to be accorded an arrested person, nor shall such arrested person be discharged from custody or from the requirement of bail or any other condition of release pursuant to subsection (d), if at any time subsequent to the initial appearance of such person before a judge or magistrate and prior to the date fixed for the preliminary examination pursuant to subsections (b) and (c) an indictment is returned or, in appropriate cases, an information is filed against such person in a court of the United States.

(f) Proceedings before United States magistrates under this section shall be taken down by a court reporter or recorded by suitable sound recording equipment. A copy of the record of such proceeding shall be made available at the expense of the United States to a person who makes affidavit that he is unable 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.

(June 25, 1948, c. 645, 62 Stat. 819; Oct. 17, 1968, Pub.L. 90–578, Title III, § 303(a), 82 Stat. 1117.)

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

ICEMARIE H. STOTLER
CHAIR

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December 23, 1996

Honorable Ervin S. Swearingen
United States Magistrate Judge
President, FMJA
P.O. Box 1049
Florence, South Carolina 29503

Dear Judge Swearingen:

Thank you for your letter on behalf of the Federal Magistrate Judges Association proposing amendments to Rule 68 of the Federal Rules of Civil Procedure and Rule 5(c) of the Federal Rules of Criminal Procedure. A copy of your letter will be sent to the chairs and reporters of the Advisory Committees on Civil and Criminal Rules for their consideration.

From 1992 to 1995, the Advisory Committee on Civil Rules spent substantial time studying proposed revisions of Rule 68. A draft proposed amendment together with an extensive Committee Note was prepared, which would have extended the rule to both parties and permitted the shifting of attorney fees under a capped formula. The committee also requested the Federal Judicial Center to survey the bar on their reaction to the proposed amendments to Rule 68. During its many discussions on this subject, the committee considered more modest proposals, including variations of the California offer-of-judgment procedure.

The committee concluded that the proposed amendments and the more modest alternative proposals were subject to abusive gamesmanship. In the end, the committee decided to defer indefinitely further consideration of a proposed revision of Rule 68. For your information, I am enclosing the following committee materials on Rule 68: (1) a copy of the Federal Judicial Center survey; (2) draft proposed amendments to Rule 68 and excerpts of minutes of various committee

meetings on Rule 68 ; and (3) a discussion of the problems with Rule 68 and the many suggested proposals amending it prepared by Professor Edward H. Cooper, the committee's reporter.

We welcome the Federal Magistrate Judges Association's suggestions and appreciate your interest in the rulemaking process.

Sincerely,

for Peter G. McCabe
Secretary

cc: Chairs and Reporters,
Advisory Committees on Civil and Criminal Rules
Agenda and Policy Subcommittee

Agenda Item III C 2

MEMO TO: **Members, Criminal Rules Advisory Committee**

FROM: **Professor Dave Schlueter, Reporter**

RE: **Proposed Amendment to Rules 10 (Arraignment) & 43 (Presence of Defendant).**

DATE: **March 25, 1998**

At its October 1997 meeting, the Committee voted to proceed with consideration of draft amendments to Rules 10 and 43 which would permit a defendant to waive a personal appearance at an arraignment.

Attached are drafts of proposed amendments to the those two rules, along with draft Committee Notes. During the discussion at the October meeting, there was some sense that it would be appropriate to require the waiver of appearance to be in writing, and with the approval of the court. Those qualifying provisons have been included in the draft for purposes of further discussion.

Rule 10. Arraignment

(a) Arraignment, which shall be conducted in open court, ~~and shall~~ consists of:

(i) reading the indictment or information to the defendant or stating to the defendant the substance of the charge; and

(ii) calling on the defendant to plead to the indictment or information ~~thereto~~.

(b) The defendant shall be given a copy of the indictment or information before being called upon to enter a plea ~~plead~~.

(c) A defendant need not be present for the arraignment if :

(i) the defendant has waived such appearance in writing; and

(ii) the court accepts the waiver.

COMMITTEE NOTE

Read together, Rules 10 and 43 require the defendant to be 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 amendment to Rule 10, in addition to several stylistic changes, creates an exception to that rule and provides that the court may permit arraignments when the defendant has waived the right to be present in writing and the court consents to that waiver. A conforming amendment has also been made to Rule 43.

In amending the rule, and Rule 43, the Committee was very much aware of the argument 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 where there is a real question whether the defendant really 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 absence of the defendant. The question of when it would be appropriate for a defendant to waive his or her 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 waiver might be, the defendant's right be present in court stands

unless he or she waives that right. As with other rules including an element of waiver, whether a defendant voluntarily waived the right to be present in court during an arraignment will be measured by the same standards. An effective means of meeting that requirement in Rule 10 is to require that any waiver of the right be in writing. And 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 where 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.

Criminal Rules Committee
Proposed Amendment: Rule 43
March 1998

Rule 43. Presence of the Defendant

* * * * *

(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~~ 35(b) or (c) or 18 U.S.C. § 3582(c)]; or

(5) when, as provided in Rule 10, the defendant has waived the right to be present at the arraignment.

COMMITTEE NOTE

The amendment to Rule 43(c) reflects the concurrent change to Rule 10 which permits a defendant to waive his or her presence at the arraignment.

New matter is underlined and matter to be deleted is lined through. Matter in brackets reflects proposed changes currently pending before the Supreme Court

Agenda Item III C 3

MEMO TO: Members, Criminal Rules Advisory Committee

FROM: Professor Dave Schlueter, Reporter

RE: Proposed Amendment to Rule 12.2

DATE: March 26, 1998

At its October 1997 meeting, the Committee agreed to consider amendments to Rule 12.2, which would accomplish two results. First, a defendant who intends to introduce expert testimony on the issue of mental condition at a capital sentencing proceeding would be required to give notice of an intent to do so. And second, the rule would make it clear that the trial court would have the authority to order a mental examination of a defendant who had given such notice. I was directed to draft appropriate language to effect those changes.

Subsequently, the Department of Justice submitted suggested language to include in Rule 12.2 (Attached). But the suggested draft also included suggested procedures for releasing the results of the examination to an attorney for the government before a guilty verdict on a capital crime had been returned. Although the Committee did not explicitly address that issue in conjunction with its discussion on Rule 12.2, the Minutes of the October meeting reflect that there was some limited discussion regarding release of the report in conjunction with a possible amendment to Rule 32 and that it was understood that any reports would be sealed. Nonetheless it seems reasonable to consider whether any procedure short of sealing the results of the examination might be appropriate.

The attached draft includes the suggestions forwarded by the Department along with some style and format changes. I have also included some alternative language, which might better address the issue of disclosure of the results of the examination--assuming that the Committee decides to permit some form of early disclosure. The issue of disclosure raises several sub-issues:

First, what dangers, if any, might be presented by releasing the results of the examination before the defendant has actually been convicted for at least one capital crime?

Second, assuming that early disclosure is permitted, what standards should be used, if any, in deciding whether to release the results?

Third, assuming early disclosure is permitted, should both sides be permitted to request such?

Fourth, if the court is to consider the issue of whether the results of the examination will not tend to incriminate the defendant on the question of guilt or innocence, *see* Rule 12.2(c)(i), should the defendant be permitted to contest that averment. If so, wouldn't that require disclosure to the defendant beforehand?

The attached Committee Note is a draft, which assumes that some provision will be made for early disclosure to both the defendant and the government. Depending on the language finally selected by the Committee, that section of the Note will have to be rewritten.

I have also attached copies of the Department's original letter and copies of the pertinent statutes. This matter is on the agenda for the April meeting in Washington.

Rule 12.2. Notice of Insanity Defense or Expert Testimony ~~of~~ on Defendant's Mental Condition

* * * * *

(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 (1) the issue of guilt or (2) whether in a capital case, a sentence of capital punishment should be imposed, 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.

(1) *Authority to Order Examination; Procedures.* If the defendant provides notice under subdivision (a) ~~In an appropriate case~~ the court ~~may~~ shall, upon motion of the attorney for the government, order the defendant to submit to an examination conducted pursuant to 18 U.S.C. ~~4241 or~~ 4242. If the defendant provides notice under subdivision (b) the court may, upon motion of the attorney for the government, order the defendant to submit to an examination conducted pursuant to procedures as ordered by the court.

(2) *Disclosure of Results of Examination.* The results of the examination conducted solely pursuant to notice under subdivision (b)(2) shall not be disclosed to any attorney for the government or the defendant unless and until the defendant is found guilty of one or more capital crimes and the defendant confirms his or her intent to offer mental condition evidence during sentencing proceedings. The results of such examination may be disclosed earlier to the attorney for the government if the court determines that:

(i) the attorney is not an attorney responsible for conducting the prosecution on the issue of guilt and the attorney requesting the results of the examination will not communicate the results, prior to the verdict, to an attorney who is so responsible, or

(ii) disclosure of the report will not tend to incriminate the defendant on the issue of guilt.

If such disclosure is made to an attorney for the government, disclosure shall also be made at the same time to the defendant.

(3) Disclosure of Statements by the Defendant. 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.

ALTERNATIVE LANGUAGE for Subdivision (c)(2)

(2) *Disclosure of Results of Examination.* The results of the examination conducted solely pursuant to notice under subdivision (b)(2) shall not be disclosed to any attorney for the government or the defendant unless and until the defendant is found guilty of one or more capital crimes and the defendant confirms his or her intent to offer mental condition evidence during sentencing proceedings.

(i) The results of the examination may be disclosed earlier to the attorney for the government, upon good cause shown, and the court determines that the attorney is not the attorney responsible for conducting the prosecution on the issue of guilt and the attorney requesting the results of the examination will not communicate them to that attorney prior to the verdict, or disclosure of the report will not tend to incriminate the defendant on the issue of guilt.

(ii) The results of the examination may be disclosed earlier to the defendant upon good cause shown.

(iii) If early disclosure is made to either an attorney for the government or the defendant, similar disclosure shall be made to the other party.

* * * *

COMMITTEE NOTE

The changes to Rule 12.2 are designed to address three issues. First, the amendment clarifies that Rule 12.2(c) authorizes a trial court to order a mental examination for a defendant who has indicated an intention to raise the defense of insanity. The second amendment relates to a requirement that the defendant provide notice of an intent to present evidence of his or her mental condition during a capital sentencing proceeding. And finally, the amendments address 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 his or her mental condition during sentencing and when the results of that examination may be disclosed.

Subdivision (b). Under current subdivision (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 pretrial notice of that intent. The amendment extends that notice requirement to a defendant who intends to offer expert testimony 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, 754-764 (E.D. Va. 1997); *United States v. Haworth*, 942 F. Supp. 1406, 1409 (D.N.M. 1996). The amendment adopts that view.

Subdivision (c). The change to subdivision (c) clarifies the authority of the court to order mental examinations for a defendant. As currently written, the trial court has the authority to order a mental examination of a defendant who has indicated under subdivision (a) that he or she intends to raise the defense of insanity. Indeed, the corresponding statute, 18 U.S.C. § 4242 indicates that the court must order an examination if the defendant has provided notice of an intent to raise that defense and the government moves for the examination. The amendment conforms subdivision (c) to that statute. And any examination conducted on the issue of the insanity defense would thus be conducted in accordance with the procedures set out in the statutory provision.

While the authority of a trial court to order a mental examination on a defendant who has registered an intent to raise the insanity defense seems clear, the authority to order an examination on a defendant who intends only to present expert testimony on his or her mental condition is not so 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 to order a mental examination on a defendant who had provided notice of an intent to offer evidence, inter alia, 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 where the defendant intends to rely on the defense of insanity. The court also rejected the argument that 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 is intended to make it clear that the authority of a court to order a mental examination under Rule 12.2(c) explicitly extends to those cases where the defendant has provided notice, under Rule 12.2(b), of an intent to present expert testimony on his or her mental condition, either on the merits or at sentencing.

The amendment to Rule 12.2(c) is not intended to limit or otherwise change the authority, which a court might have, either by statute or under its inherent authority, to order other mental examinations.

The amendment also addresses the question of what procedures should be used for a court-ordered examination. As currently stated 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 doing so, 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.

The final changes to Rule 12.2 address the question of when the results of an examination ordered under the rule, may, or must, be disclosed. The courts, which have addressed the issue generally, recognize that use of a defendant's statements made during a court-ordered examination may compromise the defendant's right against self-incrimination. *See, e.g., Estelle v. Smith*, 451 U.S. 454 (1981) (defendant's privilege against self-incrimination violated where 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 where the defendant has decided to introduce expert testimony on his or her mental condition, the courts have found a waiver of the privilege. 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 the issue of when, and to what extent, the prosecution may see the results of the examination, which may include the defendant's statements, where evidence of the defendant's mental condition is being presented solely at a capital sentencing proceeding.

The proposed change 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 testimony about his or her mental condition at a capital sentencing hearing, i.e., after a verdict of guilty on one or more capital crimes. *See, e.g., United States v. Beckford*, 962 F. Supp. 748 (E.D.Va. 1997). While the Committee did not believe that sealing the results was required, it nonetheless recognized that normally the results should not be used to the prejudice of the defendant on the issue of guilt or innocence. At the same time, the Committee believed that there might be instances where there may be sound reasons for releasing the results before the verdict. Under the amendment, either the government or the defendant may request early release of the results of the examination. Both must show good cause for the early release. But in the case of a government request for such release, the court must also conclude that disclosure of the results will not be used by an attorney handling the merits portion of the trial or after reviewing the results the court concludes that releasing the information to such an attorney will not tend to incriminate the defendant. If the government obtains the results of the examination, then similar disclosure must be made to the defendant.

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CHAPTER 313—OFFENDERS WITH MENTAL DISEASE OR DEFECT

§ 4241. Determination of mental competency to stand trial

(a) Motion to determine competency of defendant.—At any time after the commencement of a prosecution for an offense and prior to the sentencing of the defendant, the defendant or the attorney for the Government may file a motion for a hearing to determine the mental competency of the defendant. The court shall grant the motion, or shall order such a hearing on its own motion, if there is reasonable cause to believe that the defendant may presently be suffering from a mental disease or defect rendering him mentally incompetent to the extent that he is unable to understand the nature and consequences of the proceedings against him or to assist properly in his defense.

(b) Psychiatric or psychological examination and report.—Prior to the date of the hearing, the court may order that a psychiatric or psychological examination of the defendant be conducted, and that a psychiatric or psychological report be filed with the court, pursuant to the provisions of section 4247(b) and (c).

(c) Hearing.—The hearing shall be conducted pursuant to the provisions of section 4247(d).

(d) Determination and disposition.—If, after the hearing, the court finds by a preponderance of the evidence that the defendant is presently suffering from a mental disease or defect rendering him mentally incompetent to the extent that he is unable to understand the nature and consequences of the proceedings against him or to assist properly in his defense, the court shall commit the defendant to the custody of the Attorney General. The Attorney General shall hospitalize the defendant for treatment in a suitable facility—

(1) for such a reasonable period of time, not to exceed four months, as is necessary to determine whether there is a substantial probability that in the foreseeable future he will attain the capacity to permit the trial to proceed; and

(2) for an additional reasonable period of time until—

(A) his mental condition is so improved that trial may proceed, if the court finds that there is a substantial probability that within such additional period of time he will attain the capacity to permit the trial to proceed; or

(B) the pending charges against him are disposed of according to law; whichever is earlier.

If, at the end of the time period specified, it is determined that the defendant's mental condition has not so improved as to permit the trial to proceed, the defendant is subject to the provisions of section 4246.

(e) Discharge.—When the director of the facility in which a defendant is hospitalized pursuant to subsection (d) determines that the defendant has recovered to such an extent that he is able to understand the nature and consequences of the proceedings against him and to assist properly in his defense, he shall promptly file a certificate to that effect with the clerk of the court that ordered the commitment. The clerk shall send a copy of the certificate to the defendant's counsel and to the attorney for the Government. The court shall hold a hearing, conducted pursuant to the provisions of section 4247(d), to determine the competency of the defendant. If, after the hearing, the court finds by a preponderance of the evidence that the defendant has recovered to such an extent that he is able to understand the nature and consequences of the proceedings against him and to assist properly in his defense, the court shall order his immediate discharge from the facility in which he is hospitalized and shall set the date for trial. Upon discharge, the defendant is subject to the provisions of chapter 207.

(f) Admissibility of finding of competency.—A finding by the court that the defendant is mentally competent to stand trial shall not prejudice the defendant in raising the issue of his insanity as a defense to the offense charged, and shall not be admissible as evidence in a trial for the offense charged.

(As amended Oct. 12, 1984, Pub.L. 98–473, Title II, § 403(a), 98 Stat. 2057.)

§ 4242. Determination of the existence of insanity at the time of the offense

(a) Motion for pretrial psychiatric or psychological examination.—Upon the filing of a notice, as provided in Rule 12.2 of the Federal Rules of Criminal Procedure, that the defendant intends to rely on the defense of insanity, the court, upon motion of the attorney for the Government, shall order that a psychiatric or psychological examination of the defendant be conducted, and that a psychiatric or psychological report be filed with the court, pursuant to the provisions of section 4247(b) and (c).

(b) Special verdict.—If the issue of insanity is raised by notice as provided in Rule 12.2 of the Federal Rules of Criminal Procedure on motion of the defendant or of the attorney for the Government, or on the court's own motion, the jury shall be instructed to find, or, in the event of a nonjury trial, the court shall find the defendant—

(1) guilty;

(2) not guilty; or

(3) not guilty only by reason of insanity.

(As amended Oct. 12, 1984, Pub.L. 98–473, Title II, § 403(a), 98 Stat. 2059.)

§ 4243. Hospitalization of a person found not guilty only by reason of insanity

(a) Determination of present mental condition of acquitted person.—If a person is found not guilty only by reason of insanity at the time of the offense charged, he shall be committed to a suitable facility until such time as he is eligible for release pursuant to subsection (e).

(b) Psychiatric or psychological examination and report.—Prior to the date of the hearing, pursuant to subsection (c), the court shall order that a psychiatric or psychological examination of the defendant be conducted, and that a psychiatric or psychological report be filed with the court, pursuant to the provisions of section 4247(b) and (c).

(c) Hearing.—A hearing shall be conducted pursuant to the provisions of section 4247(d) and shall take place not later than forty days following the special verdict.

(d) Burden of proof.—In a hearing pursuant to subsection (c) of this section, a person found not guilty only by reason of insanity of an offense involving bodily injury to, or serious damage to the property of, another person, or involving a substantial risk of such injury or damage, has the burden of proving by clear and convincing evidence that his release would not create a substantial risk of bodily injury to another person or serious damage of property of another due to a present mental disease or defect. With respect to any other offense, the person has the burden of such proof by a preponderance of the evidence.

(e) Determination and disposition.—If, after the hearing, the court fails to find by the standard specified in subsection (d) of this section that the person's release would not create a substantial risk of bodily injury to another person or serious damage of property of another due to a present mental disease or defect, the court shall commit the person to the custody of the Attorney General. The Attorney General shall release the person to the appropriate official of the State in which the person is domiciled or was tried if such State will assume responsibility for his custody, care, and treatment. The Attorney General shall make all reasonable efforts to cause such a State to assume such responsibility. If, notwithstanding such efforts, neither such State will assume such responsibility, the Attorney General shall hospitalize the person for treatment in a suitable facility until—

(1) such a State will assume such responsibility; or

(2) the person's mental condition is such that his release, or his conditional release under a prescribed regimen of medical, psychiatric, or psychological care

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UNITED STATES CODE ANNOTATED
TITLE 18. CRIMES AND CRIMINAL PROCEDURE
PART III--PRISONS AND PRISONERS
CHAPTER 313--OFFENDERS WITH MENTAL DISEASE OR DEFECT

Current through P.L. 105-22, approved 6-27-97

§ 4247. General provisions for chapter

(a) Definitions.--As used in this chapter--
(1) "rehabilitation program" includes--
(A) basic educational training that will assist the individual in understanding the society to which he will return and that will assist him in understanding the magnitude of his offense and its impact on society;
(B) vocational training that will assist the individual in contributing to, and in participating in, the society to which he will return;
TEXT (a) (1) (C)
(C) drug, alcohol, and other treatment programs that will assist the individual in overcoming his psychological or physical dependence; and
(D) organized physical sports and recreation programs; and
(2) "suitable facility" means a facility that is suitable to provide care or treatment given the nature of the offense and the characteristics of the defendant.
(b) Psychiatric or psychological examination.--A psychiatric or psychological examination ordered pursuant to this chapter shall be conducted by a licensed or certified psychiatrist or psychologist, or, if the court finds it appropriate, by more than one such examiner. Each examiner shall be designated by the court, except that if the examination is ordered under section 4245 or 4246, upon the request of the defendant an additional examiner may be selected by the defendant. For the purposes of an examination pursuant to an order under section 4241, 4244, or 4245, the court may commit the person to be examined for a reasonable period, but not to exceed thirty days, and under section 4242, 4243, or 4246, for a reasonable period, but not to exceed forty- five days, to the custody of the Attorney General for placement in a suitable facility. Unless impracticable, the psychiatric or psychological examination shall be conducted in the suitable facility closest to the court. The director of the facility may apply for a reasonable extension, but not to exceed fifteen days under section 4241, 4244, or 4245, and not to exceed thirty days under section 4242, 4243, or 4246, upon a showing of good cause that the additional time is necessary to observe and evaluate the defendant.
(c) Psychiatric or psychological reports.--A psychiatric or psychological report ordered pursuant to this chapter shall be prepared by the examiner

designated to conduct the psychiatric or psychological examination, shall be filed with the court with copies provided to the counsel for the person examine and to the attorney for the Government, and shall include--

(1) the person's history and present symptoms;

(2) a description of the psychiatric, psychological, and medical tests that were employed and their results;

(3) the examiner's findings; and

(4) the examiner's opinions as to diagnosis, prognosis, and--

(A) if the examination is ordered under section 4241, whether the person is suffering from a mental disease or defect rendering him mentally incompetent to the extent that he is unable to understand the nature and consequences of the proceedings against him or to assist properly in his defense;

(B) if the examination is ordered under section 4242, whether the person was insane at the time of the offense charged;

(C) if the examination is ordered under section 4243 or 4246, whether the person is suffering from a mental disease or defect as a result of which his release would create a substantial risk of bodily injury to another person or serious damage to property of another;

(D) if the examination is ordered under section 4244 or 4245, whether the person is suffering from a mental disease or defect as a result of which he is in need of custody for care or treatment in a suitable facility; or

(E) if the examination is ordered as a part of a presentence investigation, any recommendation the examiner may have as to how the mental condition of the defendant should affect the sentence.

(d) Hearing.--At a hearing ordered pursuant to this chapter the person whose mental condition is the subject of the hearing shall be represented by counsel and, if he is financially unable to obtain adequate representation, counsel shall be appointed for him pursuant to section 3006A. The person shall be afforded an opportunity to testify, to present evidence, to subpoena witnesses on his behalf, and to confront and cross-examine witnesses who appear at the hearing.

(e) Periodic report and information requirements.--(1) The director of the facility in which a person is hospitalized pursuant to--

(A) section 4241 shall prepare semiannual reports; or

(B) section 4243, 4244, 4245, or 4246 shall prepare annual reports concerning the mental condition of the person and containing recommendations concerning the need for his continued hospitalization. The reports shall be submitted to the court that ordered the person's commitment to the facility and copies of the reports shall be submitted to such other persons as the court may direct. A copy of each such report concerning a person hospitalized after the beginning of a prosecution of that person for violation of section 871, 879, or 1751 of this title shall be submitted to the Director of the United States Secret Service. Except with the prior approval of the court, the Secret Service shall not use or disclose the information in these copies for any purpose other than carrying out protective duties under section 3056(a) of this title.

(2) The director of the facility in which a person is hospitalized pursuant to section 4241, 4243, 4244, 4245, or 4246 shall inform such person of any rehabilitation programs that are available for persons hospitalized in that facility.

(f) Videotape record.--Upon written request of defense counsel, the court may order a videotape record made of the defendant's testimony or interview upon which the periodic report is based pursuant to subsection (e). Such videotape record shall be submitted to the court along with the periodic report.

(g) Habeas corpus unimpaired.--Nothing contained in section 4243 or 4246 precludes a person who is committed under either of such sections from establishing by writ of habeas corpus the illegality of his detention.

(h) Discharge.--Regardless of whether the director of the facility in which a person is hospitalized has filed a certificate pursuant to the provisions of subsection (e) of section 4241, 4244, 4245, or 4246, or subsection (f) of section 4243, counsel for the person or his legal guardian may, at any time during such person's hospitalization, file with the court that ordered the commitment a motion for a hearing to determine whether the person should be discharged from such facility, but no such motion may be filed within one hundred and eighty days of a court determination that the person should continue to be hospitalized. A copy of the motion shall be sent to the director of the facility in which the person is hospitalized and to the attorney for the Government.

(i) Authority and responsibility of the Attorney General.--The Attorney General--

(A) may contract with a State, a political subdivision, a locality, or a private agency for the confinement, hospitalization, care, or treatment of, or the provision of services to, a person committed to his custody pursuant to this chapter;

(B) may apply for the civil commitment, pursuant to State law, of a person committed to his custody pursuant to section 4243 or 4246;

(C) shall, before placing a person in a facility pursuant to the provisions of section 4241, 4243, 4244, 4245, or 4246, consider the suitability of the facility's rehabilitation programs in meeting the needs of the person; and

(D) shall consult with the Secretary of the Department of Health and Human Services in the general implementation of the provisions of this chapter and in the establishment of standards for facilities used in the implementation of this chapter.

(j) This chapter does not apply to a prosecution under an Act of Congress applicable exclusively to the District of Columbia or the Uniform Code of Military Justice.

(B) by adding at the end the following new subsection:
"(h) DEFINITION.--As used in this chapter the term "State" includes the District of Columbia.".

<< 18 USCA S 4247 >>

(2) Section 4247(a) is amended--
(A) in paragraph (1)(D) by striking "and" after the semicolon;
(B) in paragraph (2) by striking the period and inserting "; and"; and
(C) by adding at the end the following new paragraph:
"(3) 'State' includes the District of Columbia.".
(3) Section 4247(j) of title 18, United States Code, is amended by striking "This chapter does" and inserting "Sections 4241, 4242, 4243, and 4244 do".

SEC. 11205. LIABILITY FOR AND LITIGATION AUTHORITY OF CORRECTIONS TRUSTEE.

(a) LIABILITY.--The District of Columbia shall defend any civil action or proceeding brought in any

U. S. Department of Justice

Criminal Division

Washington, D.C. 20530

December 8, 1997

Professor David A. Schlueter
St. Mary's University School of Law
One Camino Santa Maria
San Antonio, Texas 78228-8602

Dear Dave:

As you may recall, at the last meeting of the Advisory Committee on Criminal Rules, the Committee voted to approve in concept two amendments suggested by the Department of Justice. One was to clarify that Rule 12.2(c) permits the court to order a mental examination of a defendant who gives notice under Rule 12.2(b) of an intent to offer expert testimony on the defendant's mental condition bearing on the issue of guilt. The other was to require reasonable notice to the government when the defendant in a capital case intends to offer expert testimony on mental condition relevant to the issue of capital punishment and to allow the court to require the defendant to submit to a mental examination when such notice is given. The Committee deferred until its April meeting the consideration of amendatory language for these proposals.

We offer the following revisions for your consideration (proposed new matter underscored):

"(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 bearing upon <u>(1)</u> the issue of guilt <u>or (2) whether, in a capital case, a sentence of capital punishment should be imposed</u>, 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 <u>pursuant to statutory authority or in which notice by the defendant has been given under subdivision (a) or (b)</u>, the court may, upon motion of the attorney for the government, order the defendant to submit to an examination. <u>The examination shall be</u>

conducted pursuant to 18 U.S.C. 4241 et seq. or, in a case involving notice under subdivision (b), as otherwise ordered by the court. The results of an examination conducted solely pursuant to notice under subdivision (b)(2) shall not be disclosed to any attorney for the government unless and until the defendant is found guilty of one or more capital crimes and confirms his or her intent to offer mental condition evidence in mitigation at the sentencing phase, except that such results may be earlier disclosed to an attorney for the government if the court determines (1) such attorney is not, and will not communicate the results to, an attorney responsible for conducting the prosecution on the issue of guilt, or (2) such disclosure will not tend to incriminate the defendant on the issue of guilt. 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."

As to the first of our proposed amendments, it is effectuated by the explicit incorporation, in Rule 12.2(c), of cases in which notice is given under subdivision (b)(which relates to mental condition bearing upon guilt). As to the implementation of our second amendment, the language we propose is derived generally from the thoughtful opinions and orders in United States v. Beckford, 962 F. Supp. 748, 754-764 (E.D. Va. 1997), and United States v. Haworth, 942 F. Supp. 1406, 1409 (D.N.M. 1996). As the courts there determined, it is normally necessary to order that the defendant give notice pretrial of an intent to rely on expert mental condition testimony at the penalty phase in a capital case, and that any examinations take place pretrial as well, since if notice and examination were deferred until after the determination of guilt, a lengthy and undesirable continuance would be required. The defendant's rights were protected, however, in Beckford by the requirement that the results of a pretrial mental examination of the defendant by an independent expert be placed under seal and not divulged to the government until and unless the defendant was found guilty of a capital crime and reaffirmed his or her intent to offer mental evidence in mitigation at the penalty phase.

Under our proposal, the court could opt for the method used in Beckford -- i.e., sealing of the results -- or for a different solution that equally safeguarded the defendant's rights: to allow the results to be disclosed immediately to an attorney for the government, provided that attorney was not involved in conducting the prosecution on the guilt phase and was instructed not to reveal any of the information in the report to the members of the prosecution team until after verdict of guilty and a reaffirmation by the defendant of an intent to use mental evidence during the penalty phase (i.e., creating a "firewall").

Finally, the court could make an earlier disclosure of the results, even to a member of the prosecution team, if it determined that the results would not tend to incriminate the defendant on the issue of guilt. Earlier disclosure of the results, in appropriate situations, is beneficial to the efficient administration of justice and may be beneficial to the government and the defendant as well. If the results cast doubt on whether the death penalty is appropriate, early disclosure may afford the government a better opportunity, without seeking a continuance, to consider whether or not its insistence on the death penalty should be abandoned. And if the results are otherwise, early disclosure will better enable the government, without seeking a continuance, to prepare to meet the defendant's mental evidence in mitigation.

Your consideration of the above is appreciated. Please contact us if you have any suggestions about how the language can be improved, since by no means are we wedded to a particular formulation. We hope you had a good holiday and look forward to seeing you here in Washington in the spring.

Sincerely,

Mary Frances Harkenrider

Roger A. Pauley

Mary Frances Harkenrider
Roger A. Pauley

U. S. Department of Justice

Criminal Division

Office of the Assistant Attorney General *Washington, D.C. 20530*

JUL 15 1997

The Honorable D. Lowell Jensen
Judge of the United States District Court
Northern District of California
1301 Clay Street, 4th Floor
Oakland, CA 94612

Dear Judge Jensen:

I am writing to request that the Advisory Committee on Criminal Rules consider amending the Rules relating to mental examinations of defendants in two respects: (1) to clarify that Rule 12.2(c) permits a court to order, on motion of the government, a mental examination of a defendant who gives notice of an intent under Rule 12.2(b) to introduce expert testimony in support of a defense of mental condition bearing on the issue of guilt; and (2) to extend the Rules to permit a court to order a government-requested mental examination of a defendant when it appears that the defendant will offer expert testimony as to mental condition at sentencing.

On the first issue, the lower courts are now in conflict. Until recently, the courts had construed Rule 12.2(c) as including not only situations in which a defendant has given notice under Rule 12.2(a) of an intent to rely on expert evidence to prove a defense of insanity, but also those in which notice was given under Rule 12.2(b). However, the law is currently in some disarray as a result of United States v. Davis, 93 F.3d 1286 (6th Cir. 1996). There the court held that, because Rule 12.2(c) only authorizes the court to order a mental examination "pursuant to 18 U.S.C. 4241 or 4242," which relates to competency and sanity examinations, and not under 18 U.S.C. 4247, the general provision regarding psychiatric and psychological examinations, the Rule does not permit a court to order a mental examination in the situation addressed by Rule 12.2(b). The court indicated in dicta, however, that a trial court nevertheless had inherent authority to order a noncustodial examination in proper circumstances, which it declined to define. See also, following Davis, United States v. Akers, 945 F. Supp. 1442 (D. Colo. 1996).

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We believe it is patently unfair, and contrary to the truth-seeking function of a criminal trial, to permit only the defendant to be able to undergo a mental examination by an expert of his or her choice and to offer such evidence on the issue of guilt, without affording the government the opportunity for an independent (and if necessary custodial) examination of the defendant by its own expert. Such a result is contrary to Section 4.05(1) of the Model Penal Code, on which the drafters of Rule 12.2(c) expressly relied in the Advisory Committee Note.

The court in Davis was troubled by what it regarded as a serious constitutional question involving self-incrimination whether a defendant could be made to undergo a government-requested mental examination in light of Estelle v. Smith, 451 U.S. 454 (1981), where the court held that the government's use at the capital sentencing phase of a doctor's testimony arising from a court-ordered competency examination violated the defendant's Fifth Amendment privilege because he was not advised of his right to remain silent and that his statements could be used against him at sentencing. But as the Advisory Committee Note to Rule 12.2(c) observes, Estelle itself intimates that a defendant can be required to submit to a mental examination when his silence may deprive the government of the only effective means it has of controverting his proof on an issue that the defendant himself interjects. See 451 U.S. at 465. Moreover, the Estelle opinion emphasized that the defendant in that case "introduced no psychiatric evidence, nor had he indicated that he might do so." 451 U.S. at 466.

Subsequent decisions, both of the Supreme Court and of the courts of appeals, have uniformly construed Estelle narrowly and have found a waiver of Fifth Amendment self-incrimination rights when the defendant has opted to introduce expert testimony at trial as to mental condition. E.g., Powell v. Texas, 492 U.S. 680, 683-4 (1989); Buchanan v. Kentucky, 483 U.S. 402, 421-4 (1987); Presnell v. Zant, 959 F.2d 1524, 1533 (11th Cir. 1992); Williams v. Lynaugh, 809 F.2d 1063, 1068 (5th Cir.), cert. denied, 481 U.S. 1008 (1987); Vardas v. Estelle, 715 F.2d 206, 209 (5th Cir. 1983), cert. denied, 465 U.S. 1104 (1984); United States v. Madrid, 673 F.2d 1114, 1119-21 (10th Cir. 1982). See also United States v. Vest, 905 F. Supp. 651, 653 (W.D. Mo. 1995)(finding waiver of Estelle at the capital penalty phase when a "defendant elects, with the advice of counsel, to put his mental status into issue"); United States v. Haworth, 942 F. Supp. 1406 (D.N.M. 1996)(same).

Rule 12.2(c), of course, only allows the introduction and use against the defendant of any statements made by the defendant during a mental examination when the defendant has introduced testimony on an issue respecting mental condition. The Rule thus embodies the triggering or waiver principle first hinted at in Estelle v. Smith and relied on in subsequent similar situations

by the cases cited above. In sum, we do not share the Davis court's belief that the constitutional issue is a serious or difficult one, and we urge that the Rule be amended to clarify the power of a trial court to do justice "in an appropriate case" by granting the government's request for an independent, and if necessary custodial, mental examination of the defendant, when the defendant gives notice of an intent to rely on expert testimony of his or her mental condition on the issue of guilt.

One relatively simple way to accomplish this, suggested by the Davis opinion itself, would be to amend the first sentence of Rule 12.2(c) to reference not only 18 U.S.C. 4241 and 4242 but also 18 U.S.C. 4247. The pertinent sentence would then read: "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, 4242, or 4247."

A second way that we think the Rules should be amended to permit a court-ordered mental examination of a defendant involves sentencing proceedings. The Rules nowhere authorize a court-ordered mental examination of the defendant relating to sentencing. This is a gap that should be remedied.

For example, defendants in capital proceedings, in a significant percentage of federal cases, have sought mental examinations with a view toward offering expert evidence relating to mental disease or condition in mitigation at the sentencing phase. See, e.g., United States v. Vest, supra; United States v. Haworth, supra; see also, setting forth as mitigating factors, 18 U.S.C. 3592(a)(1)(impaired capacity), (a)(6)(severe mental or emotional disturbance). Likewise in noncapital sentencing proceedings, to which the sentencing guidelines apply, defendants may sometimes wish to offer expert evidence stemming from mental examinations in an effort to persuade the court to depart downward in unusual cases. See Guideline 5H1.3 (mental condition not "ordinarily" relevant); but compare Guideline 5K2.13 (diminished capacity relevant in some cases). In both instances, the government should be able to obtain a court-ordered mental examination by another expert, for the same kind of fairness reasons as undergird Rule 12.2(c).

Leaving aside the question whether defendants should be required, as in Rule 12.2(a) and (b), to give some form of timely notice of an intention to offer such expert testimony (both Vest and Haworth granted government motions to so require, apparently in the exercise of inherent authority),[1] if it appears that they

---

[1] In order to clarify the law and prevent future litigation, we believe the Rules should also be amended to require adequate notice of an intention to offer expert testimony at the sentencing phase.

intend to do so, the trial judge should be able to order that the defendant undergo a mental examination by another expert. See Vest, supra, 905 F. Supp. at 653: "If a defendant elects to present mitigation testimony addressing his mental status, then ... [u]nless the government is allowed to conduct its own mental health examination, it may be deprived 'of the only effective means it has of controverting ... proof on an issue that [defendant has chosen to] interject into the case.'", quoting from Estelle. In sum, in order to promote fairness and avoid future litigation, the Rules should be amended to permit court-ordered mental examinations of defendants when appropriate in sentencing proceedings, both capital and noncapital.

Your and the Committee's consideration of these matters is appreciated.

Sincerely,

(signed) John C. Keeney

John C. Keeney
Acting Assistant Attorney General

Agenda Item III C4

MEMO TO: **Members, Criminal Rules Advisory Committee**

FROM: **Professor Dave Schlueter, Reporter**

RE: **Proposed Amendment to Rule 24(b); Equalize Number of Peremptory Challenges**

DATE: **March 27, 1998**

At its meeting in October 1997, the Committee decided to propose an amendment to Rule 24(b) which equalize the number of peremptory challenges in a non-capital felony case. The momentum for that change was generated in part by the fact that some members of Congress continues to show an interest in amending Rule 24(b) to accomplish the same end.

As noted at the meeting, in 1990, the Advisory Committee proposed an amendment to Rule 24(b) which would have equalized the number of peremptory challenges—six apiece—for the prosecution and the defense by reducing the number of challenges available to the defense by four. The proposed amendment was approved by the Standing Committee for public comment but when it reviewed the proposal again in February 1991 following that comment period, it rejected the amendment. Since then, there has been no attempt to revisit the issue by either the Advisory Committee or Standing Committee. As noted at the last meeting, the Standing Committee's rejection of the proposal in 1991 has generally been used to convince Congress not to amend Rule 24(b).

Following discussion, I was instructed to draft an amendment to Rule 24(b) which would equalize the number of peremptory challenges at ten apiece by increasing the number of challenges available to the prosecution by four and leaving the defense number as it stands in the Rule. That language would track the most recent legislative proposal in § 501, Senate Bill 3 (*Omnibus Crime Control Act of 1997*).

A draft of the proposed language and a proposed Committee Note (incorporating language from the ~~proposed~~ 1990 Committee Note) are attached.

Rule 24. Trial Jurors

* * * * *

(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, each side is entitled ~~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 ~~.~~ , provided that the government shall not have more challenges than the total allocated to all defendants. The court may permit multiple defendants to exercise peremptory challenges separately or jointly.

* * * * *

COMMITTEE NOTE

The amendment to Rule 24(b) equalizes the number of peremptory challenges normally available to the prosecution and the defense in a felony case. Under the amendment, the number of challenges available to the defense would remain the same, ten challenges, and the prosecution's would be increased by four. The number of peremptory challenges in capital and misdemeanor cases would remain unchanged.

In 1976, the Supreme Court adopted and forwarded to Congress amendments to Rule 24(b) which would have reduced and equalized the number of peremptory challenge. Under the proposed change, each side would have been entitled to 20, 5, and 3, respectively in capital, felony, and misdemeanor cases. Order, Amendments to the Federal Rules of Criminal Procedure, 44 U.S.L.W. 4549 (1976). Congress ultimately rejected the

proposed changes but recommended that the Judicial Conference study the matter further. Congress' chief concern was that in most federal courts, the trial judge conducts the voir dire, thus making it more difficult for the parties to identify biased jurors. S. Rep. 354, 95th Cong., 1st Sess. 9, reprinted in [1977] U.S. Code Cong. & Ad. News 1477, 1482-83. In 1990 the Advisory Committee on Criminal Rules proposed an amendment to Rule 24(b) which would provided that in a felony case each side would be entitled to 6 peremptory challenges; that result would have been reached by reducing the number available to the defense by four. The Standing Committee ultimately rejected that amendment in 1991. Since then, however, Congress has indicated a willingness to reconsider the number of peremptory challenges available in a felony case. *See* Senate Bill 3 (*Omnibus Crime Control Act of 1997*) (would equalize the number of challenges at 10 for each side).

The proposed amendment equalizes the number of peremptory challenges for each side without reducing the number available to the defense. While increasing the number of challenges might, in some cases, require more jurors in the initial pool, the Committee believed that on the whole, equalizing the number of challenges is desirable. That result is accomplished in the amendment without reducing the number available to the defense.

Finally, the rule recognizes that in multi-defendant cases, the court in its discretion might grant additional peremptory challenges to the defendants. But, consistent, with the goal of equalization of the number available to each side, in that instance the prosecution could request additional challenges, not to exceed the total number available to the defendants jointly. The court, however, would not be required to equalize the number of challenges.

Agenda Item III C5

MEMO TO: Members, Criminal Rules Advisory Committee

FROM: Professor Dave Schlueter, Reporter

RE: Proposed Amendment to Rule 26; Taking Testimony from Remote Location

DATE: March 28, 1998

After hearing a report from a subcommittee (Judge Carnes, chair, Mr. Josefsberg, and Mr. Pauley), the Committee at its October 1997 meeting approved in concept an amendment to Rule 26 which permit the court to authorize the presentation of testimony by contemporaneous transmission from a different location. A draft of an amendment to accomplish that and an accompanying Committee Note are attached.

The draft generally follows the suggested language included in the subcommittee's report. In its report, the subcommittee raised the issue of whether the Rule or Note should indicate a preference for deposition testimony over contemporaneous transmission of testimony. A preference for depositions is stated in a Committee Note accompanying an amendment to Civil Rule 43(a) which uses almost identical language to that proposed here—with the exception of reference to "unavailability."

Two options are presented here. In the first, a preference for depositions is implied by requiring a finding of compelling circumstances and good cause shown. That is the language used in the civil rule.

The second option expresses no preference and treats deposition testimony and contemporaneous transmission on equal footing. That is reflected in the draft which does not include any requirement of compelling circumstances, etc. and is consistent with Crim. R. 15 which permits the introduction of a deposition if a witness is unavailable.

In both versions, the transmission involved is video, not audio.

Rule 26. Taking of Testimony

(a) IN GENERAL. In all trials the testimony of witnesses shall be taken orally in open court, unless otherwise provided an Act of Congress or by these rules, the Federal Rules of Evidence, or other rules adopted by the Supreme Court.

(b) TRANSMISSION OF TESTIMONY FROM DIFFERENT LOCATION. The court may authorize contemporaneous video presentation of testimony in open court from a different location if:

(i) the requesting party establishes compelling circumstances for such transmission;

(ii) appropriate safeguards are established; and

(iii) the witness is unavailable within the meaning of Rule 804(a) of the Federal Rules of Evidence.

ALTERNATE LANGUAGE for Subdivision (b) (No preference for Depositions)

(b) TRANSMISSION OF TESTIMONY FROM DIFFERENT LOCATION. The court may authorize the video presentation of testimony in open court from a different location if:

(i) appropriate safeguards are established; and

(ii) the witness is unavailable within the meaning of Rule 804(a) of the Federal Rules of Evidence.

COMMITTEE NOTE

The amendment to Rule 26 is intended to permit 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 the rules, an Act of Congress, or any other rule authorized by the Supreme Court. One of those exceptions is located in Rule 15, which provides that a party may present the deposition testimony of an "unavailable" witness. The amendment 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 where 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 the closest thing to having the witness actually in the court room. For example, the participants in the court room can see for themselves the demeanor of the witness and hear any pauses in the testimony, matters which are not normally available in non-video deposition testimony. Although deposition testimony is normally taken with all counsel and parties present with the witness, those are not absolute requirements. *See, e.g., United States v. Salim*, 855 F.2d 944, 947-48 (2d Cir. 1988) (conviction affirmed where deposition testimony used although defendant and her counsel were not permitted in same room with witness, witness' lawyer answered some questions, lawyers were not permitted to question witness directly, and portions of proceedings were not transcribed verbatim.

***[Alternative 1--preference for deposition testimony** Nonetheless, the Committee believed that some preference should be given to deposition testimony over contemporaneous transmission. First, normally the lawyers are present and can have the opportunity before and after a deposition to observe the witness. Second, a defendant's confrontation rights, although not absolute, are more likely to be protected if physical face-to-face confrontation is provided for. The preference is preserved by requiring that before contemporaneous transmission may be received the requesting party must convince the trial court that compelling circumstances exist. For example, a witness whose deposition was not taken is unexpectedly unavailable to testify.]*

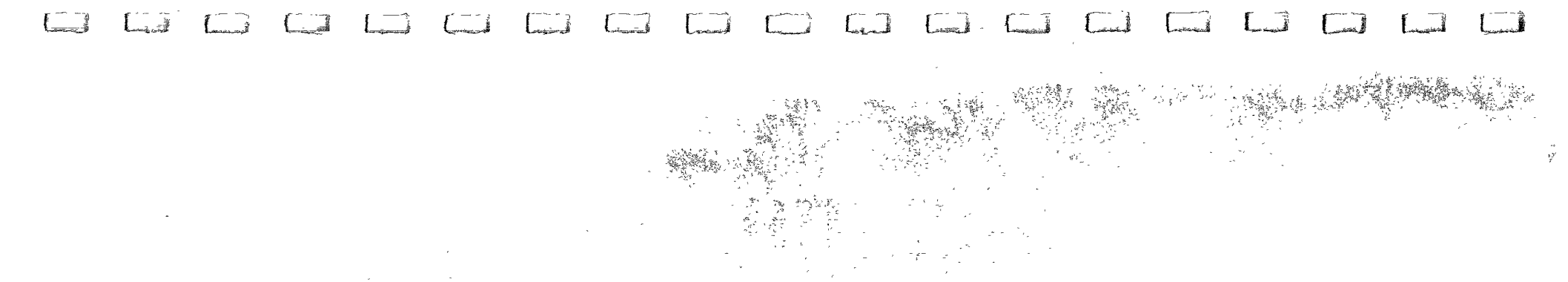
safeguards

[Alternative 2--no preference for deposition testimony Thus, although the rule does not express a preference for deposition testimony, the Committee recognized that there is a need for the trial court to impose appropriate, as required, to insure that the accuracy and quality of the transmission, the ability of any 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.]

Where the prosecution is presenting the contemporaneous transmission of a government witness, there may be a question or objection on grounds that the defendant's confrontation rights are being infringed. The Committee believes that including the requirement of "unavailability" as that term is defined in Federal Rule of Evidence, which permits use of certain deposition testimony, should normally insure that those 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 way of one-way closed circuit television. The Court outlined four elements which 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' 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. In this case, 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 Court noted that any harm to the defendant resulting from the transmitted testimony was minor 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.

While the amendment is not limited to instances such as those encountered in *Craig*, it is limited to situations where the witness is unavailable for any of the reasons set out in Federal Rule of Evidence 804(a). Whether under the particular circumstances 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.



Agenda Item III C 6

MEMO TO: **Members, Criminal Rules Advisory Committee**

FROM: **Professor David A. Schlueter, Reporter**

RE: **Suggested Changes to Rule 32; Disclosure of Presentence Reports**

DATE: **March 28, 1998**

As noted in the attached materials, the Committee on Criminal Law is considering several options for dealing with disclosure of presentence reports. One of the options under consideration by that Committee is the adoption of a model local rule on the topic. The issue apparently arose from a question posed to the General Counsel's office. The question is whether any sort of rule or guideline should be promulgated which addresses the authority of the court to release the otherwise confidential report to someone other than the parties.

Although at this point, this Committee has not been presented with any specific proposal for a local rule or a proposed change to Rule 32, the Committee might wish to at least take a position on whether it, at least in theory, supports such a change.

LEONIDAS RALPH MECHAM
Director

CLARENCE A. LEE, JR.
Associate Director

ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS

WASHINGTON, D.C. 20544

JOHN K. RABIEJ
Chief
Rules Committee Support Office

November 17, 1997

MEMORANDUM TO JUDGES STOTLER AND DAVIS AND PROFESSORS COQUILLETTE AND SCHLUETER

SUBJECT: *Draft Agenda Item Suggesting Model Local Rule Regarding Disclosure of Presentence Investigation Reports*

For your information, I am attaching a copy of a draft agenda item prepared for the Committee on Criminal Law by David Adair, the Administrative Office's Associate General Counsel, suggesting that that committee consider several options regarding disclosure of presentence reports. Apparently, courts often receive requests for this information from state courts and sometimes probation officers are subpoenaed. One of the options is to propose a model local rule. (Please regard this draft as confidential.)

Criminal Rule 32(b) sets out the requirements for a presentence investigation and (b)(6) governs the disclosure of the report. As discussed in the draft agenda item, the rule does not proscribe the disclosure of the report to others.

I advised Adair that ordinarily local rules are disfavored, especially if a national rule could handle the subject. He replied that in this case a national rule did not seem appropriate because of the varied responses by the courts. I told him that I would send a copy of the agenda item to you for your consideration. At this time, the Criminal Law Committee is being asked only whether further study is warranted. It will not propose any recommendation to the Judicial Conference until its summer 1998 meeting. If we wanted to provide input to the Criminal Law Committee we could do it before their December meeting or before their summer 1998 meeting.

JKR

John K. Rabiej

Attachment

TAB E
Criminal Law Committee
December 1997
Action Item

Model Procedures for Maintaining the Confidentiality of Presentence Reports and Probation Information

Issue: Should the Committee request that the Office of General Counsel prepare procedures for disclosure of the content of presentence investigation reports or supervision records?

Discussion

As discussed in Attachment A[1], presentence investigation reports and information gathered in the course of probation or supervised release supervision are generally regarded as confidential unless disclosure is required by statute, rule, or administrative guidelines, or is specifically authorized by the court. Nonetheless, requests for such documents and information either by subpoena or informal request are a common occurrence. These requests come from both state and federal courts, but mostly from state courts, and they come in connection with both criminal and civil proceedings.

Some courts have established procedures for dealing with such requests, but most have not. The Office of General Counsel receives an average of several requests a week for dealing with these requests and is glad to provide assistance, but the lack of an established procedure causes confusion and results in a great deal of unnecessary effort on the part of the probation officer, the United States Attorney's office, which is often asked to assist the probation office,

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[1] Attachment A is a memorandum prepared by the Office of General Counsel to assist courts, probation officers, and United States Attorney's offices in responding to requests for presentence reports and supervision information. It was last revised in February 1997.

and, ultimately, the court. The existence of an established and recognized procedure would make the entire exercise more predictable and efficient.

Many agencies in the executive branch have developed regulations to control the response to subpoenas issued to agency employees. These regulations are often referred to as "Touhy" regulations after the Supreme Court case, United States ex rel. Touhy v. Ragen, 340 U.S. 462 (1951). In Touhy, a Department of Justice employee had been held in contempt of court because he refused, on instructions from the Attorney General, to produce documents in response to a subpoena duces tecum. The Supreme Court held that the Attorney General had the authority to withdraw from subordinates the power to release agency documents pursuant to her statutory authority to prescribe regulations for "the custody, use, and preservation of the records, papers, and property" of the Department of Justice. 5 U.S.C. § 301. Subsequent decisions have upheld the authority of agencies to prohibit agency employees from testifying in response to a subpoena based on principles of federal supremacy and sovereign immunity. See Louisiana v. Sparks, 978 F.2d 226 (5th Cir. 1992); Boron Oil Co. v. Downey, 873 F.2d 67 (4th Cir. 1989).

In general, regulations promulgated by agencies share three essential features: (1) they set out procedures with which a party issuing a subpoena must comply, including the centralization of the authority for authorizing the response to the subpoena; (2) they place general limitations on the nature of responses that will be authorized; and (3) they direct that agency employees not respond to subpoenas unless appropriately authorized. Although the authority relied upon by the Department of Justice and other agencies in promulgating regulations applies to the Executive branch, there is ample authority to support the proposition

that the court controls the disclosure of presentence reports and probation information unless disclosure is controlled by statute, rule, or administrative guidelines. The promulgation of procedures to effect court-ordered disclosure would simply be consistent with that authority.

The Judicial Conference might authorize nationally applicable guidelines under its authority to provide for uniform procedures for the conduct of court business. 28 U.S.C. § 331. But different courts differ somewhat in maintaining the confidentiality of presentence reports and supervision information. These differences may be based in part on the nature of local criminal case loads and the relationships between probation offices and law enforcement agencies. The treatment of this issue by means of local rules would maintain the courts' ability to deal with local conditions in appropriate ways.

As noted above, a number of courts have already adopted local rules on the subject. In fact, 38 local rules that relate to the confidentiality of presentence reports and probation information have been identified. Some of them simply state that such records are confidential, but about 30 provide some guidance on how a request for disclosure should be handled. Three examples are provided at Attachment B. For those courts that have not adopted a local rule on the subject, or those which may want to improve an existing rule, a model may be helpful.

If the Committee is in agreement that a disclosure procedure is useful and that a model local rule is the best way to provide such a procedure, the Office of General Counsel would undertake, in consultation with the Federal Corrections and Supervision Division, to develop one or more draft model local rules for the Committee's consideration at its next meeting. It is contemplated that the drafts would include the following features: (1) a description of the

materials covered by the rule; (2) a declaration of the confidentiality of those materials; (3) a procedure for requesting the disclosure of the materials, including the designation of the decision-maker, which would be the court in most cases; and (4) general, flexible principles to be applied in the determination of disclosure. Or, if requested to do so by the Committee, the Office of the General Counsel would prepare draft, nationally applicable guidelines for disclosure. In either event, if approved by the Committee, the procedures would of course be submitted to the Judicial Conference for approval.

Among the options the committee may wish to consider are:

- Direct the Office of the General Counsel, in consultation with the Federal Corrections and Supervision Division, to develop a draft model local rule governing requests for presentence reports or probation information for consideration by the Committee at its summer 1998 meeting.
- Direct the Office of the General Counsel, in consultation with the Federal Corrections and Supervision Division, to develop draft nationally applicable guidelines governing requests for presentence reports or probation information for consideration of the Committee at its summer 1998 meeting.
- Decline to authorize development of a model local rule governing requests for presentence reports or probation information.

CONFIDENTIALITY OF PRESENTENCE, PROBATION AND SUPERVISED RELEASE INFORMATION

It is the position of the Office of the General Counsel of the Administrative Office that presentence, probation or supervised release information is confidential and may be disclosed only (1) if authorization to disclose such information has been granted by the respective sentencing court at its discretion, (2) if a court determines that a compelling need for disclosure has been demonstrated, or (3) if there exists explicit authority to disclose such information.

With regard to presentence reports, F. R. Crim. P. 32(c) provides for the disclosure of the presentence report to the defendant, the defendant's counsel, and the attorney for the Government. The rule does not specifically proscribe other disclosure, but a number of courts have determined that the purpose and function of the presentence report requires that it be confidential. The case law clearly establishes that concern for confidentiality permeates Rule 32 and its history and that, therefore, presentence information constitutes confidential court records, not public records.

> In order to be of greatest assistance to the court, the report should be as complete as possible, containing "[a]ll objective information which is significant to the decision-making process." To this end, the report is designed to
>
> > describe . . . the defendant's character and personality, evaluate . . . his or her problems and needs, help . . . the reader understand the world in which the defendant lives, reveal . . . the nature of his or her relationships with people, and disclose those factors that underlie the defendant's specific offense and conduct in general.
>
> [Administrative Office of the United States Courts, The Presentence Investigation Report 1 (Publication 105, 1978)].
>
> . . .
>
> In order to ensure the availability of as much information as possible to assist in sentencing, the courts have generally determined that presentencing reports should be held confidential.

United States v. Charmer Industries, Inc., 711 F.2d 1164, 1170 (2d Cir. 1983).

In addition, the presentence report contains a great deal of information from a variety of sources. Pursuant to statute, "[n]o limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense which a court of

the United States may receive and consider for the purpose of imposing an appropriate sentence." 18 U.S.C. § 3661. The restrictions of the rules of evidence may not apply to such information. See F. R. Evid. 1101(d)(3). The disclosure of such information to third parties unaware of the nature of the information could lead to misunderstanding that could unfairly prejudice the subject of the report or others contributing to it.

Accordingly, all courts that have considered the issue have held that presentence reports are discloseable to third parties only with the consent of the sentencing court, upon demonstration of a compelling need, or pursuant to a statute or rule. See United States v. Charmer Industries, Inc., supra; United States v. Trevino, 89 F.3d 187 (4th Cir. 1996); United States v. Moore, 949 F.2d 68 (2d Cir. 1991); United States v. Martinello, 556 F.2d 1215, 1216 (5th Cir. 1977) (per curiam); United States v. Dingle, 546 F.2d 1378, 1380-81 (10th Cir. 1976); United States v. Canniff, 521 F.2d 565, 573 (2d Cir. 1975), cert. den., 423 U.S. 1059 (1976); United States v. Walker, 491 F.2d 236, 238 (9th Cir.), cert. den., 415 U.S. 990 (1974); United States v. Daniels, 319 F. Supp. 1061, 1063-64 (E.D. Ky. 1970); Hancock Brothers, Inc. v. Jones, 293 F. Supp. 1229, 1233 (N.D. Cal. 1968); United States v. Greathouse, 188 F. Supp. 765, 766 (M.D. Ala. 1960); United States v. Durham, 181 F. Supp. 503 (D.D.C. 1960).

The confidentiality of information collected or received by probation officers in the course of supervising individuals under probation or supervised release is not so clearly established. Nonetheless, the reasons for confidentiality of this kind of information are as compelling as those for confidentiality of presentence information. In order to obtain complete information to assure that supervisees are complying with the conditions imposed by the court, in order to monitor supervisees' activities to determine if modification of conditions should be recommended to the court, and in order to better assist in the rehabilitation of supervisees, probation officers and, ultimately, the court, need the most complete information possible. This is only possible if the supervisees and other sources of information are assured of some measure of confidentiality with respect to their communications to probation officers. Although there are few reported cases directly on point, district courts have uniformly denied access to these records by third parties. See e.g., In re Subpoena and Order Directing Probation Officer to Produce Records, 737 F.Supp. 30 (W.D.N.C. 1990); In the Matter of an Application for Disclosure of the Records of Probation Investigation and Supervision, 699 F.Supp. 463 (S.D.N.Y. 1988).

This principle of confidentiality and instructions to probation officers regarding the maintenance of confidentiality are clearly set out in the Probation Manual, Guide to Judiciary Policies and Procedures, Vol. X, Chapt. II(E)(4) (presentence information) and Chapt. IV(D) (supervision information); Administrative Office of the United States Courts, The Presentence Investigation Report 2-3, 17-18 (Publication 105, 1984); and Administrative Office of the United States Courts, Presentence Investigation Reports Under the Sentencing Reform Act of 1984 11-13 (Publication 107, 1988).

Probation officers have been granted discretion to disclose presentence, probation, and supervised release information in certain limited circumstances. The disclosure of the

presentence report to the defendant, counsel for the defendant and the attorney for the Government pursuant to F. R. Crim. P. 32(c)(3) and 18 U.S.C. § 3552(d), of course, is one such circumstance. In addition, probation officers may disclose such information when necessary to warn a third party of a reasonably foreseeable risk presented by a probationer or supervised releasee under an officer's supervision. Guide to Judiciary Policies and Procedures, Vol. X, (Probation Manual) Chapt. IV(D)(3).

Finally, under certain circumstances, probation officers may disclose limited information to other law enforcement agencies when such disclosure is necessary to enable the agency to assist the probation officer in monitoring the conduct of the supervisee. For example, in order to determine if a white collar offender is engaged in sophisticated income tax fraud, the supervising officer may be required to consult with the Internal Revenue Service. Such consultation might require that the officer share certain information that would otherwise be confidential. See Administrative Office of the United States Courts, The Supervision Process 36 (Publication 106, 1983). Investigatory disclosures of the information by probation officers made in furtherance of their official duties of investigating a probationer's background or conduct, or of keeping the sentencing court informed of possible probation violations, would not vitiate the privileged character of such information for every other purpose, just as a person's Fifth Amendment privilege is not waived if self-incriminating information is divulged in another proceeding for a different purpose. See Melson v. Sard, 402 F.2d 653, 655 (D.C. Cir. 1968) (self-incriminating statements by parolee made at a parole revocation hearing may not be used against him in a subsequent criminal trial).

In light of the above principles, the confidentiality of presentence information has been protected from disclosure by court process, and production of the presentence report may not be compelled except under the most extraordinary circumstances. For example, the report is not producible under the Jencks Act, the Brady v. Maryland rule, nor must it be disclosed by the court under the provisions of the Freedom of Information Act (FOIA). Trevino, supra., Moore, supra; United States v. Trevino, 556 F.2d 1265, reh. denied, 562 F.2d 1258 (5th Cir. 1977); Dingle, supra, 546 F.2d at 1380-81; Canniff, supra, 521 F.2d at 573. See also Cook v. Willingham, 400 F.2d 885, 885-86 (10th Cir. 1968) (presentence report not subject to Brady or FOIA).* Likewise, probation officers' files and records collected in the course of preparing the presentence report are not subject to discovery by counsel. United States v. Sherlin, 67 F.3d 1208, 1217 (6th Cir. 1995); United States v. Jackson, 978 F.2d 903 (5th Cir. 1992), cert. denied, __ U.S. __, 113 S.Ct. 2429 (1993); United States v. Zavala, 839 F.2d 523 (9th Cir.), cert. denied, 488 U.S. 831 (1988); United States v. Walker, 491 F.2d 236 (9th Cir. 1974);

*The Supreme Court has held that once the report has been lent to the United States Parole Commission or the United States Bureau of Prisons, it is an agency document under the provisions of the Freedom of Information Act. 5 U.S.C. §§ 551(1)(B) and 552(f). Julian v. United States Department of Justice, 486 U.S. 1 (1988). In that case, the FOIA request was made by the subject of the report. The Supreme Court did not indicate whether the report would be discloseable to third parties under the FOIA, but in my view it is likely that the "privacy" or "investigatory records" exemptions (5 U.S.C. § 552(b)(6) or (7)) of the FOIA would apply to such requests.

United States v. Ward, 609 F. Supp. 169 (N.D. Ohio 1993). See also Adair, "Looking at the Law," 86 Federal Probation (Sept. 1993)

The compelled disclosure of presentence information may be justified only under circumstances similar to those justifying disclosure of grand jury materials. See e.g. United States v. Charmer Industries, Inc., supra, 711 F.2d at 1174, and United States v. Boesky, 674 F. Supp. 1128 (S.D.N.Y. 1987). Courts have determined that three factors are relevant to a determination that such records be disclosed: (1) in a criminal trial, if the subpoenaed information is material and exculpatory (bearing on the defendant's innocence), it must be disclosed, cf. United States v. Figurski, 545 F.2d 389, 391-92 (4th Cir. 1976) (disclosure request by third party in a criminal prosecution denied as immaterial), Charmer Industries, Inc., supra, 711 F.2d at 1172-1176, and Hancock, supra, 293 F. Supp. at 1233 (disclosure requests by third parties in civil suits denied); (2) if the defendant desires an opportunity to refute derogatory material which might adversely affect his sentence, disclosure is mandatory, Hancock, supra, 293 F. Supp. at 1232 (disclosure at sentencing is now mandatory under F. R. Crim. P. 32(c)(3)(A); (3) if the Federal court concludes that disclosure of the subpoenaed information is necessary to "meet the ends of justice," confidentiality, at the court's discretion, may be lifted, see Figurski, supra, Hancock, supra. Consistent with the concept of "ends of justice," a court may exercise its discretion to release information in the possession of the probation officer which is favorable to the person about whom the information is maintained. Usually the consent of the individual should be obtained. See Hancock, supra, 293 F. Supp. at 1233. A caveat to the third consideration is that where the information may be available by another means, disclosure should be denied, since mere convenience would be served by release of the information. See Charmer Industries, Inc., 711 F.2d at 1179.

Given the confidentiality of presentence, probation, and supervised release information established by case law and policy, probation officers have limited discretion to disclose such information. The court, as the entity for whom the information is collected and as the employer of the officer, retains the authority to permit or deny release of that information. See e.g., United States ex rel. Touhy v. Ragen, 340 U.S. 462, 467-68 (1951). Though the Judiciary has not adopted "Touhy" regulations which set out specific procedures governing the disclosure of information, the principle of Touhy nonetheless applies and the courts have held that a probation officer must be authorized by the court in order to release information from the presentence report or supervision files to the third parties. United States v. Charmer Industries, Inc., supra, 711 F.2d at 1176-1177. In United States v. Huckaby, 43 F.3d 135, (5th Cir. 1995), the court held that, although the presentence report should normally remain confidential after the sentencing hearing, the district court could release the presentence report to the public if the disclosure outweighed the purposes of confidentiality. Even then, however, the disclosure should be as limited as possible.

Generally, the court to which the information belongs, the sentencing court, should waive the information's confidentiality. Accordingly, a determination by a Federal court as to whether a probation officer should submit to legal process should be governed by the sentencing court's order where such an order has been issued. See Figurski, supra, 545 F.2d at 392.

If the person seeking disclosure alleges that the presentence report or probation officer files contain exculpatory or impeachment evidence that is material on the issue of defendant's innocence in a criminal trial, the court should examine material in camera to determine if it meets the tests for compelled disclosure noted above. The Fourth Circuit has recently established a sensible rule on the procedure and the grounds necessary for disclosure. The defendant must clearly specify the information contained in the report that the defendant expects will reveal exculpatory of impeachment evidence. Only if the defendant plainly articulates how the information contained in the report will be both material and favorable to the defense, must the court examine the report in camera to determine if there is such information. The courts determination is reviewable only for abuse of discretion. United States v. Trevino, supra.. See also, United States v. Moore, supra; United States v. Figurski, 545 at 391-392 (4th Cir. 1976); United States v. Anderson, 724 F.2d 596, 598-599 (7th Cir. 1984); United States v. DeVore, 839 F.2d 1330, 1332-1333 (8th Cir. 1988).

Often, a request or subpoena for probation or supervised release information comes from a state court. Where a submission to state legal process by the probation officer would violate the valid orders of his or her Federal superior, the Supremacy Clause bars the state from compelling such an appearance. If the sentencing court has reviewed the request or subpoena and decided that the information should not be disclosed, the Federal court's proscription of an officer from testifying or producing records relating to the subject of a presentence or probation report renders the state process an interference in the officer's official duties and an undue hardship.

The consensus regarding the confidentiality of the presentence report was challenged in United States v. Schluette, 842 F.2d 1574 (9th Cir. 1988). In that case, the Ninth Circuit permitted a newspaper to obtain a presentence report under circumstances in which the subject of that report was deceased. Shortly after Schluette was decided, however, the Seventh Circuit refused to follow that case in connection with another request by a newspaper to obtain access to a presentence report. In United States v. Corbett, 879 F.2d 224 (7th Cir. 1989), the court relied upon the traditional analysis protecting the presentence report from disclosure except under circumstances similar to those that would require disclosure of grand jury materials.

> Only where a compelling, particularized need for disclosure is shown should the district court disclose the report; even then, however, the court should limit disclosure to those portions of the report which are directly relevant to the demonstrated need. Further, throughout this inquiry the court must be sensitive not only to the interests in confidentiality of the particular report, but also to the possible effects of disclosure in any particular case.

879 F.2d at 239. Accordingly, we believe that the Schluette decision is limited by its facts and, to the extent it has any impact, that impact should be limited to the Ninth Circuit.

Prepared by
David N. Adair, Jr.
Associate General Counsel

References on the Confidentiality of Probation and Pretrial Services Information

Court Regulations and Policies:

Guide to Judiciary Policies and Procedures, Vol. X (Probation Manual), Chapter II(E) - Presentence Information.

Guide to Judiciary Policies and Procedures, Vol. X (Probation Manual), Chapter IV(D) - Releasing File Information (Probation Supervision Information), pp. 31-40. Note: Includes Chapter IV(D)(1)(E), p. 34 - Requests by Subpoena.

Guide to Judiciary Policies and Procedures, Vol. XII (Pretrial Services Manual), Chapter III - Confidentiality of Pretrial Services Information, Parts A & B, pp. 1-8.

The Presentence Investigation Report (Publication 105, Administrative Office of the U.S. Courts, 1984), pp. 2-3, 17-18.

Presentence Investigation Reports Under the Sentencing Reform Act of 1984 (Publication 107, Administrative Office of the U.S. Courts, 1988), pp. 11-13.

Drug Aftercare Regulations:

Code of Federal Regulations Title 42, Part 2.

Guide to Judiciary Policies and Procedures, Vol. X, Chapter X(I) - Confidentiality of Substance Abuse Patient Records, pp. 55-67.

Articles:

"FOIA Presentence Report Disclosure," David N. Adair, Jr., *Looking at the Law*, Federal Probation, September, 1988, pp. 77-81.

"Discovery of Probation Officer Files," David N. Adair Jr., *Looking at the Law*, Federal Probation, September, 1993.

"Confidentiality of Presentence, Probation and Supervised Release Information," monograph by David N. Adair, Jr., August, 1996. Earlier version printed in two parts in News and Views, August 29, 1994 and September 12, 1994.

"The Confidentiality of Presentence Reports of Accomplice Witnesses When They are Requested as Brady Material or Jencks Statements," Catharine Goodwin, News and Views, June 3, 1996.

Three Examples of Local Rules on Confidentiality

1. Central District of California--Declaration of Confidentiality

RULE 10. PROBATION

* * * *

10.8 Probation Records. Pre-sentence investigation and reports, probation supervision records, and reports of studies and recommendation pursuant to 18 U.S.C. Sec. 4208(b), 4252, 5010(e) or 5034, are confidential records of this Court.

2. Northern district of Oklahoma--Short Form Disclosure Procedure

LOCAL CRIMINAL RULE 32.2 PRESENTENCE REPORTS

A. Confidential. The pretrial services, presentence and probation reports maintained by the Probation Office of this court are hereby declared to be confidential and, except as otherwise authorized in this rule, are to be used only as allowed by 18 U.S.C. Section 4205(e), Section 4208(b)(2) and Rule 32(c)(3), Federal Rules of Criminal Procedure. Correspondence to the United States Probation Office or to the court, relative to a charged defendant, shall also be deemed confidential and shall not be released publicly except upon order of the court.

* * *

3. District of Vermont--Long Form Disclosure Procedure

LOCAL CRIMINAL RULE 57.1 DISCLOSURE OF PRETRIAL SERVICES, PRESENTENCE, OR PROBATION RECORDS

(a) Authorized Disclosure. Pretrial services reports and presentence reports are prepared by the probation officer for the benefit of the court. They are confidential and may be disclosed only in the following circumstances:

(1) if authorization to disclose such information has been granted by the respective sentencing court at its discretion;

(2) if the court determines that a compelling need for disclosure has been demonstrated; or

(3) if there exists explicit authority to disclose such information. Unless compelling

reasons are made known to the court before any hearing, probation officers are not permitted to testify as to the content of any pretrial services, presentence or other report requested by the court and prepared in the course of their duties. They are expected to answer any specific inquiries by the court at any hearing but are not to be made the subject of interrogation by either counsel unless directed by the court.

(b) Petition for Pretrial Services Information. Pretrial Services records are governed by specific confidentiality regulations, which set forth the limited circumstances under which Pretrial Services information may be disclosed. When a demand for disclosure of pretrial records is made to a probation officer, by way of subpoena or other judicial process, the officer must inform the chief probation officer, who files a petition seeking instruction from the court regarding response to the subpoena, consistent with the confidentiality regulations.

(c) Written Request Required. Requests for confidential records maintained by the probation office, including presentence and probation supervision records, must be directed to the court in writing. The request also must state with particularity the need for specific information in the records.

(d) Petition for Presentence or Probation Records. When a demand for disclosure of presentence and probation records is made to a probation officer, by way of subpoena or other judicial process, the officer must file a petition seeking instruction from the court regarding response to the subpoena. When a correctional agency makes a request for information on a defendant or on an offender who is or has been under supervision, the request must be reviewed by the chief probation officer or designee, who may release such information.

(e) Court Authorization Required. If a probation officer is subpoenaed for such records, the officer must petition the court in writing for authorization to release documentary records or produce testimony regarding confidential court information. A court order is required before any disclosure is made. This rule extends to any current or former employee of the Probation Office who is subpoenaed or otherwise requested to testify regarding confidential court information and applies to any information acquired in the course of the employee's duties.

(f) Continuing Confidentiality. Any copy of a presentence report and related information necessary to classify a defendant-e.g., psychiatric reports, violation of probation reports, etc.-made available by the court to the United States Parole Commission or the Bureau of Prisons remains a confidential court document. The documents must be handled in compliance with rules and regulations established by the Bureau of Prisons and U.S. Parole Commission for the safekeeping and disclosure of confidential court/agency documents.

Agenda Item III C 7

MEMO TO: Members, Criminal Rules Advisory Committee

FROM: Professor Dave Schlueter, Reporter

RE: Technical Change to Rule 32.1: Information Item

DATE: March 26, 1998

As noted in the attached memo from Mr. Rabiej, Rule 32.1 uses the terms "United States magistrate" and "federal magistrate" rather than the correct terms, "United States magistrate judge" and "federal magistrate judge." As he notes any action on changing the language can wait until other substantive amendments are made to the rule or a package of technical amendments is made.

LEONIDAS RALPH MECHAM
Director

CLARENCE A. LEE, JR.
Associate Director

ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS

WASHINGTON, D.C. 20544

JOHN K. RABIEJ
Chief
Rules Committee Support Office

February 6, 1998

MEMORANDUM TO HON. W. EUGENE DAVIS

SUBJECT: *Incorrect Terminology in Criminal Rule 32.1*

Criminal Rule 32.1 contains the terms "United States magistrate" and "federal magistrate," rather than the correct terms "United States magistrate judge" and "federal magistrate judge." This apparent error is also noted in footnote 1 to the rule. I believe that the Committee already caught this problem at an earlier meeting, but decided to defer action until a package of technical or stylistic changes were made. I have added this matter to the Criminal Docket sheet (see attachment).

John K. Rabiej

Attachment

cc: Honorable Alicemarie H. Stotler (with attach.)
Professor David A. Schlueter (with attach.)
Professor Daniel R. Coquillette (with attach.)

Agenda Item III C 8

MEMO TO: Members, Criminal Rules Advisory Committee

FROM: Professor D. Schlueter, Reporter

RE: Consideration of an Amendment to Rule 41(c)(2)(D)

DATE: March 27, 1998

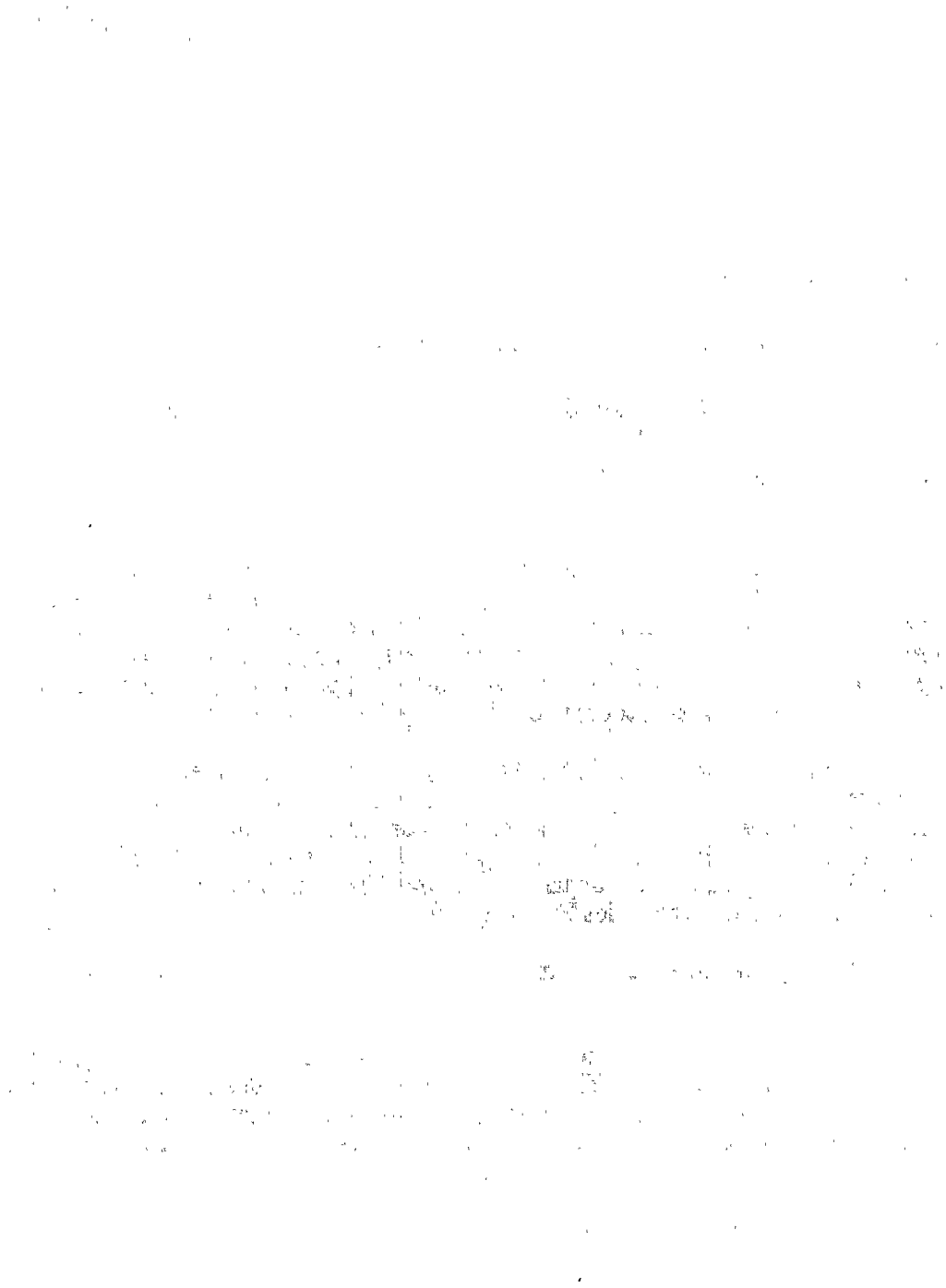
Judge Dowd has suggested that the Committee consider a possible amendment to Rule 41(c)(2)(D). He recently sat on a case at the Sixth Circuit in which there was no recording of the affiant's telephone call to the magistrate to request a warrant. The majority concluded that the requirements of that rule had been violated, that violation was not sufficient to suppress the evidence which was discovered during the subsequent search. Judge Dowd dissented.

As Judge Dowd notes in his dissent and in his correspondence, an amendment in 1977 originally included a requirement that a transcript be made of the sworn oral testimony setting out the grounds for the issuance of the warrant, that it be signed by the affiant in the presence of the magistrate, and filed with the court. That requirement was apparently removed by Congress when it reviewed the amendment under the Rules Enabling Act.

He suggests that the Committee consider placing that requirement back into Rule 41.

He also suggests that the rule be amended to provide that a district judge is permitted to issue a warrant. The current rule already provides that a warrant may be issue by a "federal magistrate judge," and Rule 54(c) indicates that a "federal magistrate judge" includes a "judge of the United States" which in turn includes a "district judge."

This matter is on the agenda for the April meeting.



United States District Court
Northern District of Ohio
United States Courthouse
2 South Main Street
Akron, Ohio 44308

David D. Dowd, Jr.
Judge

(330) 375-5834
Fax: (330) 375-5628

February 18, 1998

Judge W. Eugene Davis
United States Court of Appeals
for the Fifth Circuit
556 Jefferson Street, Suite 300
Lafayette, Louisiana 70501-6945

Dear Judge Davis,

In the late 70's the Advisory Committee proposed, presumably at the urging of the Justice Department, a procedure for the issuance of a search warrant after the basis for the warrant was submitted by phone. See C. Rule 41(c)(2).

I sat with the Sixth Circuit in December of 1997 on a case that involved serious flaws in completing the process as outlined in Rule 41 (c)(2)(D). The case has now been published in United States v. Chaar, ____F.3d_____(Sixth Cir. 1998). I dissented and my dissent makes reference to the fact that when the addition to Rule 41 was proposed, it apparently contained a provision that the "transcript of the sworn oral testimony setting forth the grounds for the issuance of the warrant must be signed by affiant in the presence of the magistrate and filed with the court." See footnote 1 in my dissent and also check the advisory committee notes for the 1977 amendment. However, the Congress apparently deleted that part of the proposal. In my opinion, the committee might want to consider an amendment to Rule 41 that would put that requirement back in the rule and also provide that a district judge would also be authorized to issue the warrant as well as a magistrate.

The Chaar case involved a fairly minor prosecution. However, it is fairly easy to imagine a scenario where the stakes would be much greater and the next appellate panel might view the type of mistake in the Chaar case less charitably than the majority in Chaar.

I would suggest that this concern of mine be placed on the agenda for April.

Enclosed is a copy of the slip opinion in Chaar.

I discussed this issue with David Schlueter earlier and so I am copied him and also Roger Pauley in the event he wishes to look at the subject from a Justice Department perspective and his vast institutional knowledge of the work of the committee.

I look forward to seeing you in D.C. in late April.

Yours very truly,

David D. Dowd, Jr.
United States District Judge

DDD:dmw

Enclosure

cc: Professor David A. Schlueter
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UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT
556 JEFFERSON STREET
SUITE 300
LAFAYETTE, LOUISIANA 70501

W. EUGENE DAVIS
CIRCUIT JUDGE

February 25, 1998

Judge David D. Dowd, Jr.
United States District Court
Northern District of Ohio
2 South Main Street
Akron, OH 44308

Dear David:

Thanks for your suggestion that we put your concern about rule 41(c)(2) on the agenda. By copy of this letter to Professor Schlueter, I ask that he include this as an agenda item.

Sincerely,

W. Eugene Davis

cc: Professor David A. Schlueter
Mr. John K. Rabiej

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ELECTRONIC CITATION: 1998 FED App. 0052P (6th Cir.)
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UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

OUSSAMA MOHAMED CHAAR,
Defendant-Appellant.

No. 96-2316

Appeal from the United States District Court
for the Eastern District of Michigan at Detroit.
No. 95-80604--John Corbett O'Meara, District Judge.

Argued: December 1, 1997

Decided and Filed: February 11, 1998

Before: BOGGS and MOORE, Circuit Judges; and
DOWD,* District Judge.

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*The Honorable David D. Dowd, Jr., United States District Judge for the Northern District of Ohio, sitting by designation.

COUNSEL

ARGUED: Amy L. Ryntz, RAYMOND & PROKOP, Southfield, Michigan, for Appellant. Jennifer J. Peregord, OFFICE OF THE U.S. ATTORNEY, Detroit, Michigan, for Appellee. **ON BRIEF:** Robert E. Forrest, RAYMOND & PROKOP, Southfield, Michigan, for Appellant. Jennifer J. Peregord, OFFICE OF THE U.S. ATTORNEY, Detroit, Michigan, for Appellee.

BOGGS, J., delivered the opinion of the court, in which MOORE, J., joined. DOWD, D. J. (pp. 13-19), delivered a separate dissenting opinion.

OPINION

BOGGS, Circuit Judge. Oussama Mohamed Chaar appeals from the district court's denial of a motion to suppress evidence, which led to his conviction for smuggling cigarettes. We affirm the district court.

I

At 12:52 pm, on September 22, 1994, the Detroit office of the FBI received an anonymous tip.[1] The tipster said that Oussama Chaar was smuggling $80,000 worth of cigarettes a week into Michigan and selling them to local gas stations. He said that Chaar and an associate named Jamil would be bringing a shipment of cigarettes in from Kentucky that

[1]These facts are taken primarily from an affidavit prepared by the investigating agent long after the events in question. As will be discussed below, this is problematic, but Chaar has not offered evidence to contradict the facts as set forth here.

afternoon some time before 4 pm, and that they would take them in a truck to a storage facility on 23 Mile Road, between I-94 and Gratiot Road. Finally, he described Chaar as: "34 years old, fat guy, glasses, drives 1991 two tone Aerostar, lives in an apartment on 23 Mile near I-94." Chaar had not been the subject of any previous investigations.

The FBI relayed the tip to the Bureau of Alcohol, Tobacco, and Firearms (ATF), which assigned the case to Special Agent Krappmann. Krappmann was informed by other investigating officers that there was another storage area at 21 Mile Road and Gratiot (investigation of the facility at 23 Mile having apparently proved fruitless), and that a check with the facility revealed that Chaar leased two storage lockers there. The rental agent indicated that Chaar had said that he worked for a gas station, and that he would be using the lockers to store excess cigarettes.

At about 4:30 pm, Krappmann called the United States Attorney's office from the storage facility to begin the process of getting a telephonic search warrant. He told Assistant United States Attorney Cynthia Oberg that there were exigent circumstances justifying the telephonic process, because it would be easy for a smuggler to transfer the illegal cigarettes into used, tax-stamped cases; because it was too late in the day to travel back to Detroit (about 25 miles) to get a warrant by normal means; and because it would be difficult to maintain visual surveillance in the meantime.

Krappmann, Oberg, and Magistrate Judge Lynn Hooe had a conference call at 4:50. According to an affidavit filed later by Krappmann, the call was tape recorded. According to the boilerplate language of the warrant form, Krappmann was appropriately placed under oath. Krappmann and Magistrate Judge Hooe filled out identical warrant forms in an identical manner. Magistrate Judge Hooe determined that there was probable cause to believe that contraband cigarettes were being stored at Chaar's storage lockers at the storage facility on 21 Mile, and that the exigent circumstances justified a telephonic search warrant. At about 5:05, Magistrate Judge Hooe authorized the warrant and gave Krappmann permission

to sign Hooe's name to Krappmann's copy of the warrant form, pursuant to FED. R. CRIM. P. 41(c)(2)(C).

Shortly after the magistrate judge authorized the warrant, Chaar and another man arrived in a two-tone Aerostar. Chaar mostly matched the physical description the informant had given. Krappmann and his assistant observed Chaar and his accomplice go to Chaar's storage lockers and unload cases of cigarettes from the van. As the officers approached the van, they noted that the cases (inside the van but easily viewable) did not have Michigan tax stamps on them. When the officers identified themselves to the men, the men shut the van doors. The officers executed the warrant and seized from the storage lockers 687 cartons of cigarettes that lacked Michigan tax identification.

Chaar was indicted for possession of contraband cigarettes, in violation of 18 U.S.C. § 2342(a), and for aiding and abetting his co-conspirator, in violation of 18 U.S.C. § 2(a). He moved to suppress the incriminating evidence. The district court rejected the motion, and Chaar entered into a plea agreement with the government. The agreement was conditional, allowing Chaar to appeal the denial of his motion to suppress. Chaar pleaded guilty, and the district court sentenced him to 36 months of probation and a $2,500 fine. Chaar then filed this timely appeal.

Chaar raises three objections in his appeal. First, he argues that the evidence obtained pursuant to the warrant should have been suppressed because the recording of the telephonic conference between Krappmann and the magistrate judge (and the transcript, if one was made) has been lost. No duplicates are available, and so, Chaar argues, this court has no basis to review the warrant. Second, he claims that there was not probable cause to support the warrant. Third, he argues that the *Leon* "good faith" exception should not apply.

II

FED. R. CRIM. P. 41(c)(2)(D) requires, with regard to telephonic warrants, that:

> [T]he Federal magistrate judge shall record . . . 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.

The government admits that those requirements were clearly violated in this case. Although the record does not reveal how, the tape recording was lost and the transcript (if there was one) was lost as well. The first question before us is what effect this violation of the rules has on the admissibility of the evidence.

A

Initially, we note that as a matter of placing blame, this case is a poor candidate for suppression of the evidence. "[T]he exclusionary rule is designed to deter police misconduct rather than to punish the errors of judges and magistrates." *United States v. Leon*, 468 U.S. 897, 916 (1984). We do not exclude evidence, absent constitutional violations, unless the exclusion furthers the purpose of the exclusionary rule, *id.* at 918, and it was Magistrate Judge Hooe's error (not any misconduct by Officer Krappmann) that deprived us of both

tape and transcript. Therefore, on the facts of this case, exclusion is an inapt remedy.[2]

The disposition of this Rule 41(c)(2)(D) violation is a matter of first impression in this circuit. Most Rule 41(c)(2)(D) cases, in this and other circuits, have dealt with the oath requirement, which is not at issue here, as Chaar does not contest the validity of Krappmann's oath.[3] Outside of the oath context, two other circuits have considered failures of the recording and transcription requirements of Rule 41(c)(2)(D).

[2]Despite the fact that the Rule 41 violation was the fault of the judicial officers involved, not the executive ones, it seems curious to us that the prosecutor supposedly did not know about the deficiency until Chaar's motion to dismiss was filed.

Rule 41(g) requires the magistrate judge to file with the district court all papers in connection with the warrant (including, presumably, the transcript of the officer's sworn testimony). Assuming that the tape and any transcript were lost at some time before the eve of the indictment, it should have been apparent to a prosecutor working on the case that there could be a Rule 41 problem. If the loss occurred after filing in the district court, the prosecution should have been alert to document that fact.

Although the government prevails in this particular case, we can foresee (contrary to the dissent's pessimistic fourth footnote) that if this sort of sloppiness by government agencies — either judicial or executive or both — continues, there will be cases in which otherwise sound convictions will have to be overturned. We admonish the government to take steps to ensure that this does not occur.

[3]We have held in the context of oaths for warrants in general that "[t]he Fourth Amendment does not require that statements made under oath in support of probable cause be tape-recorded or otherwise placed on the record or made part of the affidavit." *United States v. Shields*, 978 F.2d 943, 946 (6th Cir. 1992). That case did not concern federal officers, however, and the court specifically noted that it was only discussing the Fourth Amendment, and did not purport "to closely examine the prescriptions of Rule 41." *Id.* at 946 n.5.

In another case, pointing to the clear and simple oath requirements of Rule 41(c)(2)(D) and the Fourth Amendment, we required an officer obtaining a telephonic warrant to take the oath before giving testimony. *United States v. Shorter*, 600 F.2d 585, 588–89 (6th Cir. 1979). As mentioned above, however, Chaar does not contest the validity of Krappmann's oath.

In *United States v. Richardson*, 943 F.2d 547, 549 (5th Cir. 1991), the Fifth Circuit held that in the absence of a recording or transcript, a warrant does not merit a presumption of regularity. Nevertheless, the court held that it was appropriate for a reviewing court to use extrinsic evidence to examine the circumstances surrounding the issuance of the warrant. *Ibid.*

The Ninth Circuit has held that

> unless a clear constitutional violation occurs, noncompliance with Rule 41 requires suppression of evidence only where,
>
> (1) there was "prejudice" in the sense that the search might not have occurred or would not have been so abrasive if the rule had been followed, or (2) there is evidence of intentional and deliberate disregard of a provision in the Rule.

United States v. Stefanson, 648 F.2d 1231, 1235 (9th Cir. 1981).

We agree with both of these rulings in the following senses with respect to Rule 41(c)(2)(D).[4] First of all, although the evaluation of a warrant after a violation of Rule 41(c)(2)(D) must be searching and skeptical (the Rule is, after all, designed to preserve evidence for reviewing courts), district courts are well-equipped to weigh any evidence that is available after the fact, and defendants can both contest evidence through cross-examination and submit their own evidence. Furthermore, suppression is an appropriate remedy only when the violation is either of constitutional dimensions (*i.e.* the search became constitutionally unreasonable), is prejudicial, or is intentional.

[4]To the extent that *Stefanson* disclaimed the stringent oath requirement we expressed in *Shorter*, we do not support *Stefanson*. As mentioned above, however, Chaar has not challenged the sufficiency of the oath.

None of these three bases for suppression apply here. First, as will be discussed below, the search was not unconstitutional per se. Second, Chaar has given us no basis to conclude that, absent the violation, the search would have been less abrasive or would not have occurred. Third, Chaar has not alleged, let alone shown evidence, that the violation was intentional. Although we can imagine cases in which a Rule 41(c)(2)(D) violation would meet our criteria, we require more than mere conjecture to suppress evidence.

We acknowledge that neither we nor Chaar have any way now of knowing what the magistrate judge knew when he issued the warrant. Not even the original tip sheet is part of the record — the only evidence from which we can evaluate the sufficiency of the evidence underlying the warrant is Krappmann's affidavit, which was prepared nineteen months after the events it described. Given this epistemological problem, we are less than enthusiastic about affirming this search. However, Chaar gives us no evidence to support a decision to suppress it.

Chaar has the burdens of production and persuasion in seeking suppression of this evidence. *United States v. Blakeney*, 942 F.2d 1001, 1015 (6th Cir. 1991), *cert. denied*, 502 U.S. 1035 (1992); *United States v. Smith*, 783 F.2d 648, 650 (6th Cir. 1986). As such, the fact that there was no testimony to refute Krappmann's testimony, from either Magistrate Judge Hooe, Oberg or anyone else present in the courthouse when the warrant was issued, redounds to Chaar's detriment. Chaar was free to call any or all of these people as witnesses; he may well have believed that such testimony would not be helpful to him, and we will not strain to disagree. Furthermore, despite having a full and fair opportunity to cross-examine Krappmann at the suppression hearing, Chaar did not challenge the validity of Krappmann's oath or question Krappmann's version of the events

surrounding the search and arrest.[5] Chaar also made no attempt to show that he was prejudiced by the Rule 41(c) violation, and adduced no evidence to suggest that Krappmann's account was incorrect or that the tape and transcript had been lost intentionally. Therefore, we will not suppress this evidence merely on the basis of the Rule 41 violation.

B

Even though the Rule 41(c)(2)(D) violation does not itself require suppression of this evidence, we must still review the constitutionality of this search. The Fourth Amendment mandates that searches be reasonable. It also requires warrants supported by probable cause, subject to a few circumscribed exceptions. Even though the violation of Rule 41(c)(2)(D) in this case does not mandate suppression, the warrant does not necessarily pass constitutional muster.

Evaluating this warrant to determine if its issuance was supported by probable cause is a difficult undertaking, given that the only real source of evidence we have is an affidavit

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[5]For instance, it is unclear how the officers were able to determine that the cigarette cases in the van had no tax stamps, since they presumably could not see all of the sides of each case. Chaar did not, however, pursue this argument at the suppression hearing.

The only portion of Krappmann's testimony that spoke to the sufficiency of the evidence that was before the magistrate judge concerned the anonymous tip, and how it had been transmitted from the FBI to the ATF to the magistrate judge and, nineteen months later, to the reviewing court. Krappmann testified he believed that nothing had been "lost in the translation," although he noted that the tip was not part of the record. Chaar did not press this point.

In general, most of the testimony that Chaar's lawyer tried to elicit regarded facts to which the government had already stipulated. As a result of this, the district court became impatient with the lawyer and hinted that it was getting close to issuing sanctions based on those questions. There is no reason for us to believe, however, that the district court acted unfairly or that Chaar was prevented from making a case by following a fruitful line of examination or cross-examination.

written nineteen months after the fact. We need not engage in this complicated and speculative exercise, however, because there is a simpler and relatively non-speculative reason to conclude that this search was constitutional: the "good-faith exception" of *United States v. Leon*, 468 U.S. 897 (1984).[6]

[6]We have rejected three other justifications for a warrantless search here.

First, the "search incident to arrest" exception fails. The officers in this case likely had probable cause to arrest the defendants, based on the anonymous tip, the unstamped cigarette cases, and the defendants' suspicious behavior. A lawful search incident to that arrest could have included the van full of cigarettes. *United States v. Patterson*, 993 F.2d 121, 122–23 (6th Cir. 1993) (allowing searches of vehicles incident to arrest, regardless of arrestee's lack of proximity to vehicle). However, even though the cigarettes in the vehicle apparently had no tax stamps, and even though 650 cartons of them were seized pursuant to the warrant, the indictment was based solely on cigarettes taken from the storage lockers. Only the suppression of the latter cigarettes is at issue, and the search incident to arrest provides no basis for a warrantless search of the storage lockers.

Similarly, the "exigent circumstances" justification is inapplicable. Even if there was no time to get a warrant to search the defendants or their car, the storage locker easily could have been guarded while a warrant was obtained. *See United States v. Kelly*, 913 F.2d 261, 265 (6th Cir. 1990) (holding that search of locked suitcase requires warrant, absent exigent circumstances or consent).

Finally, "plain view" is unavailing. The district court noted that the officers observed the contraband cigarettes in Chaar's vehicle "in plain view." It is unclear if the district court meant this as an alternate basis for approving the search, but if this was its intent, it was wrong. The requirements for a "plain view" exception are well-settled:

> Four conditions must be present before police may seize an item pursuant to the plain view doctrine: (1) the item must be in plain view; (2) the item's incriminating nature must be immediately apparent; (3) the item must be viewed by an officer lawfully located in a place from which the object can be seen; and (4) the item must be seized by an officer who has a lawful right of access to the object itself.

United States v. Jenkins, 124 F.3d 768, 774 (6th Cir. 1997). The fourth requirement is the problem here, because the officers had no right of access to the storage lockers without a warrant. "[E]ven where the object is contraband, this Court has repeatedly stated and enforced the basic rule that the police may not enter and make a warrantless seizure." *Horton v. California*, 496 U.S. 128, 137 n.7 (1990).

We have summarized the *Leon* doctrine as follows:

> [T]he exclusionary rule should be modified so as not to bar the admission of evidence seized in reasonable, good-faith reliance on a search warrant that is subsequently held to be defective.
>
> [*Leon*] noted four specific situations where the good faith reliance exception would *not* apply: (1) where the supporting affidavit contained knowing or reckless falsity; (2) where the issuing magistrate failed to act in a neutral and detached fashion, and serve[d] merely as a rubber stamp for the police; (3) where the supporting affidavit d[id] not provide the magistrate with a substantial basis for determining the existence of probable cause, or in other words, where the warrant application was supported by [nothing] more than a 'bare bones' affidavit; and (4) where the officer's reliance on the warrant was neither in good faith nor objectively reasonable.

United States v. Leake, 998 F.2d 1359, 1366 (6th Cir. 1993) (quotation marks and citations omitted) (third, fourth, and fifth alterations in original).

Chaar offers no evidence that Krappmann lied to obtain the warrant. We are given no basis to conclude that the evidence Krappmann provided contained knowing or reckless falsity — if Krappmann's evidence was deficient, it was because it was of poor quality, not because it was deliberately falsified. In fact, Krappmann has been more than forthcoming about the extent to which the tipster's information proved inaccurate, belying a conclusion that the government "practiced to deceive."

There is also no evidence that Magistrate Judge Hooe failed to act in a neutral and detached manner or was acting as a

"mere rubber stamp." There is no evidence to suggest that he was somehow involved in the "competitive enterprise of ferreting out crime," *Johnson v. United States*, 333 U.S. 10, 14 (1948), or that he was blindly and automatically approving the warrant.

Somewhat relatedly, there was significant evidence supporting probable cause in this case. The warrant was based on the anonymous tipster's information that Chaar and an accomplice were smuggling cigarettes to a particular place; and the location of storage lockers in the vicinity, rented by Chaar for the purpose of storing cigarettes. The tipster, while anonymous and thus of untested reliability, gave a personal description of Chaar and indicated who his illicit customers were. Viewing the evidence at its weakest, the magistrate judge had good reason to believe, based on Krappmann's corroboration, that Chaar stored two lockers worth of cigarettes. The magistrate judge could reasonably have made the inferential leap (more like a hop) that someone storing so many cigarettes, about whom a tip had been received, could very well be smuggling those cigarettes.[7] Chaar points to inaccuracies in the anonymous tip, and deficiencies in Krappmann's corroborative efforts, but he does not convince us that the magistrate judge based his conclusion on inadequate "bare bones" evidence.

Finally, based on the foregoing, we conclude that Krappmann's reliance on the warrant both was in good faith and was objectively reasonable. Accordingly, the *Leon* standards are met and the search was valid.

III

For the foregoing reasons, we AFFIRM the district court.

[7] Far from "engag[ing] in sheer speculation" as to the basis of the magistrate judge's ruling, Dissent at 18, we base our characterization of the facts before the magistrate judge on the uncontested sworn testimony of Officer Krappmann.

DISSENT

DOWD, District Judge, dissenting.

My fellow colleagues forgive the violation of the provisions of Rule 41(c)(2)(D)[1] and deny the sanction of suppression based on the teachings of *United States v. Leon*, 468 U.S. 897 (1984). I respectfully disagree and thus dissent.

Initially, I find the violation of Fed. R. Crim. P. 41(c)(2)(D) to be considerably more serious than does the majority. The majority opinion concludes that the violation in this case, i.e. the failure of the recording and transcription requirements of Rule 41(c)(2)(D), does not warrant suppression of the evidence. The majority bases its holding on cases from the Fifth and Ninth Circuits which held this same violation to be

[1] The rulemaking process led to the 1977 amendment to Rule 41 by adding the provisions of Rule 41(c)(2). The advisory committee notes for the 1977 amendment, presented in support of the passage of the amendment, stated that for such a subdivision (c)(2) warrant to issue, four requirements must be met. The fourth requirement would have solved the problem in the instant case:

> Return of the duplicate original warrant and the original warrant must conform to subdivision (d). *The transcript of the sworn oral testimony setting forth the grounds for issuance of the warrant must be signed by affiant in the presence of the magistrate and filed with the court.*

(Emphasis added).

An examination of subdivision (c)(2), however, fails to disclose the underlying material. Section (2)(e) of Pub.L. 95-78 provided in part that the amendment by the Supreme Court (in its order of Apr. 26, 1976) to subdivision (c) of Rule 41 of the Federal Rules of Criminal Procedure (subdivision (c) of this rule) is approved in a modified form. Presumably, the underlying material in the committee notes referring to item 4 was deleted by the Congress.

a mere "technical" violation of Rule 41(c)(2)(D), which did not mandate suppression. I find the majority's reliance on these cases to be misplaced for the reason that there exists a significant factual difference between the instant case and the cases cited by the majority. In the cases forgiving the violation of Rule 41, the magistrate judge testified at the suppression hearing as to his memory of the conversation, thus corroborating the testimony of the affiant and presenting the reviewing court with a more complete record as to the facts which led to the initial determination of the existence of probable cause; in the instant case, however, Magistrate Judge Hooe did not testify.

In the first case cited by the majority, *United States v. Richardson*, 943 F.2d 547, 549 (5th Cir. 1991), the Fifth Circuit was faced with the review of a telephonic search warrant application in which the recording equipment did not work, and, as a result, the magistrate failed to make any record of the communication in which the affiant applied for the search warrant. At the subsequent suppression hearing, while the district court had no record of the oral affidavit, both the magistrate and the affiant testified as to their memory of the conversation. *Id.* The district court was therefore able to corroborate the affiant's testimony with that of the magistrate judge, and thus come to the appropriate judicial determination as to whether probable cause was in fact presented to the magistrate judge at the time the warrant was issued. The appellate court in that case noted with approval the district court's review of the magistrate's testimony: "[s]ince the [district] court could not review a tape or transcription of the telephone call between [the affiant] and the magistrate, it acted well within its discretion in basing its decision on a thorough review of the testimony of [the affiant] and the magistrate." *Id.*

The other case cited by the majority, *United States v. Stefanson*, 648 F.2d 1231 (9th Cir. 1981), involved the application for a telephonic search warrant in which the magistrate judge recorded only a portion of the telephone call due to problems with the recording device. Two days after

granting the search warrant, the magistrate judge executed a transcript of the phone call, using his memory and the portion of the tape recording that existed. *Id.* at 1233. At the subsequent suppression hearing, the district court heard testimony from the magistrate judge as to his memory of the events, and denied the motion to suppress the evidence. The Ninth Circuit upheld this denial, holding that the mere "technical" violation of Rule 41 did not justify suppression due to the fact that the magistrate judge testified to his memory of the conversation and thereby corroborated the affiant's statements and satisfied the reviewing courts that probable cause had, in fact, been presented to the magistrate judge. *Id.* at 1235.

In sharp contrast to those cases is the instant case, in which the only evidence of the conversation presented to the district court at the suppression hearing was the affidavit of the affiant, executed nineteen months after the issuance of the warrant, and the affiant's subsequent testimony detailing his memory of what facts he provided to Magistrate Judge Lynn Hooe, unaided by the either corroborating or conflicting testimony of Magistrate Judge Hooe. The lack of any testimony by the magistrate judge distinguishes this case from the cases cited by the majority in which the magistrate judges did testify. *See also United States v. Allen*, 586 F.Supp. 825 (N.D. Ill., 1984)(holding that even though tape recording of phone call from affiant to magistrate was blank, suppression was not necessary due to the fact that the magistrate and the affiant both testified as to the contents of the conversation). For this reason, I find the violation of Rule 41(c)(2)(D) in this case to be more than a mere "technical" violation.

The obvious purpose behind the requirements of a transcription of the information provided by the affiant under the provisions of Rule 41(c)(2)(D) is to allow reviewing courts to determine if the application for the warrant met the probable cause requirements of the Fourth Amendment. The failure to comply with those provisions in this case prohibits the appropriate judicial determination as to whether probable cause was presented to Magistrate Judge Hooe in support of

the issuance of the warrant. Moreover, the lack of any testimony by the magistrate judge makes reliance on the above-cited cases improper.

The majority acknowledges the fact that the magistrate judge did not testify in this case, but concludes that this only worked to disadvantage the defendant, since, as the party seeking suppression, he bore the burdens of persuasion[2] and production.[3] *See United States v. Blakeney*, 942 F.2d 1001, 1015 (6th Cir. 1991), cert. denied, 502 U.S. 1035 (1991). It is my belief that this circular rationale fails to recognize the shifting of the burden of production that occurs on a motion to suppress, and in this case put the burden on the government to produce the testimony of the magistrate judge.

Initially, the burden of production is on the defendant to make a prima facie showing of illegality. *United States v. De la Fuente*, 548 F.2d 528, 533-34 (5th Cir. 1977). Following such showing, the burden of production shifts to the government to present rebuttal evidence. *Richardson*, *supra*, at 548-49. In this case, I believe that the defendant met his initial burden of production concerning the illegality of the warrant by presenting evidence of the Rule 41(c)(2)(D) violation. The burden of production then shifted to the government to rebut this showing of illegality with evidence that the warrant was properly supported by probable cause. This could have been done by presenting the testimony of the magistrate judge who issued the warrant. However, since no such testimony was offered, I believe that the showing of illegality was never rebutted by the government, and thus the motion to suppress should have been granted.

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[2]"[O]bligation which rests on one of the parties to an action to persuade the trier of the facts, generally the jury, of the truth of a proposition which he has affirmatively asserted by the pleadings." *Director, OWCP, Department of Labor v. Greenwich Collieries [Ondecko]*, 512 U.S. 267, 275 (1994).

[3]"[A] party's obligation to come forward with evidence to support its claim." *Greenwich Collieries*, *supra*, at 272.

In addition to my finding that the failure to record the conversation or have the magistrate judge testify at the district court level is a substantial violation of Rule 41(c)(2)(D), I disagree with the majority's decision that this search was constitutional under the "good faith exception" of *United States v. Leon*, 468 U.S. 897 (1984). *Leon* prohibits the sanction of exclusion of the evidence seized in violation of the Fourth Amendment if the reliance on the magistrate's determination of probable cause by the officers executing the warrant was objectively reasonable. *Id.* at 922. However, *Leon* recognizes exceptions to that general rule, including: (1) "bare-bones" affidavits, where the affidavit does not provide the magistrate with a substantial basis for determining the existence of probable cause; and (2) situations where the officer's reliance on the warrant was neither reasonable nor in good faith. *Id.* at 923. It is my position that the teachings of *Leon* cannot be applied to this case because both of the aforementioned exceptions apply, rendering the warrant invalid.

Under the first exception, *Leon* will not uphold a search based on an affidavit which did not provide the magistrate judge with a sufficient basis on which to find probable cause. *Leon* therefore necessarily requires an examination of whether the affidavit was so inadequate as to preclude the magistrate judge from making a determination of the existence of probable cause. In this case, however, such an examination is impossible, and therefore the application of *Leon* is improper. Here, the only evidence of the telephonic affidavit is the memory of the affiant as to what information he provided to the magistrate judge to justify the finding of probable cause. Moreover, that memory is based on the affiant's recollection nineteen months after the issuance of the warrant, with no corroboration from the magistrate judge who issued the warrant. These facts simply do not provide the reviewing courts with sufficient evidence to apply *Leon*. Rather, we are being asked to now extend the "good faith exception" to a situation in which we must conjecture as to what facts the affiant presented the magistrate judge, and

whether based on those facts, the magistrate judge should have determined that probable cause existed.

The majority here engages in sheer speculation as to what facts the magistrate judge was presented with, and concludes that *Leon* does apply:

> Viewing the evidence at its weakest, the magistrate judge had good reason to believe, based on Krappmann's corroboration, that Chaar stored two lockers worth of cigarettes. The magistrate judge could reasonably have made the inferential leap (more like a hop) that someone storing so many cigarettes, about whom a tip had been received, could very well be smuggling those cigarettes.

The majority therefore finds a sufficient basis on which to conclude that probable cause existed; and thus rejects the first exception to *Leon*. I, however, find an insufficient basis on which to review the conversation between the affiant and the magistrate, and therefore find that the first exception to *Leon* exists and renders the warrant invalid.

Furthermore, I find that the second exception to *Leon* exists, namely, that there was no reasonable basis for the officer to believe that good faith existed. The affiant here concedes that the investigation and search were commenced on the same day, based upon an anonymous tip received by another officer. This situation necessarily requires an application of this circuit's previous rule stating that when an anonymous tip provides the basis for establishing probable cause, the affiant must meet a higher standard to establish probable cause due to the inherent limitations of anonymous tips. *See United States v. Leake*, 998 F.2d 1359, 1363 (6th Cir. 1993)(holding that review of warrant issued on the basis of anonymous tip requires test of whether "totality of the circumstances" supports the conclusion that evidence or contraband will be found at a particular place). In *Leake*, we found *Leon* inapplicable, and held that there was no probable cause to support the issuance of the warrant due to the "limited information provided by the anonymous caller,

coupled with the brief limited surveillance by the affiant officer that turned up nothing unusual." *Id.* at 1367.

I find that similar insufficiencies exist in the evidence presented to the district court in this case, which prevent the application of *Leon*. Here, as in *Leake*, it was an anonymous tip that led to the initial investigation of the defendant. What is more is that the tipster's information as to the location of the facility proved to be incorrect, and there was no future activity described by the tipster which could be corroborated by the officers before applying for the search warrant. As a result, what we know of the tipster's information fails to suggest even a hint of sufficient indicia as to the tipster's credibility. *See Leake*, *supra*, at 1365.

Therefore, based on the record before the district court, the motion to suppress should have been granted.[4] I would vacate the conviction and sentence and remand for further proceedings. Thus I dissent.

[4] I acknowledge that the teachings of *Leon* emphasize that the purpose of the exclusionary rule is to deter police misconduct rather than to punish errors of judges and magistrates. However, every police officer worth his salt knows that the proper execution of a search warrant includes the subsequent filing of an inventory of those things seized. Presumably a sophisticated police officer, such an agent of the ATF, knowledgeable enough of Rule 41(c) (2)(D) to make use of the rule, and, assisted in the application by an assistant United States Attorney, would be conscious of and concerned with the need to comply with the transcription provisions of Rule 41(c)(2)(D). If the errors in this case pass muster, when revealed, it is difficult to conceive of a violation of the transcription provisions of Rule 41(c)(2)(D) that would cause judicial concern.

United States District Court
Northern District of Ohio
United States Courthouse
2 South Main Street
Akron, Ohio 44308

David D. Dowd, Jr.
Judge

(330) 375-5834
Fax: (330) 375-5628

January 12, 1998

BY FACSIMILE AND U.S. MAIL
Professor David A. Schlueter
St. Mary's University
School of Law
One Camino Santa Maria
San Antonio, TX 78228-8602

Dear David:

I sat on the 6th Circuit in December. We have under consideration a case dealing with a search warrant based on oral testimony under the provisions of Criminal Rule 41(c)(2)(A). Unfortunately, the provisions of 41(c)(2)(D) were not followed. There is neither a recording of the conversation between the officer and the magistrate-judge nor a stenographic or longhand verbatim record of the oral testimony given in support of the issuance of the warrant.

Nineteen months after the search the affiant submitted an affidavit describing the oral testimony presented to the magistrate-judge.

I have been reviewing the committee notes for the 1977 amendment which added 41(c)(2) and the notes state the four requirements for the subdivision (c)(2) warrant. The fourth requirement is described as foliows:

> (4) Return of the duplicate original warrant, and the original warrant must conform to subdivision (d). The transcript of the sworn oral testimony setting forth the grounds for issuance of the warrant must be signed by affiant in the presence of the magistrate and filed with the court.

I have reviewed Rule 41 and I am unable to find in the rule the requirement that "the transcript of the sworn oral testimony setting forth the grounds for issuance of the warrant must be signed by the affiant in the presence of the magistrate and filed with the court". Am I missing something? Or is this an example of an incorrect note accompanying a rule?

I would like to discuss this with you at your earliest convenience. We have done research on this type of search warrant, but to my knowledge no one has picked up on what I have called the fourth requirement.

We are sending this letter by fax.

Yours very truly,

David D. Dowd, Jr.
United States District Judge

DDD:dmw

Agenda Item III C 9

MEMO TO: **Members, Criminal Rules Advisory Committee**

FROM: **Professor Dave Schlueter, Reporter**

RE: **Proposal to Permit Defendant to Waive Appearance at Arraignment on Superseding Indictments and Pleas**

DATE: **March 28, 1998**

The attached letter from Magistrate Judge Scoville proposes that Rule 43 be amended to permit a defendant to waive his or her appearance at an arraignment on a superseding indictment and also enter a plea of not guilty or stand mute, without appearing in open court.

That portion of the proposal addressing the waiver of appearance at an arraignment (whether superseding or otherwise) is already addressed in proposed amendments to Rules 10 and 43 (*See* Agenda for April 1997 meeting). The question of whether a defendant can waive personal appearance when called upon to enter a plea is not addressed in those amendments.

If the Committee is inclined to consider an amendment permitting a defendant to waive appearance at the entry of a not guilty plea or when refusing to enter a plea (for any case or only in those cases where there has been a superseding indictment), then some additional consideration should be given to whether an amendment should be made to Rule 11 as well.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
110 MICHIGAN N. W.
GRAND RAPIDS, MICHIGAN 49503

CHAMBERS OF
JOSEPH G. SCOVILLE
UNITED STATES MAGISTRATE

(616) 456-2309
(FTS) 372-2309

97-CR-I

October 16, 1997

Mr. Peter G. McCabe
Secretary
Committee on Rules of Practice and Procedure
of the Judicial Conference of the United States
Washington, D.C. 20544

Re: Proposed Amendment to Federal Rules of Criminal Procedure

Dear Mr. McCabe:

I am writing to you in your capacity as Secretary of the Standing Committee on Rules of Practice and Procedure. I have enclosed what I believe to be a modest proposal for amendment to Criminal Rule 43. The proposed amendment would allow a defendant who has previously appeared in person for arraignment to waive personal arraignment on subsequent, superseding indictments and enter a plea of not guilty in writing.

The genesis of this proposal came a few years ago, when our court was asked to identify methods of saving taxpayer money in criminal cases. Several judges concluded that the practice of rearraigning defendants on superseding indictments, many of which are merely technical in nature, creates unnecessary expense. Personal appearance for arraignment on a superseding indictment often requires transportation costs from far away detention facilities and payment of CJA panel attorneys for what amounts to a formality. In some cases, the probation department has been required to pay for transportation for out-of-state defendants released on bond to return to the district only for this purpose.

The model for the proposal comes from the Michigan Court Rules, which allow a defendant to waive personal presence at any arraignment, as a matter of right. The enclosed proposal does not go that far, as it allows the court to direct a personal appearance in any particular case. I have circulated this proposal to the United States Attorney's Office, the Federal Defenders of both the Eastern and Western Districts of Michigan, and the Committee on the United States Courts of the State Bar of Michigan. I received minor editorial comments, which have been incorporated into the enclosed proposal. None of those attorneys reviewing the proposal expressed any objection to the concepts embodied therein.

If this proposal is in proper form, I would appreciate your bringing it to the attention of the Advisory Committee on the Federal Rules of Criminal Procedure for its consideration.

Thank you for your assistance in this matter.

Very truly yours,

Joseph G. Scoville
U. S. Magistrate Judge

mml

enclosure

Fed. R. Crim. P. 43

* * * *

(c) **Presence Not Required.** A defendant need not be present in the following situations:

* * * *

(5) Unless the court directs otherwise, a defendant who is represented by a lawyer and has personally appeared for arraignment on an indictment may enter a plea of not guilty or stand mute to a superseding indictment by filing, at or before the time set for the arraignment, a written statement signed by the defendant and the defendant's lawyer acknowledging that the defendant has received a copy of the superseding indictment, has read or had it read or explained, understands the substance of the charge and potential penalties, waives arraignment in open court, and pleads not guilty to the charge or stands mute.

Rationale

The filing of superseding indictments has become common. The taxpayers are put to unnecessary expense by the present requirement that a defendant appear personally for arraignment on superseding indictments, which is a formality in the vast majority of cases. The proposed amendment would allow a represented defendant to waive appearance in response to a superseding indictment, unless the court or counsel see a reason for personal appearance. The amendment is patterned after Rule 6.113 of the Michigan Court Rules, which allows the entry of not-guilty pleas in this fashion in all felony cases as a matter of right.

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

December 11, 1997

Honorable Joseph G. Scoville
United States District Court
110 Michigan N.W.
Grand Rapids, Michigan 49503

Dear Judge Scoville:

Thank you for your suggestion to amend Criminal Rule 43 to allow a defendant to waive the right to be present at a subsequent, superseding arraignment. The Advisory Committee on Criminal Rules is considering an amendment that would allow a represented defendant to waive the right to be present at any arraignment, including the initial arraignment, which would encompass your suggestion. A copy of your letter has been sent to the chair and reporter of the advisory committee for their review in the event that a more limited alternative is considered along the lines suggested in your proposal.

I have enclosed excerpts of the minutes and the relevant materials considered by the advisory committee at its October 13-14, 1997 meeting. I will advise you of any actions taken by the advisory committee with regard to Criminal Rule 43.

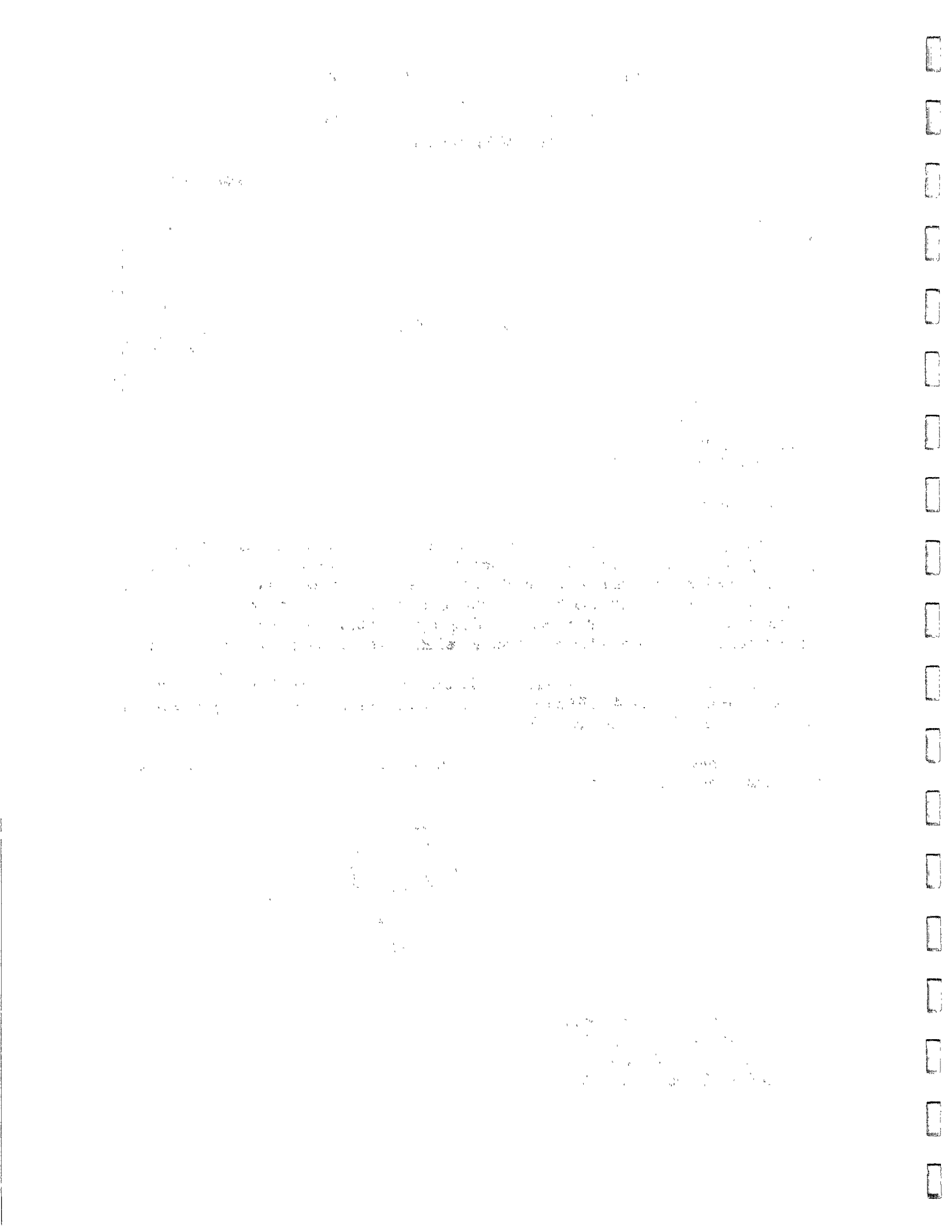
The committee meets next on April 27-28, 1998. We welcome your suggestion and appreciate your interest in the rulemaking process.

Sincerely,

Peter G. McCabe
Secretary

Enclosure

cc: Honorable Alicemarie H. Stotler
Honorable W. Eugene Davis
Professor David A. Schlueter
Professor Daniel R. Coquillette



Agenda Item III C-10

MEMO TO: **Members, Criminal Rules Advisory Committee**

FROM: **Professor Dave Schlueter, Reporter**

RE: **Pending Legislation Which Would Amend Rule 46(e) Regarding Authority of Court to Revoke Bond**

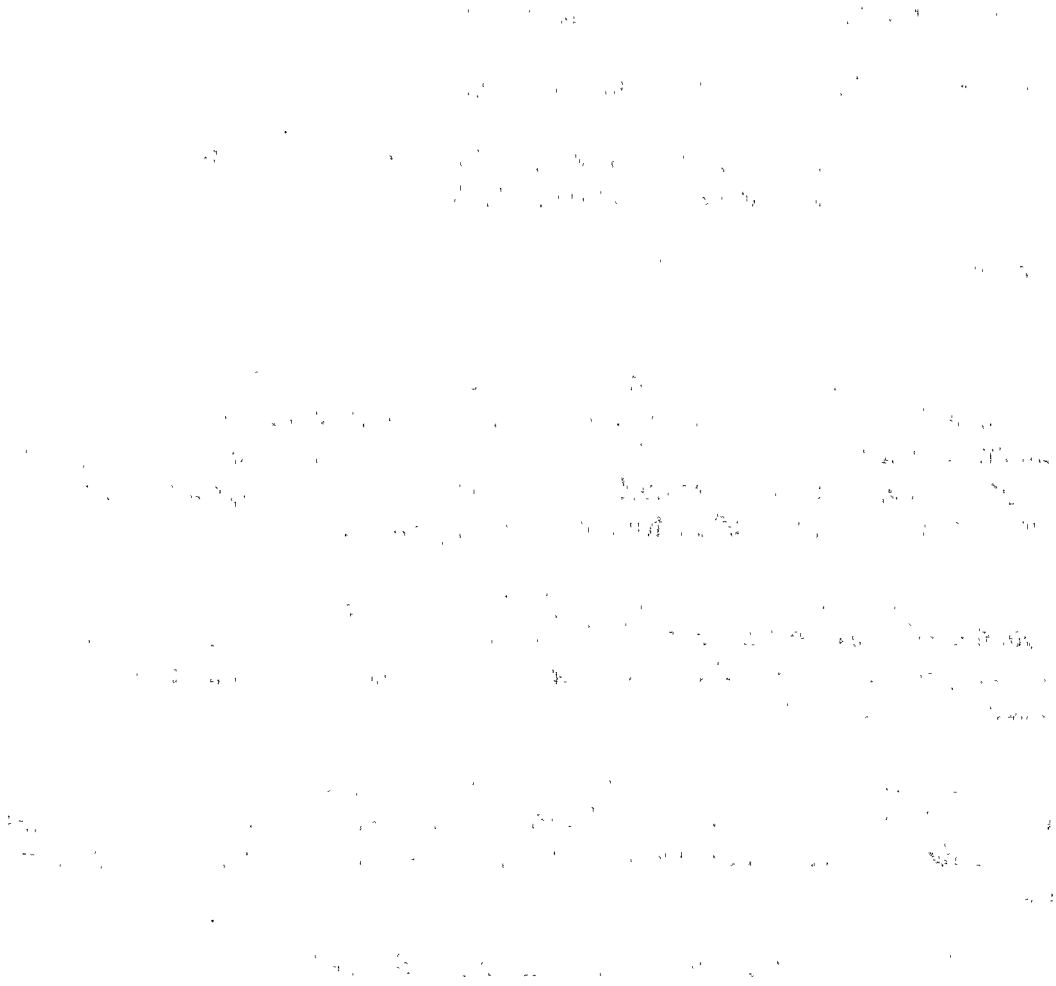
DATE: **March 28, 1997**

Last summer, Representative Bill McCullum introduced H.R. 2134 which would amend Rule 46(e). The amendment would limit the authority to revoke bonds to those situations where a defendant has failed to appear. Under current practice a magistrate or judge may impose conditions which are not limited to failures to appear, e.g., to remain in particular location or to refrain from violating the law, etc.

Representative McCullum has agreed to delay any further action on his proposal until the Advisory Committee has had an opportunity to review the matter under the Rules Enabling Act and decide whether to propose and forward to the Standing Committee an amendment of its own.

The attached materials include a copy of the proposed amendment, a statement by the Department of Justice opposing the amendment, statements by witnesses who testified at a hearing on the bill (including Judge Davis) and a copy of a Ninth Circuit decision on the issue.

This matter will be on the agenda for the April meeting.



LEONIDAS RALPH MECHAM
Director

CLARENCE A. LEE, JR.
Associate Director

ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS

WASHINGTON, D.C. 20544

JOHN K. RABIEJ
Chief
Rules Committee Support Office

March 13, 1998
Via Federal Express Mail

MEMORANDUM TO PROFESSOR DAVID A. SCHLUETER

SUBJECT: *Materials on H.R. 2134, the "Bail Bonds Fairness Act of 1997"*

On very short notice, Judge Davis agreed to testify before Representative Bill McCollum's House Judiciary Subcommittee on Crime on March 12 on H.R. 2134, which would amend Criminal Rule 46(e). As we earlier discussed, I am attaching copies of Judge Davis' statement on H.R. 2134, statements from two other witnesses testifying at the same hearing, a Ninth Circuit published opinion on the issue, and a copy of the bill.

The hearing was very successful. Representative McCollum, who introduced the bill and chairs the Subcommittee on Crime, agreed to defer any further action on the bill until after the advisory committee's meeting. We agreed to report back to the Representative after the committee has had an opportunity to consider the bill.

John K. Rabiej

Attachments

cc: Honorable W. Eugene Davis (without attach.)

105TH CONGRESS
1ST SESSION

H.R. 2134

To amend the Federal Rules of Criminal Procedure with respect to bail bond forfeitures.

IN THE HOUSE OF REPRESENTATIVES

JULY 10, 1997

Mr. MCCOLLUM introduced the following bill; which was referred to the Committee on the Judiciary

---

A BILL

To amend the Federal Rules of Criminal Procedure with respect to bail bond forfeitures.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "Bail Bond Fairness Act of 1997".

SEC. 2. FAIRNESS IN BAIL BOND FORFEITURE.

Rule 46(e)(1) of the Federal Rules of Criminal Procedure is amended by striking "there is a breach of condition

of" and inserting "the defendant fails to appear as required by".

○

The Honorable Bill McCollum
Chairman
Subcommittee on Crime
Committee on the Judiciary
U.S. House of Representatives
Washington, D.C. 20515

Dear Mr. Chairman:

This will provide the views of the Department of Justice on H.R. 2134, the Bail Bond Fairness Act of 1997. The bill would amend Rule 46(e)(1) of the Federal Rules of Criminal Procedure to authorize forfeiture of a bail bond only if the defendant fails to appear as required by the bond. Currently, Rule 46(e)(1) permits forfeiture if there is a breach of any condition of a bond. The Department opposes enactment of H.R. 2134.

First, we believe that, barring an emergency requiring prompt legislation, amendment of the rules of procedure should proceed through the processes of the Rules Enabling Act, 28 U.S.C. § 2071 et seq. That Act was created by Congress for the precise purpose of affording fair and thorough consideration, with an opportunity for comment by the public at large, to proposals for rules amendments. The Department of Justice strongly supports the Enabling Act process and would accordingly urge that the change proposed in H.R. 2134 be submitted to the Judicial Conference or an appropriate committee thereof for review in the first instance, rather than being pursued directly through legislation.

On the merits, moreover, the Department has concerns about H.R. 2134. At present, all the federal courts of appeals to have considered the question have concluded that Rule 46(e)(1) allows forfeiture of a bail bond for violation of a condition other than failure to appear. See, e.g., United States v. Gigante, 85 F.3d 83 (2d Cir. 1996) and cases cited. Typical violations for which such forfeiture has occurred include violation of a condition that the defendant break no laws while on release, or that the defendant not travel outside the jurisdiction. E.g., United States v. Vaccaro, 51 F.3d 189 (9th Cir. 1995).

A provision of the Bail Reform Act, 18 U.S.C. § 3146(d), already permits forfeiture of a bail bond for failure to appear before a court as required. If Rule 46(e) were amended to state

the same proposition as section 3146(d), as H.R. 2134 would provide, the Rule would seemingly be redundant and of no real effect.

In our view, however, Rule 46(e) serves a legitimate law enforcement purpose. Presently, the only remedies apart from bond forfeiture for breach of a condition of a bail bond other than appearance are revocation of bail and contempt. See 18 U.S.C. § 3148. Neither remedy, however, may be as effective as the possibility of bond forfeiture in deterring some defendants from violating important bond release conditions such as that they refrain from contacting or seeking to intimidate potential witnesses against them. A hardened criminal, who has served jail time in the past, may not be particularly deterred from seeking to intimidate a witness, or to commit other crimes while on release, by the prospect of a revocation of his bail or a contempt prosecution. Frequently, though, as in the Gigante case, supra, family members such as the defendant's parents or children put up their homes or life savings as security for the bond. Many defendants will not be as likely to jeopardize their family's residence or life savings by violating a bond condition as they might if only their own liberty were at stake. Thus, we regard the possibility of bond forfeiture for violation of a non-appearance condition as a useful and sometimes quite powerful tool in assuring compliance with important conditions of release, conditions that may relate directly to the safety of victims and witnesses and the integrity of the judicial system.

It may be, however, that the Rule should be limited to permit forfeiture only for violation of conditions deemed by the court to be "substantial" or in some other way, if it can be shown that bonds are being forfeited (and not remitted or set aside under Rule 46(e)(2) as is within the court's discretion) for breaches of minor conditions. A referral of this issue to the appropriate Judicial Conference committee for consideration under the Rules Enabling Act would enable a full and fair examination of this question.

The Office of Management and Budget has indicated that there is no objection to the submission of this letter from the standpoint of the Administration's program.

Sincerely,

Andrew Fois
Assistant Attorney General

JUDICIAL CONFERENCE OF THE UNITED STATES

STATEMENT OF

JUDGE W. EUGENE DAVIS
U.S. COURT OF APPEALS FOR THE FIFTH CIRCUIT

BEFORE

THE SUBCOMMITTEE ON CRIME

COMMITTEE ON THE JUDICIARY

UNITED STATES HOUSE OF REPRESENTATIVES

ON

H. R. 2134
"BAIL BOND FAIRNESS ACT OF 1997"

March 12, 1998

Good morning Chairman McCollum. On behalf of the Judicial Conference of the United States I wish to thank you for inviting me to appear before the Subcommittee today to discuss H.R. 2134, the "Bail Bond Fairness Act of 1997." My name is W. Eugene Davis. I am a circuit judge in the Court of Appeals for the Fifth Circuit. I chair the Judicial Conference's Advisory Committee on Criminal Rules ("advisory committee").

Under Rule 46(e)(1) of the Federal Rules of Criminal Procedure a district court shall forfeit the bail of a person who breaches a condition of bond while on release prior to trial. Rule 46(e)(2) then authorizes the district court to set aside any forfeiture. Section 2 of H.R. 2134 would amend Rule 46 and authorize a court to forfeit bail only when the "defendant fails to appear as required" by the bond. I urge you and the other members of the subcommittee to defer action on this bill and allow the rulemaking process established under the Rules Enabling Act to proceed.

Inconsistent with the Rules Enabling Act

H.R. 2134 directly amends one of the Federal Rules of Practice and Procedure. Its passage would thwart the rulemaking process established by Congress under the Rules Enabling Act, 28 U.S.C. §§2071-77. Under the Act, proposed amendments to the federal rules are presented by the Supreme Court to Congress for approval only after being subjected to extensive scrutiny by the public, bar, and bench. As envisioned by Congress, the Rules Enabling Act

rulemaking process offers a systematic review of rule proposals that is designed to identify potential problems, suggest improvements, unearth lurking ambiguities, and eliminate possible inconsistencies. The rulemaking process is laborious and time-consuming, but the painstaking process reduces the potential for future satellite litigation over unforeseen consequences or unclear provisions. It also ensures that all persons, including the public, who may be affected by a rule change have had an opportunity to express their views on it. Direct amendment of the federal rules circumvents this careful process established by Congress.

Advisory Committee Work

Rule 46(e) has not been carefully examined by the advisory committee since the rule's promulgation in 1944. The advisory committee has received no complaints or comments from the bar, bench, or public on the rule, and the committee is not otherwise aware of any problems associated with it. The advisory committee will next meet on April 27-28, 1998, in Washington, D.C. In light of Congress' interest in this matter, I will place the proposed amendment of Rule 46(e) in H.R. 2134 on the agenda of the advisory committee's meeting.

A defendant is frequently granted bail and released from detention subject to a number of conditions as authorized by 18 U.S.C. §3142. The release conditions are many and varied, and it is important that a court retain the authority —as it presently does—to ensure that a defendant complies with them. It has been my experience that when a defendant breaches a condition of release, the judge "revokes" the bail and remands the defendant to custody without "forfeiting" the bond (requiring payment by the surety). It has also been my experience that a release bond is

"forfeited" only when a defendant fails to make a required appearance. Indeed, the standard appearance bond form issued by the Administrative Office of the U.S. Courts, which I believe is used uniformly by the federal courts, only obligates the surety to pay the proceeds of the bond if the defendant fails to appear. So, unless the defendant fails to appear as ordered the surety has no exposure under the standard appearance bond. A separate standard form is used that contains the various conditions of pretrial release and the governing sanctions for defendant's violations. But the surety does not sign and is not bound by those conditions, which apply solely to the defendant. Copies of each form are attached.

Rule 46(e) may need further study. But we must be careful not to unintentionally disturb the court's authority to "revoke" bail and enforce all the conditions of release. If given an opportunity to do so, the advisory committee will focus on: (1) whether a change or clarification in Rule 46(e) is justified; and (2) if so, whether we should expand the specific language proposed in H.R. 2134 to Rule 46(e) to make it clear that the court has the authority to "revoke" bail for failure to comply with any release condition as well as the authority to forfeit the bond for the defendant's failure to appear.

Conclusion

Under the rulemaking process, proposed changes are vetted and thoroughly studied and debated. Hidden problems are often discovered and brought to the attention of the advisory committee. By deferring immediate action and permitting the rulemaking process to proceed on this proposed amendment, this subcommittee and Congress will have assured itself of a well-

documented record on which to make a decision once the rule change has completed its course in accordance with the Rules Enabling Act.

I look forward to continuing this dialogue with you and the other members of the subcommittee. I would be happy to answer any questions that you may have. Thank you.

AO 98 (Rev. 8/85) Appearance Bond

United States District Court

DISTRICT OF _____

UNITED STATES OF AMERICA

V.

APPEARANCE BOND

_____
Defendant

CASE NUMBER:

Non-surety: I, the undersigned defendant acknowledge that I and my . . .
Surety: We, the undersigned, jointly and severally acknowledge that we and our . . .
personal representatives, jointly and severally, are bound to pay to the United States of America the sum of $_____, and there has been deposited in the Registry of the Court the sum of $_____ in cash or _____ (describe other security.)

The conditions of this bond are that the defendant _____ (name).
is to appear before this court and at such other places as the defendant may be required to appear, in accordance with any and all orders and directions relating to the defendant's appearance in this case, including appearance for violation of a condition of defendant's release as may be ordered or notified by this court or any other United States district court to which the defendant may be held to answer or the cause transferred. The defendant is to abide by any judgment entered in such a matter by surrendering to serve any sentence imposed and obeying any order or direction in connection with such judgment.

It is agreed and understood that this is a continuing bond (including any proceeding on appeal or review) which shall continue until such time as the undersigned are exonerated.

If the defendant appears as ordered or notified and otherwise obeys and performs the foregoing conditions of this bond, then this bond is to be void, but if the defendant fails to obey or perform any of these conditions, payment of the amount of this bond shall be due forthwith. Forfeiture of this bond for any breach of its conditions may be declared by any United States district court having cognizance of the above entitled matter at the time of such breach and if the bond if forfeited and if the forfeiture is not set aside or remitted, judgment may be entered upon motion in such United States district court against each debtor jointly and severally for the amount above stated, together with interest and costs, and execution may be issued and payment secured as provided by the Federal Rules of Criminal Procedure and any other laws of the United States.

This bond is signed on _____ (Date) at _____ (Place)

Defendant. _____ Address. _____

Surety. _____ Address. _____

Surety. _____ Address. _____

Signed and acknowledged before me on _____ (Date)

_____
Judicial Officer/Clerk

Approved: _____
Judicial Officer

United States District Court

_____ DISTRICT OF _____

UNITED STATES OF AMERICA

V.

ORDER SETTING CONDITIONS OF RELEASE

Case Number:

_____
Defendant

IT IS ORDERED that the release of the defendant is subject to the following conditions:

(1) The defendant shall not commit any offense in violation of federal, state or local law while on release in this case.

(2) The defendant shall immediately advise the court, defense counsel and the U.S. attorney in writing before any change in address and telephone number.

(3) The defendant shall appear at all proceedings as required and shall surrender for service of any sentence imposed as directed. The defendant shall appear at (if blank, to be notified)_____
Place

_____ on _____
Date and Time

Release on Personal Recognizance or Unsecured Bond

IT IS FURTHER ORDERED that the defendant be released provided that:

(✓) (4) The defendant promises to appear at all proceedings as required and to surrender for service of any sentence imposed.

( ) (5) The defendant executes an unsecured bond binding the defendant to pay the United States the sum of _____ dollars ($_____) in the event of a failure to appear as required or to surrender as directed for service of any sentence imposed.

Additional Conditions of Release

Upon finding that release by one of the above methods will not by itself reasonably assure the appearance of the defendant and the safety of other persons and the community, it is FURTHER ORDERED that the release of the defendant is subject to the conditions marked below:

( ) (6) The defendant is placed in the custody of:
(Name of person or organization) _____
(Address) _____
(City and state) _____ (Tel. No.) _____
who agrees (a) to supervise the defendant in accordance with all the conditions of release, (b) to use every effort to assure the appearance of the defendant at all scheduled court proceedings, and (c) to notify the court immediately in the event the defendant violates any conditions of release or disappears.

Signed: _____
Custodian or Proxy

( ) (7) The defendant shall:
( ) (a) maintain or actively seek employment.
( ) (b) maintain or commence an educational program.
( ) (c) abide by the following restrictions on his personal associations, place of abode, or travel: _____
( ) (d) avoid all contact with the following named persons, who are considered either alleged victims or potential witnesses: _____
( ) (e) report on a regular basis to the supervising officer.
( ) (f) comply with the following curfew: _____
( ) (g) refrain from possessing a firearm, destructive device, or other dangerous weapon.
( ) (h) refrain from excessive use of alcohol.
( ) (i) refrain from any use or unlawful possession of a narcotic drug and other controlled substances defined in 21 U.S.C. §802 unless prescribed by a licensed medical practitioner.
( ) (j) undergo medical or psychiatric treatment and/or remain in an institution, as follows: _____
( ) (k) execute a bond or an agreement to forfeit upon failing to appear as required, the following sum of money or designated property _____
( ) (l) post with the court the following indicia of ownership of the above-described property, or the following amount or percentage of the above-described money: _____
( ) (m) execute a bail bond with solvent sureties in the amount of $ _____
( ) (n) return to custody each (week)day as of _____ o'clock after being released each (week)day as of _____ o'clock for employment, schooling, or the following limited purpose(s): _____
( ) (o) surrender any passport to _____
( ) (p) obtain no passport.
( ) (q) submit to urine analysis testing upon demand of the supervising officer.
( ) (r) participate in a program of inpatient or outpatient substance abuse therapy and counseling if deemed advisable by the supervising officer.
( ) (s) submit to an electronic monitoring program as directed by the supervising officer.
( ) (t)

Advice of Penalties and Sanctions

TO THE DEFENDANT:

YOU ARE ADVISED OF THE FOLLOWING PENALTIES AND SANCTIONS:

A violation of any of the foregoing conditions of release may result in the immediate issuance of a warrant for your arrest, a revocation of release, an order of detention, and a prosecution for contempt of court and could result in a term of imprisonment, a fine, or both.

The commission of any crime while on pre-trial release may result in an additional sentence to a term of imprisonment of not more than ten years, if the offense is a felony; or a term of imprisonment of not more than one year, if the offense is a misdemeanor. This sentence shall be in addition to any other sentence.

Federal law makes it a crime punishable by up to five years of imprisonment, and a $250,000 fine or both to intimidate or attempt to intimidate a witness, victim, juror, informant or officer of the court, or to obstruct a criminal investigation. It is also a crime punishable by up to ten years of imprisonment, a $250,000 fine or both, to tamper with a witness, victim or informant, or to retaliate against a witness, victim or informant, or to threaten or attempt to do so.

If after release, you knowingly fail to appear as required by the conditions of release, or to surrender for the service of sentence, you may be prosecuted for failing to appear or surrender and additional punishment may be imposed. If you are convicted of:

(1) an offense punishable by death, life imprisonment, or imprisonment for a term of fifteen years or more, you shall be fined not more than $250,000 or imprisoned for not more than ten years, or both;
(2) an offense punishable by imprisonment for a term of five years or more, but less than fifteen years, you shall be fined not more than $250,000 or imprisoned for not more than five years, or both;
(3) any other felony, you shall be fined not more than $250,000 or imprisoned not more than two years, or both;
(4) a misdemeanor, you shall be fined not more than $100,000 or imprisoned not more than one year, or both.

A term of imprisonment imposed for failure to appear or surrender shall be in addition to the sentence for any other offense. In addition, a failure to appear or surrender may result in the forfeiture of any bond posted.

Acknowledgement of Defendant

I acknowledge that I am the defendant in this case and that I am aware of the conditions of release. I promise to obey all conditions of release, to appear as directed, and to surrender for service of any sentence imposed. I am aware of the penalties and sanctions set forth above.

_____
Signature of Defendant

_____
Address

_____
City and State Telephone

Directions to United States Marshal

( ) The defendant is ORDERED released after processing.
( ) The United States marshal is ORDERED to keep the defendant in custody until notified by the clerk or judicial officer that the defendant has posted bond and/or complied with all other conditions for release. The defendant shall be produced before the appropriate judicial officer at the time and place specified, if still in custody.

Date: _____

_____
Signature of Judicial Officer

_____
Name and Title of Judicial Officer

WHITE COPY - COURT YELLOW - DEFENDANT BLUE - U.S. ATTORNEY PINK - U.S. MARSHAL GREEN - PRETRIAL SERVICES

Remarks to the House Judiciary Committee

regarding H.R. 2134

the "Bail Bond Fairness Act"

by Milton Hirsch*

*These remarks were originally prepared for submission for publication to *The Champion*, the Journal of the National Association of Criminal Defense Lawyers.

Introduction

On July 10, Congressman McCollum of Florida introduced H.R. 2134, the "Bail Bond Fairness Act of 1997." The bill was promptly referred to the House Judiciary Committee where, at the time of this writing, it still reposes. Those of Mr. McCollum's colleagues who choose to review the bill will be struck by its brevity: In its entirety, the bill purports to do no more than delete from Fed.R.Cr.P. 46(e)(1) the words, "there is a breach of condition of"; and to insert in their place the words, "the defendant fails to appear as required by".[1] This seemingly paltry change, however, reflects a long-running jurisprudential conflict over the proper understanding of bail, and the proper operation of the bail bond system.

Theories of Bail

Bail -- and its now-forgotten cousin, mainprise -- is among our most ancient legal practices. Like many such practices, the custom evolved long before its rationale was formally stated. Oliver Wendell Holmes traces bail to the tribal custom of offering and holding hostages.[2] So firmly entrenched was the "hostage" theory of bail that "[a]s late as the reign of Edward III, Shard, an English judge, after stating ... that bail [i.e. sureties] are a prisoner's keepers, and shall be charged if he escapes, observes, that some say that the bail shall be hanged in his place."[3]

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1 Subpart (1) of Rule 46(e) presently provides that if "there is a breach of condition of a bond, the district court shall declare a forfeiture of the bail." If H.R. 2134 passes, the amended rule will provide that if "the defendant fails to appear as required by a bond, the district court shall declare a forfeiture of the bail".

2 Holmes, **The Common Law** (Dover ed. NY 1991) p.249.

3 Id. at 249-50. Holmes adds that, according to the ancient practice, the surety was "bound 'body for body', and modern law-books find it necessary to state that this does not make them liable to the punishment of the principal offender if he does not appear, but only to a fine.

Modern jurisprudence offers several rationales for the bail system, which can be grouped for analytical purposes into two paradigms. In the "presumption of innocence" model, bail is a right of the accused, a natural corollary of the accused's right to be presumed innocent. "[T]o refuse or delay to bail any person bailable, is an offence [*sic*] against the liberty of the subject".[4] According to this model, an arrested citizen's juridical status differs from that of any other citizen *only* in that he has been arrested, and is therefore bound as an obligation of citizenship to submit himself to the process of the court. But the government is entitled to ask nothing more of him than that he honor this obligation. In all other respects, it must treat him precisely as it treats all other, unarrested, citizens. Arrest triggers no general, unparticularized power in the government to evaluate the conditions upon which the citizen shall continue to be entitled to participate in society; that is a determination that may be made at trial.

Fundamentally different from the "presumption of innocence" paradigm is the "grace" paradigm. The "grace" model gives precedence to the community's entitlement and

obligation to protect itself from crime and the prospect of crime. The fact of arrest alerts the body

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[4] Wm. Blackstone, IV **Commentaries on the Laws of England** p. 294 (Univ. Chicago ed. 1979). Blackstone adds that

> this imprisonment ... is only for safe custody, and not for punishment: therefore, in this dubious interval between the commitment and trial, a prisoner ought to be used with the utmost humanity; and neither be loaded with needless fetters, or subjected to other hardships than such as are absolutely requisite for the purpose of confinement only ... .

Id. at 297.

politic to alter the arrested person's juridical status, to place him in a kind of juridical purgatory until a final determination of his place in society can be made at trial. If he is vindicated, he will be restored to his *status quo ante*; if not, he moves from purgatory to the Hades of formal condemnation and isolation from society. For society to ignore the fact of arrest -- to permit the arrested person to live at liberty like any other citizen -- is to be derelict in the discharge of society's duty to protect itself from crime and the threat of crime.[5] If it so chooses, the body politic may release the arrested person from custody pending trial, but it does so as an act of grace; and it may burden its act of grace with conditions of its own choosing. In theory, a defendant could be released for so long as he can stand on one leg and yodel, and no longer. Society's principal incentive to grant bail is a pragmatic one: it is expensive and impractical to imprison all arrestees at all times.

Appearance Bonds and Performance Bonds

In early common law times, the "presumption of innocence" model was favored. "By the antient [*sic*] common law, before and since the conquest, all felonies were bailable, till murder was excepted by statute; so that persons might be admitted to bail before conviction

almost in every case."[6] Consistent with the "presumption of innocence" paradigm, the bail bond

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[5] Blackstone's adherence to the "presumption of innocence" model in general does not restrain him from embracing the "grace" model in particular situations. "[B]ail is ... taken away, wherever the offence [*sic*] is of a very enormous nature: for then the public is entitled to demand nothing less than the highest security that can be given; *viz.* the body of the accused." Id. at 295. The judge who admitted a defendant to bail on insufficient security was liable to be fined in the event of the nonappearance of the defendant. Id. at 294-5.

[6] Blackstone at p.295. By Blackstone's own time, a host of statutes disentitled defendants from admission to bail for a wide variety of crimes. See also F.W. Maitland, **Constitutional History of England** (Cambridge Univ. Press 1911) at p. 272:

> Our early law seldom kept a man in prison before trial if he could find pledges, if he could find persons who could undertake for his

contract imposed but one condition: the defendant's timely appearance at trial. Blackstone offers this sample bail bond:

> Know all men by these presents, that we Charles Long of Burford in the county of Oxford, gentleman, Peter Hamond of Bix in the said county, yeoman, and Edward Thomlinson of Woodstock in the said county, innholder, are held and firmly bound to Christopher Jones, esquire, sheriff of the county of Berks, in four hundred pounds of lawful money of Great Britain, to be paid to the said sheriff, or his certain attorney, executors, administrators, or assigns; for which payment well and truly to be made, we bind ourselves and each of us by himself for the whole and in gross, our and every of our heirs, executors, and administrators, firmly by these presents, sealed with our seals. ...
>
> The condition of this obligation is such, that if the above-bounden Charles Long do appear before the justices of our sovereign lord the king at Westminster, on the morrow of the holy Trinity, to answer William Burton, gentleman, of a plea of debt of two hundred pounds, then this obligation shall be void and of none effect, or else shall be and remain in full force and virtue.[7]

Apart from its archaic language, the foregoing would be a perfectly acceptable and useful form of bail bond in a "presumption of innocence" jurisdiction today. It is a simple contract, the mutual obligations being that of the sureties to pay money, and that of the sheriff to release the defendant into the (as Blackstone would have it) "friendly custody" of the sureties. There is a single condition

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> production in court. According to Glanvill it is only in cases of homicide that it is usual to keep a man in prison instead of allowing him to find pledges. The law during the next century grew somewhat stricter. The Statute of Westminster I (1275, c. 12) defined the cases in which pledges are not to be allowed -- persons taken for the death of a man, or by commandment of the king or of his justices, or for forest offences, or for certain other causes, are not to be replevied.

[7] Blackstone, vol. III at Appendix. The bond is obviously given in a civil, rather than a criminal case; but is nonetheless illustrative.

subsequent, i.e. the defendant's obligation to appear for trial. If the condition subsequent is met, the sureties are relieved of their obligation; otherwise not. Lawyers and bail bondsmen routinely refer to such a bail bond as an "appearance bond". It commands the defendant's appearance, and nothing more.

Such a bond is inadequate to the perceived needs of a "grace" jurisdiction. As the common law evolved, "the form of recognizance upon the bail of a defendant [became] 'for his appearance to take his trial *and to be of good behavior in the meantime*.'"[8] The summary requirement of "good behavior" has become more particularized in modern practice. Bail bonds in federal court today typically require not only that the defendant appear as required, but also that he refrain from committing any crimes, that he not be rearrested, that he not leave the geographical jurisdiction of the court, that he maintain employment, that he submit to the supervision of a pretrial services authority, and the like. Consistent with the "grace" model, such bond conditions are appropriate. Society is obliged to protect itself; society is not obliged to enlarge the defendant on bail; therefore society will enlarge the defendant on bail, if at all, only on conditions that sufficiently protect society. Lawyers and bail bondsmen denominate as a "performance bond" a bail bond that requires the defendant's good behavior.

How it is that the condition of good behavior insinuated itself into bail bonds is one of those questions that may be forever hidden in the mists of history. At common law, a form of personal surety differing only slightly from bail was mainprise. The legal fiction underlying bail was that the

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[8] Baker vs. State, 213 So.2d 285, 288 (Fla.4th DCA 1968), quoting Reg. vs. Badger, 4 Q.B. 467, 114 Eng.Reprint 975 (emphasis supplied).

defendant never left custody. He was, while on bail, still constructively in jail, having done nothing more than, in effect, changing jailers. Bail, then, was applicable only to someone who had been charged with a crime, arrested, and incarcerated. "[N]o man is bailed but he that is arrested, or is in prison; for he that is not in custody or in prison cannot be delivered out ... but a man may be mainperned that never was in prison."[9] Mainprise "is not custody; so that the defendant was absolutely at large, and not even bound by recognizance to appear; for it does not appear, by the forms of entry of mainprise, that the principal enters into any obligation to appear ... ."[10]

If a defendant admitted to mainprise was not in custody, and was not obliged to appear for trial, what was he obliged to do? There is a suggestion in the sources -- and it is no more than a suggestion -- that the purpose of mainprise was to assure the principal's good behavior before he could engage in criminal conduct, not his presence at trial after he had engaged in criminal conduct. Thus Smith might be admitted to mainprise on condition that he be of good behavior where there was concern that Smith was likely to throw stones at the house of his neighbor Jones. Even today, some American jurisdictions have statutes

on the books recognizing "peace bonds", although such practice has been largely supplanted by the use of restraining orders and injunctions.

If the foregoing historical summary is correct, it explains the derivation of the requirement of good behavior as a condition of bail. Over the course of the years, the distinction between mainprise and bail was blurred, and ultimately mainprise passed out of existence in American practice. The requirement of good behavior is the vestige of mainprise, incorporated in the law of bail.

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[9] United States vs. Milburn, 26 F. 1243, 1247 (D.C.Cir. 1835) (Cranch, C.J.), quoting Coke. See also Blackstone, vol. III at p.128.

[10] Milburn at 1249.

The problem is that the foregoing historical summary may be entirely incorrect. Some sources suggest that mainprise evolved as the number of crimes for which bail was unavailable increased. If Jones was arrested for a forest offense, and was denied his writ *de homine replegiando* by the local authorities, he was without a remedy. The Court of Chancery, seeking to expand its jurisdiction and exploit a source of revenue, provided a remedy in the form of a writ of *manucaptionem*, of mainprise. If this is the true source of mainprise, then mainprise was available to release offenders who had committed crimes too greivous for bail, not to restrain prospective offenders who might commit some act of misconduct at some point in the future.

Breach of bond conditions, and its consequence

As a matter of tautology, an appearance bond can be breached only by the nonappearance of the defendant. In such a case, the remedy for the breach is the amount of the bond. But a performance bond can be breached in as many ways as there are conditions of bail. When a condition other than timely appearance is breached, what remedy follows?

Conditions of bail other than timely appearance are sometimes called "collateral" conditions. In jurisdictions that make this distinction -- the distinction between the appearance condition and all other "collateral" conditions -- the general rule is that although failure of the defendant to appear will result in forfeiture of the bail, violation of a collateral condition will result in the remand of the defendant to custody, but will not trigger forfeiture of bail.[11] The purpose of money bail, after all, is to assure the presence of the accused. A surety becomes a guarantor of the defendant's presence.

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[11] See, e.g., Accredited Surety and Casualty Co. Inc., vs. State of Florida f/u/b/o Dade County, 1992 Fla.App.LEXIS 4747 (Fla.3rd DCA 1992); State vs. Cardinal, 520 A.2d 984 (Vermont, 1986); In Re E.H., 397 N.E.2d 571 (Ill.4th DCA 1979).

He has a financial incentive to monitor the defendant's whereabouts. If the accused flees, and fails to appear at time of trial, the surety is liable without more in the amount of the bond.

But "forfeiture of cash bail for breach of conditions other than an appearance condition transforms monetary bail from a guarantor of appearance into a potentially punitive tool useful in the enforcement of all bail conditions. The purpose of forfeiture, however, is not to punish, but rather to assure that the defendant will appear at court when required."[12] Modern bail bonds typically require a defendant, for example, to commit no crimes, and to maintain employment. To forfeit the money of a surety whose principal is arrested for failure to curb dog,[13] or who loses his job because his employer relocates the

factory, seems to further no goal of the criminal justice system -- unless the provision of financial windfalls to the government is a goal of the criminal justice system. The counterargument, of course, is that forfeiture for violation of a collateral condition is no more incongruous than is forfeiture for failure of appearance. A surety is an absolute guarantor of the

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12 Cardinal, 520 A.2d at 986.

13 See In Re E.H., supra, at 573:

> The State has not cited nor have we found any reported Illinois cases which have allowed a forfeiture for any reason other than a defendant's failure to appear. ... [A]pplication of the State's interpretation leads to extreme results. For example, the bail condition in the present case prohibited the respondent from violating "any criminal law of the State of Illinois or any ordinance of any municipality of said State." Accepting the State's position, a defendant out on $200,000 bond must have his bond forfeited and a $200,000 judgment entered against him even if he is guilty of only a traffic violation.

appearance of his principal. He does not pledge his best efforts to encourage the accused to appear for trial; he pledges the body of the accused, or a sum certain in its stead.[14] Is it more burdensome or less just to require the surety to be the absolute guarantor of his principal's good behavior? Circumstances beyond the surety's control may result in the principal losing his job, or failing to curb his dog; but circumstances beyond the surety's control may result in the principal fleeing the jurisdiction, and no one will suggest that it is unfair to require the surety to pay. The chief distinction, of course, is that the accused's failure to appear is almost always willful, whereas the accused's failure to comply with performance conditions -- e.g. maintaining employment -- may be inadvertent. But this distinction turns on the intent state of the accused, not of his surety. If it is fair to require a non-negligent surety to pay for the breach willfully

committed by his principal, why is it unfair to require a negligent (or, for that matter, non-negligent) surety to pay for the breach inadvertently committed by his principal? In neither case is the focus on the intent state of the surety. In both cases, the surety is absolutely liable for the misconduct of the defendant, without regard to the intent state of the surety or the defendant.

The foregoing argument, though rarely articulated in case or statute law, has carried the day in some American jurisdictions. In federal court, for example, no distinction is drawn between failure

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[14] That a surety made his best efforts to prevent the accused from fleeing, or to locate the accused after he has fled, may fuel the surety's claim for remission, in whole or in part, after forfeiture of bail. But a request for remission, "an appeal *ad misericordiam*[,] ... [is a]t best ... granted as an act of grace ... [not as] a plea in bar." United States vs. Mack, 295 US 480, 488-9 (1935)(Cardozo, J.).

to appear and "collateral" breaches of a bond.[15] Both result in mandatory forfeiture.[16] Courts routinely forfeit bail for violations of travel restrictions[17], for subsequent violations of law[18], and for failure to report as required to pretrial services[19].

The only limitation on this practice derives from application of fundamental contract law principles. A bail "bond is a contract, and as with any contract, both parties must abide by its terms."[20] If a bond

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15 The federal jurisdiction follows the "grace" rather than the "presumption of innocence" model of bail. Neither the Eighth Amendment nor any federal statute creates a substantive right to bail. Stack vs. Boyle, 342 US 1 (1951). United States vs. Salerno, 481 US 739 (1987) formally recognizes society's authority and obligation to incarcerate an arrestee who poses a prospect of criminal danger. Such incarceration, known as pretrial detention, is described in the Salerno opinion as administrative, not punitive. On the face of it, such a statement is absurd: the pretrial detainee, living behind bars and walls, subject to the rule of the warden, kept from his job, home, and family, feels himself no less punished than his convicted cellmate. The administrative/punitive distinction, however, looks not to the effect of incarceration on the citizen, but to society's intent in incarcerating the citizen. The defendant is isolated from society to protect society from him until it can be determined at trial that there is no further need to do so. So long as his arrest was supported by probable cause, none of his rights are infracted. He has no right to pretrial release. Pretrial release is an act of grace on the part of the body politic, and the body politic may not be feeling graciously disposed toward him.

16 See Fed.R.Cr.P. 46 and discussion *supra* at ___.

17 See, e.g., United States vs. Stanley, 601 F.2d 380 (9th Cir. 1979); United States vs. Nolan, 564 F.2d 376 (10th Cir. 1977); United States vs. Brown, 410 F.2d 212 (5th Cir. 1969).

18 United States vs. Gigante, 85 F.3d 83 (2d Cir. 1996); United States vs. Vaccaro, 51 F.3d 189 (9th Cir. 1995); United States vs. Beard, 1992 U.S.App. LEXIS 8572 (9th Cir. 1992); United States vs. Patriarca, 948 F.2d 789 (1st Cir. 1991); United States vs. Santiago, 826 F.2d 499 (7th Cir. 1987); Nebraska vs. Hernandez, 511 N.W.2d 535 (Neb.Ct.App. 1993); State vs. Saback, 534 A.2d 1155 (R.I. 1987).

19 United States vs. Terrell, 983 F.2d 653 (5th Cir. 1993).

20 United States vs. Dudley, 62 F.3d 1275, 1278 (10th Cir. 1995). The bail contract is to be "strictly construed in accordance with its own terms", Dudley at 1278 quoting United States vs. Jackson, 465 F.2d 964, 965 (10th Cir. 1972). Because the bail contract is invariably a contract

imposes no performance conditions, the bond is not forfeitable for violation of common performance conditions, even if those conditions are set out in the court order accompanying the bond and directing the defendant's release on the bond.[21]

Conclusion

In the context of the foregoing analysis, H.R. 2134 purports to work a sweeping, and salutary, change in bail practices in the courts of the United States. The effect of the bill, if passed, will be to restore the "collateral conditions" rule: A defendant who fails to report to pretrial services, or who fails a urine screening, or who temporarily leaves the jurisdiction without court permission, will be subject to more stringent conditions -- even revocation -- of bail. He may be remanded to custody. But if he is not remanded to custody, and if he shows up for trial on time, his bail will not be forfeited. Thus the increased "fairness" for

which the "Bail Bond Fairness Act of 1997" is angling is not fairness to the defendant nor fairness to the prosecution, but fairness to the surety. The surety who timely produces his principal for trial has fulfilled his obligation to the courts and is entitled to discharge of his obligation under the bond. He need not be concerned that, while enlarged on bail, the defendant ran a traffic light, went across a jurisdictional line for the weekend, quit his job. The consequences of these acts of misconduct will

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of adhesion drafted by the government (typically a preprinted form), ambiguities should be resolved in favor of the surety.

[21] Dudley at 1278 ("Although the bond could be conditioned on the same factors as contained in the order setting conditions of release, it was not. This particular bond is clear and unambiguous and is specifically conditioned upon the appearance of the Defendant").

remain where they belong -- with the defendant.

The restoration of the "collateral conditions" rule will likely result in an increase in the number of defendants who, having been admitted to bail, are actually released. Sureties -- particularly corporate sureties -- may be willing to accept the risk of a given defendant's nonappearance in circumstances in which they would not accept the risk of the same defendant's violation of performance conditions. Even under the "grace" paradigm of bail, it is in society's interest to see that arrestees who have been admitted to bail are released from custody on the terms to which they have been admitted. If nothing else, the considerable costs associated with the housing and maintenance of the pretrial detainee population will be reduced.

Mr. Chairman:

Thank you for giving me the opportunity to speak about the importance of H.R. 2134 to the bail bond industry.

My name is Deborah Snow. I am President and Chairman of the Board of Accredited Surety and Casualty Co., Inc. which was founded in 1971 by my father. Accredited specializes in underwriting bail bonds. I have literally grown up in the bail bond business working with my father in his retail bail bond agency, his Managing General Agency and the insurance company. Accredited is still a family owned and operated insurance company domiciled in Florida. It is rated "A" by the A. M. Best company.

Accredited is licensed in 26 states. It currently underwrites bail in fifteen of those states. In 1996, Accredited wrote approximately 88,000. bail bonds. We are very proud of Accredited and the service its agents provide to the criminal justice system in their respective communities.

Since my father's debilitating stroke in 1993, I am frequently amazed at how often I drew on the wealth of knowledge he imparted to me over the years. In reviewing the "Bail Bond Fairness Act of 1997", I am reminded of one of my father's favorite statements "we don't write bail bonds, we write *appearance* bonds." The philosophy he espoused, and that Accredited follows today, is that it doesn't matter if a bail agent has enough collateral to pay a bond forfeiture, the agent's obligation to the court and to the public is to produce the defendant.

You might ask, "Where did the idea of bail get its start?" Bail dates back to England during the Middle Ages when the local authorities would release a person accused of a crime to a member of the community for supervision. If the defendant failed to appear, the good citizen would be imprisoned in the criminal's place! Many variations of bail existed throughout the ensuing years eventually evolving into the system we have today in the United States.

In state court systems, bail bonds are appearance bonds. If a defendant fails to appear the bond is forfeited and the bail bond agent must either produce the defendant or pay the forfeiture to the court. Speaking as the head of an insurance company specializing in bail, I consider this a defined risk. I know that the bail bond executed by an Accredited bail agent should only be forfeited in a state court if the defendant fails to appear. Therefore, the underwriting of a bail bond by an Accredited agent for a defendant in state court is based on the likelihood of a defendant to appear in court. Once the bail agent has assessed that risk, he or she can take whatever additional steps are necessary to assure the defendant appears in court. For example, the family or an indemnitor may be asked to co-sign on the bail bond or place collateral with the bail agent.

The problem for the bail industry in Federal court revolves around the *Veccaro* decision, Nos. 94-10021, 94-10072, U.S. Court of Appeals, Ninth Circuit. This decision held that " (1) bail could be forfeited for breach of condition of release and forfeiture was not limited to failure to appear, and (2) defendant and surety were appropriately found jointly and severally liable."

Imagine how difficult it is to underwrite a bail bond for a defendant detained in the Federal court system when the risk is not solely appearance? How can a bail agent or the insurance company guarantee the behavior of a defendant released on bond? As an example I am attaching a copy of the Special Conditions of Bond from the U.S. District Court, Southern District of Florida. As you can see, a Federal court can require a defendant released on bail to adhere to a curfew, random urine testing, take an educational program, remain employed full-time, and much more. None of which has anything to do with the most basic aspect of a bail bond which is the *appearance* of the defendant in court on his or her appointed day. This decision has transformed the traditional *appearance* bond into a *performance* bond.

Forfeitures for breach of conditions have occurred in the Federal court system which have forced the bail agent and the insurance companies underwriting bail to adhere to strict underwriting guidelines which, in most cases, require full collateral. As a result, fewer Federal bonds are written by bail agents. The risk of forfeiture for a breach of conditions even if the defendant appears in court is too great.

Bail bonds written by agents through insurance companies, also known as corporate sureties, are insurance contracts. The company insures or guarantees that a defendant will appear in court. If the defendant fails to appear, the court is guaranteed the full amount of the bond by virtue of this insurance contract. Think for a moment of other types of insurance, such as auto, homeowners, health and life. How could companies underwrite these policies if the risks were not clearly defined and damages could be assessed for something other than the original intent of the policy?

The "Bail Bond Fairness Act of 1997" would restore appearance as the sole reason for forfeiture of a bail bond in Federal Court. This would enable bail agents to write more Federal bonds which would assist the Federal court system in supervising its defendants. As my father said, "we write *appearance* bonds."

Thank you for your consideration of H.R. 2134.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

UNITED STATES OF AMERICA,

Plaintiff,

v.

Defendant,

_____/

APPEARANCE BOND: _____

CASE NO.: _____

I, the undersigned defendant and I or we, the undersigned sureties jointly and severally acknowledge that we and our personal representatives, jointly and severally, are bound to pay to the United States of America, the sum of $ _____.

STANDARD CONDITIONS OF BOND

The conditions of this bond are that the defendant:

1. Shall appear before this court and at such other places as the defendant may be required to appear, in accordance with any and all orders and directions relating to the defendant's appearance in this case, including appearance for violation of a condition of the defendant's release as may be ordered or notified by this court or any other United States District Court to which the defendant may be held to answer or the cause transferred. The defendant is to abide by any judgment entered in such matter by surrendering to serve any sentence imposed and obeying any order or direction in connection with such judgment. This is a continuing bond, including any proceeding on appeal or review, which shall remain in full force and effect until such time as the court shall order otherwise.

2. May not at any time, for any reason whatever, leave the Southern District of Florida or other District to which the case may be removed or transferred after he or she has appeared in such District pursuant to the conditions of this bond, without first obtaining written permission from the court, except that a defendant ordered removed or transferred to another district may travel to that district as required for court appearances and trial preparation upon written notice to the Clerk of this court or the court to which the case has been removed or transferred. The Southern District of Florida consists of the following counties: Monroe, Dade, Broward, Palm Beach, Martin, St. Lucie, Indian River, Okeechobee, and Highlands.

3. May not change his or her present address as recorded on this bond without prior permission in writing from the court. The defendant's present address is:

   _____

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4. Is required to appear in court at all times as required by notice given by the court or its clerk to the address on this bond or in open court or to the address as changed by permission from the court. The defendant is required to ascertain from the Clerk of Court or defense counsel the time and place of all scheduled proceedings on the case. In no event may a defendant assume that his or her case has been dismissed unless the court has entered an order of dismissal.

5. Shall not commit any act in violation of state or federal law.

DISTRIBUTION:
WHITE to Court file
BLUE to defendant
GREEN to Assistant U.S. Attorney
YELLOW to Counsel
PINK to U.S. Marshal
GOLD to Pretrial Services

SD/FM-2
REV. 7/90

DEFENDANT: _____

CASE NUMBER: _____

SPECIAL CONDITIONS OF BOND

In addition to compliance with the previously stated conditions of bond, the defendant must comply with those special conditions checked below:

___ a. Surrender all passports and travel documents to the Pretrial Services Office of the Court.

___ b. Report to Pretrial Services as follows: _____

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___ c. Submit to random urine testing by Pretrial Services for the use of non-physician-prescribed substances prohibited by law.

___ d. Maintain or actively seek full-time gainful employment.

___ e. Maintain or begin an educational program.

___ f. Avoid all contact with victims of or witnesses to the crimes charged.

___ g. Refrain from possessing a firearm, destructive device or other dangerous weapon.

___ h. Comply with the following curfew: _____

___ i. Comply with the following additional special conditions of this bond: _____

_____

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PENALTIES AND SANCTIONS APPLICABLE TO DEFENDANT

Violation of any of the foregoing conditions of release may result in the immediate issuance of a warrant for the defendant's arrest, a revocation of release, an order of detention, as provided in 18 U.S.C. 3148, forfeiture of any bail posted, and a prosecution for contempt as provided in 18 U.S.C. 401 which could result in a possible term of imprisonment or a fine.

The commission of any offense while on pretrail release may result in an additional sentence upon conviction for such offense to a term of imprisonment of not more than ten years, if the offense is a felony; or a term of imprisonment of not more than one year, if the offense is a misdemeanor. This sentence shall be consecutive to any other sentence and must be imposed in addition to the sentence received for the offense itself.

Title 18 U.S.C. 1503 makes it a criminal offense punishable by up to five years of imprisonment and a $250,000 fine to intimidate or attempt to intimidate a witness, juror or officer of the court; 18 U.S.C. 1510 makes it a criminal offense punishable by up to five years of imprisonment and a $250,000 fine to obstruct a criminal investigation; 18 U.S.C. 1512 makes it a criminal offense punishable by up to ten years of imprisonment and a $250,000 fine to tamper with a witness, victim or informant; and 18 U.S.C. 1513 makes it a criminal offense punishable by up to ten years of imprisonment and a $250,000 fine to retaliate against a witness, victim or informant, or threaten or attempt to do do.

It is a criminal offense under 18 U.S.C. 3146, if after having been released, the defendant knowingly fails to appear as required by the conditions of release, or to surrender for the service of sentence pursuant to a court order. If the defendant was released in connection with a charge of, or while awaiting sentence, surrender for the service of a sentence, or appeal or certiorari after conviction, for:

(1) an offense punishable by death, life imprisonment, or imprisonment for a term of fifteen years or more the defendant shall be fined not more than $250,000 or imprisoned for not more than ten years, or both;

(2) an offense punishable by imprisonment for a term of five years or more, but less than fifteen years, the defendant shall be fined not more than $250,000 or imprisoned for not more than five years, or both;

(3) any other felony, the defendant shall be fined not more than $250,000 or imprisoned not more than two years, or both;

(4) a misdemeanor, the defendant shall be fined not more than $100,000 or imprisoned not more than one year, or both.

A term of imprisonment imposed for failure to appear or surrender shall be consecutive to the sentence of imprisonment for any other offense. In addition, a failure to appear may result in the forfeiture of any bail posted, which means that the defendant will be obligated to pay the full amount of the bond, which may be enforced by all applicable laws of the United States.

DISTRIBUTION:
WHITE to Court file
BLUE to defendant
GREEN to Assistant U.S. Attorney
YELLOW to Counsel
PINK to U.S. Marshal

DEFENDANT: _____

CASE NUMBER: _____

PENALTIES AND SANCTIONS APPLICABLE TO SURETIES

Violation by the defendant of any of the foregoing conditions of release will result in an immediate obligation by the surety or sureties to pay the full amount of the bond. Forfeiture of the bond for any breach of one or more conditions may be declared by a judicial officer of any United States District Court having cognizance of the above entitled matter at the time of such breach, and if the bond is forfeited and the forfeiture is not set aside or remitted, judgement may be entered upon motion in such United States District Court against each surety jointly and severally for the amount of the bond, together with interest and costs, and execution may be issued and payment secured as provided by the Federal Rules of Criminal Procedure and other laws of the United States.

SIGNATURES

I have carefully read and I understand this entire appearance bond consisting of three (3) pages, or it has been read to me, and, if necessary, translated into my native language, and I know that I am obligated by law to comply with all of the terms of this bond. I promise to obey all conditions of this bond, to appear in court as required, and to surrender for service of any sentence imposed. I am aware of the penalties and sanctions outlined in this bond for violations of the terms of the bond.

If I am an agent acting for or on behalf of a corporate surety, I further represent that I am a duly authorized agent for the corporate surety and have full power to execute this bond in the amount stated.

DEFENDANT

Signed this _____ day of _____, 19 ____, at _____, Florida.

Signed and acknowledged before me:

WITNESS: _____

ADDRESS: _____

_____ ZIP _____

DEFENDANT: (Signature) _____

ADDRESS: _____

_____ ZIP _____

TELEPHONE: _____

CORPORATE SURETY

Signed this _____ day of _____, 19 ____, at _____, Florida.

SURETY: _____

ADDRESS: _____

_____ ZIP: _____

AGENT: (Signature) _____

PRINT NAME: _____

TELEPHONE: _____

INDIVIDUAL SURETIES

Signed this _____ day of _____, 19 ____, at _____, Florida.

SURETY: (Signature) _____

PRINT NAME: _____

RELATIONSHIP TO DEFENDANT: _____

ADDRESS: _____

TELEPHONE: _____

SURETY: (Signature) _____

PRINT NAME: _____

RELATIONSHIP TO DEFENDANT: _____

ADDRESS: _____

TELEPHONE: _____

APPROVAL BY COURT

Date: _____

_____

UNITED STATES MAGISTRATE JUDGE

DISTRIBUTION:
WHITE to Court file
BLUE to defendant
GREEN to Assistant U.S. Attorney
YELLOW to Counsel
PINK to U.S. Marshal

ADDRESSES AND TELEPHONE NUMBERS OF COURT OFFICES

Clerk of Court

301 North Miami Avenue, Miami, Florida 33128-7788 ..... (301) 536-4131
299 E. Broward Blvd., Ft. Lauderdale, Florida 33301 ..... (305) 356-7076
701 Clematis Street, West Palm Beach, Florida 33401 ..... (407) 655-8710
301 Simonton Street, Key West, Florida 33040 ..... (305) 296-4947

Pretrial Services

330 Biscayne Blvd., Suite 500, Miami, Florida 33132 ..... (305) 536-6906
299 E. Broward Blvd., Ft. Lauderdale, Florida 33301 ..... (305) 356-7922
701 Clematis Street, West Palm Beach, Florida 33401 ..... (407) 659-6550

Probation

300 N.E. 1st Avenue, Mami, Florida 33132 ..... (305) 536-5334
200 S. Andrews Avenue, Room 406, Fort Lauderdale, Florida 33301 ..... (305) 356-7486
701 Clematis Street, Room 215, West Palm Beach, Florida 33401 ..... (407) 831-9794

Federal Public Defender

301 N. Miami Avenue, Suite 321, Miami, Florida 33128-7787 ..... (305) 536-6900
101 N.E. 3rd Avenue, Room 202, Ft. Lauderdale, Florida 33301 ..... (305) 356-7436
224 Datura Street, Room 601, West Palm Beach, Florida 33401 ..... (407) 833-6288

Stansell does not, however, mandate a charging scheme. Nowhere does the court suggest that a charge brought under section 304 must be accompanied by a second charge under the same subpart. Indeed, in *Stansell* itself, the only charge which the government filed under 41 C.F.R. § 101-20.3 was the section 304 count. *See Stansell*, 847 F.2d at 610. The district court appears to have confused *Stansell*'s command that section 302 be construed in context with a command that it be charged in some specific manner. Consequently, we reverse the court's dismissal of the section 304 count.

V

In sum, we reverse the district court's dismissal of both the section 304 and section 305 counts and remand for trial; however, we affirm the court's exclusion of the government's witness and dismissal of the related count.

AFFIRMED in part, REVERSED in part, and REMANDED for trial.

UNITED STATES of America,
Plaintiff-Appellee,

v.

John Joseph VACCARO, Defendant-Appellant,

and

Rochelle Bell, doing business as Bell Bail Bonds, Real Party in Interest-Appellant.

Nos. 94-10021, 94-10072.

United States Court of Appeals, Ninth Circuit.

Argued and Submitted Dec. 15, 1994.

Decided March 21, 1995.

On appeal from magistrate's report and recommendation declaring forfeiture of bail bonds, the United States District Court for the District of Nevada, Edward C. Reed, Jr., J., 719 F.Supp. 1510, declared bonds forfeited, and defendant appealed. The Court of Appeals, 931 F.2d 605, dismissed appeal. On remand, the district court found defendant and surety jointly and severally liable. Appeal was taken. The Court of Appeals, Skopil, Senior Circuit Judge, held that: (1) bail could be forfeited for breach of condition of release, and forfeiture was not limited to failure to appear, and (2) defendant and surety were appropriately found jointly and severally liable.

Dismissed in part and affirmed in part.

1. Bail ⇐77(1)

Enforcement of bond forfeiture, although arising from prior criminal proceeding, is nevertheless a civil action.

2. Federal Courts ⇐668

Because enforcement of bond forfeiture is a civil action, notice of appeal must be filed within 60 days of district court's denial of motion to alter or amend judgment. F.R.A.P.Rule 4(a)(1), 28 U.S.C.A.; Fed.Rules Civ.Proc.Rule 59(e), 28 U.S.C.A.

3. Federal Courts ⇐668

Timely filing of notice of appeal is jurisdictional requirement.

4. Federal Courts ⇐669

Inadvertence or mistake of counsel is not "excusable neglect" which will allow district court to extend time for filing notice of appeal. F.R.A.P.Rule 4(a)(5), 28 U.S.C.A.

See publication Words and Phrases for other judicial constructions and definitions.

5. Federal Courts ⇐670

Under "unique circumstances doctrine," reviewing court may exercise jurisdiction over appeal that was not timely filed but only where district court itself suggests that time for appeal has been extended or tolled and party acts in reasonable reliance on that suggestion. F.R.A.P.Rule 4(a)(5), 28 U.S.C.A.

See publication Words and Phrases for other judicial constructions and definitions.

6. Bail ⇐75.3

Federal courts have authority to order forfeiture of bail bond on breach of condition of release. Fed.Rules Cr.Proc.Rule 46(e)(1), 18 U.S.C.A.

7. Bail ⇐75.3

Bail Reform Act does not supplant remedies available to court under rules of criminal procedure and does not preclude court's authority to order forfeiture of bail bond on breach of condition of release. 18 U.S.C.A. § 3148(a); Fed.Rules Cr.Proc.Rule 46(e)(1), 18 U.S.C.A.

8. Bail ⇐75.3

There is no irreconcilable conflict between Bail Reform Act, which allows for sanctions against defendant for breach of condition of release, and criminal procedure rule which allows sanctions against bond or posted security. 18 U.S.C.A. § 3148(a); Fed.Rules Cr.Proc.Rule 46(e)(1), 18 U.S.C.A.

9. Bail ⇐75.2(1), 75.3

Fact that Bail Reform Act limits sanctions to serious breach of nonappearance does not preclude imposition under criminal procedure rules of other penalties, such as forfeiture, for breach of other release conditions. 18 U.S.C.A. § 3148(a); Fed.Rules Cr. Proc.Rule 46(e)(1), 18 U.S.C.A.

10. Bail ⇐75.2(1), 75.3

While general purpose of bail bond is to insure that accused will reappear at given time, forfeiture of bond is not limited to situations in which defendants fail to appear; forfeiture is appropriate for violations of other conditions of release. 18 U.S.C.A. § 3148(a); Fed.Rules Cr.Proc.Rule 46(e)(1), 18 U.S.C.A.

11. Bail ⇐75.3

Forfeiture is appropriate sanction for violation of release condition only if parties have agreed to that condition, as bail bond is contract between government and defendant and his surety.

12. Bail ⇐62, 71

Language of bond contract is strictly construed in accordance with terms contained therein.

13. Bail ⇐62, 75.3

Language of bail bond and documents incorporated by reference was clear that release was conditioned on good behavior and that bail could be forfeited if he violated any law while free on bail, and not solely for failure to appear. 18 U.S.C.A. § 3148(a); Fed.Rules Cr.Proc.Rule 46(e)(1), 18 U.S.C.A.

14. Bail ⇐75.3

Because bond is strictly construed contract between government and defendant, where terms clearly specified that defendant could be held personally liable for amount of bond if conditions of release were violated and bond was declared forfeited, defendant could be held jointly and severally liable with surety for bond amount. 18 U.S.C.A. § 3148(a); Fed.Rules Cr.Proc.Rule 46(e)(1), 18 U.S.C.A.

M. Kent Kozal, Las Vegas, NV, for defendant-appellant John Vaccaro.

Stephen B. Krimel, Santa Rosa, CA, for real party in interest-appellant Rochelle Bell d/b/a Bell Bail Bonds.

Greg Addington, Asst. U.S. Atty., Reno, NV, for plaintiff-appellee U.S.

Appeals from the United States District Court for the District of Nevada.

Before: SKOPIL, Senior Circuit Judge, NORRIS, and HALL, Circuit Judges.

SKOPIL, Senior Circuit Judge:

The question presented on appeal is whether a district court may order forfeiture of a bail bond after finding that defendant violated a "break no laws" condition of release. Defendant and bail bond company contend that a bond cannot be forfeited except for a defendant's failure to appear. The bond company failed to file a timely notice of appeal, and accordingly, its appeal is dismissed. We conclude that the district court properly forfeited the bond, holding defendant liable. We affirm.

I.

John Joseph Vaccaro was convicted of racketeering. *United States v. Vaccaro*, 682 F.Supp. 1132 (D.Nev.1985), *aff'd*, 816 F.2d

448 (9th Cir.), *cert. denied*, 484 U.S. 928, 108 S.Ct. 295, 98 L.Ed.2d 255 (1987). His pretrial release was secured by a $100,000 bond provided by Bell Bail Bonds (Bell). As a condition of his release, Vaccaro agreed that he would "not violate any local, state or federal laws or regulations."

Vaccaro violated the "break no laws" condition. Consequently, the district court ordered the bail bond forfeited. *United States v. Vaccaro*, 719 F.Supp. 1510, 1521 (D.Nev. 1989). Both Vaccaro and Bell appealed. We dismissed those appeals, however, and remanded to allow the district court to enter judgment. *United States v. Vaccaro*, 931 F.2d 605, 606 (9th Cir.1991). On remand, the district court entered judgment holding Vaccaro and Bell jointly and severally liable.

Bell and Vaccaro timely filed a motion pursuant to Federal Rule of Civil Procedure 59(e) to alter or amend the judgment, contending that neither should be held liable for the amount of the bond. The district court denied the motion. Vaccaro timely appealed. Bell's notice of appeal was not timely filed.

II.

[1–3] Enforcement of a bond forfeiture, although arising from a prior criminal proceeding, is nevertheless a civil action. *United States v. Plechner*, 577 F.2d 596, 597 (9th Cir.1978). Thus, Bell's notice of appeal was required to be filed within sixty days of the district court's denial of the Rule 59(e) motion. *See* Fed.R.App.P. 4(a)(1). The timely filing of a notice of appeal is a jurisdictional requirement. *Valan v. Shalala*, 30 F.3d 102, 103 (9th Cir.1994).

Bell admits that it failed to file its notice of appeal within sixty days of the district court's December 2, 1993 denial of the Rule 59(e) motion. Bell offers, however, several reasons why we should ignore or otherwise excuse the tardy filing. First, Bell suggests that the time period should be measured from December 4 (rather than December 3) or that the mailing (rather than filing) of the notice of appeal should be determinative. Both of these suggestions, however, directly conflict with Federal Rule of Appellate Procedure 4. Second, Bell contends that the late filing was due to counsel's misconstruction of the rules relating to the time periods for filing notices of appeal. Bell suggests that a finding of "excusable neglect" or application of the "unique circumstances" doctrine is therefore warranted. We conclude that neither form of relief is available to Bell.

[4] A district court may "upon a showing of excusable neglect or good cause" extend the time for filing a notice of appeal, but only if the party files a motion seeking the extension "not later than 30 days after the expiration of the time prescribed by this Rule 4(a)." Fed.R.App.P. 4(a)(5). Even if such a motion could now be entertained, we have held that "[i]nadvertence or mistake of counsel . . . does not constitute excusable neglect." *Alaska Limestone Corp. v. Hodel*, 799 F.2d 1409, 1411 (9th Cir.1986).

[5] The unique circumstances doctrine is a limited exception that allows an appellate court to exercise jurisdiction over an appeal that was not timely filed. *United Artists Corp. v. La Cage Aux Folles, Inc.*, 771 F.2d 1265, 1267 (9th Cir.1985). The exception is reserved, however, for situations, "[w]here the district court itself suggests that the time for appeal has been extended or tolled, and a party acts in reasonable reliance upon that suggestion." *Barry v. Bowen*, 825 F.2d 1324, 1329 (9th Cir.1987). There is no such claim in this case. Bell's notice of appeal was not timely. Accordingly, we do not have jurisdiction, and we must dismiss Bell's appeal. *See Valan*, 30 F.3d at 103.

III.

[6, 7] Federal courts are authorized by Federal Rule of Criminal Procedure 46(e)(1) to order forfeiture of a bail bond upon a breach of a condition of release. *See United States v. Abernathy*, 757 F.2d 1012, 1014 (9th Cir.), *cert. denied*, 474 U.S. 854, 106 S.Ct. 156, 88 L.Ed.2d 129 (1985). Vaccaro argues that the authority granted by Rule 46(e)(1) has been implicitly overruled by the Bail Reform Act of 1984. Specifically, he argues that the Bail Reform Act establishes the sanctions that a court may impose for violations of a release agreement and the penalties for a defendant's failure to appear. *See* 18 U.S.C. §§ 3148(a), 3146(d). The district court rejected Vaccaro's argument. *Vaccaro*, 719 F.Supp. at 1513–14. *See also United*

States v. Dunn, 781 F.2d 447, 449-50 & n. 10 (5th Cir.1986) ("The Bail Bond Reform Act was never intended to supplant remedies available pursuant to Rule 46.").

We agree with the district court that the forfeiture provisions of Rule 46(e) were not implicitly repealed by the Bail Reform Act. Such repeals are disfavored and should not be inferred unless there is clear and manifest congressional intent, or if in fact there is an irreconcilable conflict. *Rambold v. Pacific First Federal Savings*, 798 F.2d 1307, 1310 (9th Cir.1986), cert. *denied*, 482 U.S. 905, 107 S.Ct. 2480, 96 L.Ed.2d 373 (1987).

The legislative history of the Bail Reform Act does not offer even a hint that Congress intended to limit the district court's power under Rule 46(e) to fashion conditions of release and to impose forfeiture if those conditions are not satisfied. Section 3148(a) was intended to add to the court's arsenal of sanctions by providing for revocation of release, detention, and contempt. These powers were added to meet the criticism that there were not adequate sanctions for violation of release conditions. *See* Senate Report No. 98-225, 98th Cong., 2d Sess., *reprinted in* 1984 U.S.C.C.A.N. 3182, 3217. Any argument that Congress intended to make these new remedies exclusive flies in the face of the expressed legislative intent to *add* new sanctions.

Similarly, we find no indication that Congress intended section 3146(d) to supersede the authority provided by Rule 46(e). Section 3146(d) provides that when "a person fails to appear before a court as required, and the person executed an appearance bond . . . the judicial officer may, regardless of whether the person has been charged with an offense under this section, declare [the bond] forfeited." Congress explained that section 3146(d) "simply emphasizes" that a court may order forfeiture of a bond for bailjumping and "makes it clear that such forfeiture may be ordered irrespective of whether the person has been charged with the offense of bailjumping." *Id.*

[8, 9] There is also no irreconcilable conflict between the Bail Reform Act and Rule 46(e). Section 3148(a) provides for sanctions against the defendant; Rule 46(e) provides for sanctions against the bond or posted security. Section 3146 codifies the offense of bailjumping and provides stringent penalties; it was not unreasonable for Congress to limit the statute's application to the serious breach of nonappearance. "This limitation, however, does not necessarily preclude imposition of less stringent penalties, such as forfeiture, for less serious violations of Rule 46[e] restrictions." *Dunn*, 781 F.2d at 450 n. 9. (internal quotation omitted). We agree with the Fifth Circuit that "there is no conflict between Rule 46[e] and the Bail Reform Act; the Rule and the Act are complementary and form an unified system in dealing with pretrial release." *Id.* (internal quotation omitted); *see also Morton v. Mancari*, 417 U.S. 535, 551, 94 S.Ct. 2474, 2483, 41 L.Ed.2d 290 (1974) ("[W]hen two statutes are capable of coexistence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective.") Finally, we agree with the district court that the fact that Rule 46(e)(1) was not amended in conjunction with the Bail Reform Act "is an indication of the continued viability of the 46(e)(1) forfeiture sanction." *Vaccaro*, 719 F.Supp. at 1514 n. 2.

IV.

[10] Vaccaro nevertheless contends that Rule 46(e)(1) forfeiture should be limited to the breach of nonappearance. We agree that generally "[t]he purpose of a bail bond is to insure that the accused will reappear at a given time." *United States v. Toro*, 981 F.2d 1045, 1049 (9th Cir.1992) (internal quotation omitted). We do not agree, however, that forfeiture is limited only to situations where defendants fail to appear. Various courts have held that forfeiture of bail bond is appropriate for violations of other conditions of release. *See, e.g., United States v. Terrell*, 983 F.2d 653, 656 (5th Cir.1993) (violation of travel and drug possession condition); *Dunn*, 781 F.2d at 451-52 (violation of travel restrictions); *United States v. Stanley*, 601 F.2d 380, 382 (9th Cir.1979) (per curiam) (violation of travel restrictions); *United States v. Nahas*, 564 F.2d 376, 378 (10th Cir.1977) (per curiam) (violation of travel and appearance conditions). Moreover, courts have specifi-

cally uphold forfeiture for violation of "break no laws" conditions. *See United States v. Santiago*, 826 F.2d 490, 505 (7th Cir.1987); *Nebraska v. Hernandez*, 1 Neb.App. 830, 511 N.W.2d 535, 538 (1993) (citing cases).

[11, 12] We do agree with Vaccaro that forfeiture is appropriate for violation of a release condition only if the parties have agreed to the condition. "A bail bond is a contract between the government and the defendant and his surety." *Plechner*, 577 F.2d at 598. "The language of the bond contract is strictly construed in accordance with the terms contained therein." *United States v. Lujan*, 589 F.2d 436, 438 (9th Cir. 1978), *cert. denied*, 442 U.S. 919, 99 S.Ct. 2842, 61 L.Ed.2d 287 (1979). Thus, forfeiture would not be appropriate for breach of a condition imposed by the court without notice. *See United States v. LaPicard*, 723 F.2d 663, 665–66 (9th Cir.1984) (reversing judgment of forfeiture for breach of a "break no laws" condition imposed on defendant after the bond was posted). *See also United States v. Miller*, 539 F.2d 445, 447 (5th Cir. 1976) (per curiam) ("[S]urety ... may not be held liable for any greater undertaking than he has agreed to.").

[13] The district court here carefully examined the language of the bond and documents incorporated by reference. *Vaccaro*, 719 F.Supp. at 1517. The bond, signed by Vaccaro, states: "If the defendant appears as ordered and otherwise obeys and performs the *foregoing conditions* of this bond, then this bond is to be void.... Forfeiture of the bond for *any breach of its conditions* may be declared by any United States District Court ... as provided by Federal Rules of Criminal Procedure." *Id.* (emphasis added). Immediately following the forfeiture clause is an incorporation clause typed in all capital letters that are larger than those in the forfeiture clause. The incorporation clause states: "SEE, ALSO, ORDER SPECIFYING METHODS AND CONDITIONS OF RELEASE ATTACHED HERETO AND MADE A PART HEREOF." *Id.* The attached order, also signed by Vaccaro, contains the "break no laws" condition. *Id.* Finally, an attached document entitled "NOTICE TO SURETY" provides that bail could be forfeited if defendant violates "*any* conditions of release." *Id.* at 1518 (emphasis in original).

We disagree with Vaccaro that these provisions are ambiguous. Reading the documents as a whole, and giving a reasonable interpretation to each clause, we conclude that Vaccaro should have understood that his release was conditioned on his good behavior, and that bail could be forfeited if he violated any law while free on bail. There is no need to invoke the general rule that courts resolve ambiguities against the drafter. *See Timms v. United States*, 678 F.2d 831, 834 n. 2 (9th Cir.), *cert. denied*, 459 U.S. 1080, 103 S.Ct. 559, 74 L.Ed.2d 932 (1982). The rule is "not to be invoked simply to reach a result favoring the party who did not draft the agreement." *Lippo v. Mobil Oil Corp.*, 776 F.2d 706, 714 n. 15 (7th Cir.1985).

V.

[14] Finally, Vaccaro contends that the district court erred by holding him jointly and severally liable for the bond amount. We reject this contention. The bond is a contract between the government and defendant, and should be "strictly construed in accordance with the terms contained therein." *Lujan*, 589 F.2d at 438. The terms of the agreement clearly specified that Vaccaro could be held personally liable for the amount of the bond if conditions of release were violated and if the bond was declared forfeited.

CONCLUSION

Bell's notice of appeal was not timely, and accordingly, Bell's appeal is dismissed for lack of appellate jurisdiction. The district court did not err by ordering the bail bond forfeited for Vaccaro's violation of the "break no laws" condition of release. Vaccaro was properly held jointly and severally liable for the amount of the bond.

The appeal in No. 94–10072 is DISMISSED. The appeal in No. 94–10021 is AFFIRMED.

Erskine & Tulley, 208 Cal.App.3d 884, 894, 250 Cal.Rptr. 339 (1988).

Plaintiffs meet the first and last requirements above; the second, however, is not met. "Because a constructive trust is a specific remedy, the plaintiff must have some interest that can be returned to it." *Pegg*, 782 F.2d at 1500 (citing *Mandeville v. Solomon*, 33 Cal. 38, 44 (1867)). Here, plaintiffs can show no entitlement to the AOR contract which may have been awarded to them but for defendants fraudulent conduct. The Request for Proposals for the AOR contract specified that the Navy had the right in its discretion to reject any and all proposals. Thus, plaintiffs as a matter of law cannot establish that they had a "right" to that contract. Therefore, their claim in Count VI for damages based upon unjust enrichment must be dismissed.

Having considered carefully the arguments of counsel and being fully advised, the Court HEREBY ORDERS that:

(1) partial summary judgment is entered in plaintiffs' favor as follows: that defendants' committed mail fraud under federal law and acted with fraudulent intent under California law.

(2) plaintiff Service Engineering's motion for partial summary judgment that it would have received the AOR contract is denied.

(3) defendants' cross-motion for summary judgment as to fraud is denied.

(4) defendants' cross-motion for summary judgment as to plaintiffs' Sherman Act claim in Count I is denied.

(5) defendants' cross-motion for summary judgment as to plaintiffs' RICO claim in Count II is granted and Count II is dismissed.

(6) defendants' cross-motion for summary judgment as to the issue of damages for lost profits is denied.

(7) defendants' cross-motion for summary judgment as to the issue of damages based upon unjustenrichment is granted.

UNITED STATES of America, Plaintiff,

v.

John Joseph VACCARO, Defendant.

No. CR-R-84-46-ECR.

United States District Court,
D. Nevada.

April 4, 1989.

Opinion on Motion for Reconsideration
Aug. 8, 1989.

On appeal from Magistrate's report and recommendation declaring forfeiture of two bail bonds, the District Court, Edward C. Reed, Jr., Chief Judge, held that: (1) Bail Reform Act did not supercede provisions in Rules of Criminal Procedure making forfeiture of bond permissible sanction for violating condition of release; (2) defendant was entitled to evidentiary hearing at bail forfeiture proceeding; and (3) Federal Rules of Evidence apply to proceedings related to forfeiture of bail bond.

Remanded.

1. Bail ⇐75.3

Bail Reform Act did not supercede provisions in Rules of Criminal Procedure making forfeiture of bond permissible sanction for violating condition of release. 18 U.S.C.A. § 3141 et seq.; Fed.Rules Cr. Proc.Rules 46, 46(e), (e)(1), 18 U.S.C.A.

2. Bail ⇐77(1)

Defendant charged with violating condition of bail was entitled to evidentiary hearing at bail forfeiture proceeding. 18 U.S.C.A. § 3146; Fed.Rules Cr.Proc.Rule 46(e), 18 U.S.C.A.

3. Bail ⇐77(1)

Better practice is to provide evidentiary hearing at bail forfeiture proceeding to any defendant requesting one; hearing will provide opportunity for all parties to present evidence on issue of whether any

conditions of release were violated. Fed. Rules Cr.Proc.Rule 46(e), 18 U.S.C.A.

4. Bail ⇐77(1)

Federal Rules of Evidence apply to proceedings related to forfeiture of bail bond. 18 U.S.C.A. § 3142(f); Fed.Rules Evid.Rule 1101(d)(3), 28 U.S.C.A.; Fed. Rules Cr.Proc.Rule 46(e), 18 U.S.C.A.

5. Bail ⇐77(1)

Government was required to prove defendant's breach of condition of bail at bail bond forfeiture proceeding by preponderance of the evidence, rather than by probable cause only. 18 U.S.C.A. § 3148(b).

6. Bail ⇐77(1)

Forfeiture of bail bond is limited to those cases where it can be shown by preponderance of the evidence that defendant has violated condition of release. 18 U.S.C.A. § 3148(b).

7. Jury ⇐21(6)

Defendant was not entitled to jury trial at bail forfeiture proceeding based on alleged violation of condition of release. Fed.Rules Cr.Proc.Rule 46(e), 18 U.S.C.A.

8. Bail ⇐59

Separate order specifying additional restrictions with which defendant agreed to comply, including condition that he not violate any law while he was released on bail, was part of appearance bond and bound bond surety, where appearance bond incorporated order specifying methods and conditions of release.

9. Bail ⇐62

Bail bond is contract between Government and defendant and his or her surety; language of bond contract is to be strictly construed in accordance with terms contained therein.

10. Bail ⇐60

Surety's agent did not exceed authority of her power of attorney when she signed appearance bond that incorporated order requiring defendant to violate no laws while he was released on bail; power of attorney specifically listed only four types of payment which could not be guaranteed and gave agent authority to execute appearance bonds.

11. Bail ⇐77(1)

Evidence that defendant pled guilty to criminal acts committed while released on bail was sufficient to establish that defendant violated federal law while released in violation of appearance bond, warranting forfeiture of that bond. Fed.Rules Cr. Proc.Rule 46(e), (e)(2, 4), 18 U.S.C.A.

12. Bail ⇐59

Order specifying methods and conditions of release containing condition that defendant commit no crime while he was released on bond was part of appeal bond, where order was referred to in capital letters in large type in appearance bond. 18 U.S.C.A. § 3142(c).

13. Bail ⇐77(1)

Condition of appeal bond that defendant "commit no crimes" while on release required proof by preponderance of evidence that defendant had committed crime while on release for bail to be forfeited, and did not permit forfeiture on basis on indictment charging violations of federal law while defendant was on release. 18 U.S.C.A. § 3142(f).

William Maddox, U.S. Atty., Reno, Nev., for plaintiff.

H. Dale Murphy, Reno, Nev., and Stephen B. Krimel, San Diego, Cal., for defendant.

ORDER

EDWARD C. REED, Jr., Chief Judge.

This is an appeal from a report and recommendation filed by Magistrate Phyllis Halsey Atkins on August 15, 1988, (document # 775), wherein she declared a forfeiture of two bonds posted on behalf of defendant John Joseph Vaccaro. Because we find that the proper procedures were not followed at Vaccaro's bail forfeiture hearing, and insufficient evidence to support forfeiture of Bond # 2, we remand this

cause to the Magistrate for further hearing, consistent with this order.

FACTUAL BACKGROUND

Defendant John Joseph Vaccaro was indicted by a federal grand jury in the District of Nevada for a variety of crimes related to interstate racketeering. On June 30, 1984, Vaccaro made an initial appearance before United States Magistrate Philip M. Pro in Las Vegas, Nevada, (document # 29). On July 5, 1984, Bernadine D'Anna of Rusty's Bail Bonds (Rusty's) posted a $100,000 corporate surety bond for Vaccaro (Bond # 1). The underwriter on the bond was Allied Fidelity Insurance Company (Allied). *See* Document # 29. Magistrate Pro issued a separate Order Specifying Methods and Conditions of Release (document # 29). This order, signed by Vaccaro, contained a condition that "the defendant shall not violate any local, state, or federal laws or regulations."

On March 28, 1985, the jury returned a guilty verdict on seventeen counts against Vaccaro (document # 385). *See United States v. Vaccaro*, 602 F.Supp. 1132 (D.Nev.1985). This Court continued Vaccaro's conditions of release as they had been previously set (documents # 400 and 401).

On June 6, 1985, this Court imposed sentence on Vaccaro and increased his bond pending appeal to $350,000 cash or corporate surety, incorporating the previously posted $100,000 bond (document # 490). On June 11, 1985, Joe Andre of Sparks Bail Bonds (Sparks) posted a $250,000 corporate surety bond (Bond # 2). The bond underwriter on Bond # 2 was Classified Insurance Corporation (Classified) (document # 502). This Court issued a separate Order Specifying Methods and Conditions of Release (document # 503). This order contained a condition that the defendant "shall not commit a Federal, State, or local crime while on release." The Ninth Circuit affirmed Vaccaro's conviction in *United States v. Vaccaro*, 816 F.2d 443 (9th Cir. 1987), *cert. denied*, 484 U.S. 914, 108 S.Ct. 262, 98 L.Ed.2d 220 (1987).

On May 21, 1987, the Special Grand Jury for the United States District Court, Central District of California, returned indictment No. CR-87-439 against, *inter alia*, John Joseph Vaccaro (document # 662, Exhibit A) (California Indictment). The indictment charges Vaccaro with conspiracy, extortion, distribution of cocaine, and RICO violations. Some of these violations allegedly occurred between August, 1984, and August, 1985, while Vaccaro was released on bond during the pendency of his federal criminal case here in Nevada.

On May 27, 1987, the United States moved to revoke the conditions of Vaccaro's release and to forfeit his bail (document # 662). Magistrate Atkins ordered that a warrant be issued for Vaccaro's arrest (document # 663). A hearing was held before Magistrate Atkins on October 5 and 6, 1987, at the request of bond underwriters Classified and Bell[1] (document # 667). Because Vaccaro conceded the issue on revocation of his release, the sole issue for determination at the hearing was the forfeiture of Vaccaro's bond (*see* Transcript of Hearing, page 6, lines 19-20).

At the hearing, over the objection of Vaccaro's counsel, hearsay evidence was taken on the issue of whether Vaccaro had breached a condition of his release. Relying on Fed.R.Evid. 1101(d)(3) for the proposition that the rules of evidence do not apply to "proceedings involving bail," (document # 775, page 13, line 21), the Magistrate permitted hearsay testimony from FBI Special Agent John Jones regarding alleged criminal conduct of Vaccaro between August, 1984, and August, 1985. Specifically, Special Agent Jones testified regarding acts alleged in count sixteen of the California indictment, wherein Vaccaro is charged with distribution of cocaine on or about August 5, 1985. (*See* California

1. In the brief of Classified and Bell Bail Bonds (Bell), opposing forfeiture of Vaccaro's bond (document # 680), Bell, of Van Nuys, California, states that Bond # 1 was initiated through Allied by them. Allied's Las Vegas agent, Rusty's Bail Bonds, posted Bond # 1 upon the request of Bell, as a "standard trade courtesy." Document # 680, page 1 n. 1. Allied is apparently in liquidation; however, Bell concedes liability for the $100,000 bond, and opposes forfeiture as a real party in interest.

16 F.2d 443 (9th Cir. 84 U.S. 914, 108 S.Ct. (1987).

ıe Special Grand Jury s District Court, Cen- rnia, returned indict- against, *inter alia*, (document # 662, Ex- lictment). The indict-) with conspiracy, ex- f cocaine, and RICO hese violations alleg- n August, 1984, and Vaccaro was released ndency of his federal Nevada.

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e courtesy." Document d is apparently in liqui- ncedes liability for the oses forfeiture as a real

Indictment, Exhibit A to document # 662). Based on this testimony, and the California indictment, the Magistrate found "probable cause to believe that Vaccaro violated federal laws while he was released on bond" (document # 775, page 5, lines 3–4).

She further noted her knowledge of Vaccaro's subsequent guilty plea to count six of the California indictment (document # 775, page 16, lines 3–13; page 16, line 26 and page 17, lines 1–12). Count six alleged extortion between August, 1984, and August, 1985. The Magistrate concluded that all this evidence was sufficient to find probable cause to believe that Vaccaro had violated the "break no laws" condition of his bond during the period of his release. She ordered forfeiture of the bonds on that basis (document # 775, pages 16–17). She further denied any remission of the bond, finding that it "would not be in the interest of justice" (document # 775, page 26, lines 6–7).

Defendant Vaccaro filed his objections to the Magistrate's report (document # 777), as did sureties Classified and Bell (document # 779). Vaccaro objects to the Magistrate's findings that 1) a "break no laws" provision was a condition of his release; 2) that Fed.R.Crim.P. 46(e) governs a bail forfeiture, rather than the provisions of the Bail Reform Act of 1984, 18 U.S.C. § 3141 *et seq.*; 3) that Vaccaro was not entitled to a trial by jury on the issue of forfeiture; 4) that the Rules of Evidence do not apply to a bail forfeiture hearing; 5) that the government need show breach of condition by probable cause, not by a preponderance of the evidence; 6) that Vaccaro's plea of guilty was for conduct taking place between August, 1984, and August, 1985. Further, Vaccaro argues that *ex parte* contact between the government and Magistrate Atkins regarding Vaccaro's guilty plea should disqualify Magistrate Atkins from any further hearings necessary in this case.

Bell and Classified join in Vaccaro's objections. They further object to the Magistrate's findings that 1) the issuing bail agents had real or apparent authority to bind the corporate sureties to something beyond an "appearance bond;" and 2) the terminology of the bonds supports forfeiture for a breach of condition.

STANDARD OF REVIEW

According to 28 U.S.C. § 636(a)(1) and Local Rule 11(c)(I)(B)(3), we review *de novo* the Magistrate's recommendation to forfeit the bond of defendant John Vaccaro. The order of forfeiture being dispositive and not merely a pretrial matter, the appropriate standard of review is *de novo*, and not the clearly erroneous or contrary to law standard.

DISCUSSION

A. *Rule 46(e) and the Bail Reform Act*

[1] All defendants contend that the provisions of the Bail Reform Act of 1984, 18 U.S.C. § 3141 *et seq.*, should control this bail forfeiture proceeding. They argue that Fed.R.Crim.P. 46(e) was superceded by the 1984 amendments to the Bail Reform Act, and that forfeiture of bond is no longer a permissible sanction for violating a condition of release. We disagree.

Rule 46(e)(1) provides: "If there is a breach of condition of a bond, the district court shall declare a forfeiture of the bail." Subsections (2) and (4) go on to empower district courts with discretion in setting aside or remission of a forfeiture. We believe that the Bail Reform Act was never intended to supplant remedies available pursuant to Rule 46. This holding is consistent with other decisions.

For example, in *Brown v. United States*, 410 F.2d 212, 215–17 (5th Cir.1969), *cert. denied*, 396 U.S. 932, 90 S.Ct. 272, 24 L.Ed.2d 230 (1969), the Fifth Circuit iterated its conclusion that there is no conflict between the provisions of the Bail Reform Act and Rule 46(e). Rather, the two are "complimentary and form a unified system in dealing with pretrial release." *Brown*, 410 F.2d at 216. *See also United States v. Castaldo*, 636 F.2d 1169, 1171 (9th Cir. 1980). The Bail Reform Act only authorizes forfeiture of bond for breach of appearance related conditions. It further provides other heavy penalties for the most serious breach—nonappearance. *See* 18 U.S.C. § 3146. The Bail Reform Act is silent with respect to penalties for nonap-

pearance related breaches. But in Rule 46(e), Congress maintained forfeiture of bond as a penalty for breach of *any* condition of release. Therefore, under Rule 46(e), forfeiture of bond is an appropriate sanction for violation of a condition of release, whether the condition is appearance or nonappearance related.[2]

Because we hold that Rule 46(e), and not the provisions of the Bail Reform Act, controls a bail forfeiture proceedings, it is irrelevant that the Bail Reform Act does not authorize forfeiture for a nonappearance-related breach. Further, that the first bond was issued before the effective date of the 1984 revisions to the Act is likewise without import.

B. *Procedural Entitlements*

1. Hearing

[2] There appears to be no uniform rule among federal courts regarding a defendant's right to a hearing to determine whether a condition of bond has been breached. Most instances of breach relate to a defendant's failure to appear for court proceedings; in that case, the breach is generally apparent, and forfeiture issues usually center on compliance with other procedural requirements. *See, e.g., United States v. Minor*, 846 F.2d 1184 (9th Cir. 1988) (trial court ordered forfeiture of appeal bond upon defendant's failure to appear; trial court did not err in remitting only $65,000 of defendant's $75,000 appeal bond where defendant's breach was willful); *United States v. Frias-Ramirez*, 670 F.2d 849 (9th Cir.1982) (judgment of forfeiture affirmed where defendant breached condition of bond when he failed to appear; court found magistrate adequately informed sureties of their obligation in event of breach), *cert. denied*, 459 U.S. 842, 103 S.Ct. 94, 74 L.Ed.2d 86 (1982); *Appearance Bond Surety v. United States*, 622 F.2d 334 (8th Cir.1980) (under Fed.R.Crim.P. 46(e), district court is required to forfeit bond for breach of the bond agreement upon defendant's failure to appear; however, court has discretion to remit forfeiture when justice so requires); *United States v. Lujan*, 589 F.2d 436, 438 (9th Cir.1978) (forfeiture of bond for defendant's failure to appear at several court proceedings justified where defendant remained at large; notice of required court appearances held to be adequate), *cert. denied*, 442 U.S. 919, 99 S.Ct. 2842, 61 L.Ed.2d 287 (1979); *United States v. Plechner*, 577 F.2d 596, 598 (9th Cir.1978) (forfeiture of bond for defendant's failure to appear affirmed where issue of whether defendant had breached condition of bond raised for first time on appeal).

Where a defendant is charged with breach of a non-appearance-related condition, proof problems become more apparent. A certain amount of evidence should be taken when determining whether a defendant has, for example, breached a travel restriction, or committed a crime while on release. Our research revealed a wide discrepancy in acceptable evidentiary procedures. *See, e.g., United States v. Stanley*, 601 F.2d 380, 381 (9th Cir.1979) (defendant provided an evidentiary hearing "with an opportunity to refute the charges" that he had violated a travel restriction, before the court ordered forfeiture of defendant's bond); *United States v. Quintana*, 525 F.Supp. 917 (D.Colo.1981) (district court forfeited defendant's bond after he travelled in violation of the bond agreement, based on hearsay evidence presented at a hearing regarding defendant's alleged breach; court heard hearsay evidence "[b]ecause of the short time available to the government to present its case," and "because of the nature of the proceeding,"

2. A further justification for maintaining forfeiture for breach of nonappearance-related conditions is found in the amendments to Rule 46 itself. In 1984, Subdivisions (a) and (c) were amended to reflect new numbering in the 1984 amendments to 18 U.S.C. § 3141 *et seq.* In addition, two new subdivisions were added: subdivision (e)(2), which provides for setting aside forfeitures, and subdivision (h), which authorizes forfeitures if the value of the property would be an appropriate sentence after conviction. Congress clearly had the opportunity to alter Rule 46(e)(1); its failure to do so is an indication of the continued viability of the 46(e)(1) forfeiture sanction. The 1984 amendments to Rule 46 are found in 98 Stat. 1987 Sec. 209, *reprinted in* Vol. 2 1984 U.S.Code Cong. & Admin.News 697, 1985, 1987.

but stated that defendant would be granted a further hearing to afford cross-examination if he so desired. *Id.* at 919); *United States v. Boothman*, 498 F.Supp. 798 (D.Kan.1980) (defendant who travelled and associated with a felon in violation of his bond agreement was afforded a "full evidentiary hearing" which was "full and thorough" before bond was forfeited), *aff'd*, 654 F.2d 700 (10th Cir.1981).

[3] Because the stakes are significant, we believe the better practice is to provide an evidentiary hearing to any defendant requesting one. The hearing will provide an opportunity for all parties to present evidence on the issue of whether any condition of release was violated. Of course, where a hearing is not requested, it need not be given. *See, e.g., United States v. Chavez*, 1987 WL 31581 (E.D.Pa.1987) (trial judge decided merits of government's forfeiture motion where the record was sufficient, neither the government nor the defendant requested an evidentiary hearing, and the defendant expressly requested a decision based on the record without oral argument).

2. Federal Rules of Evidence

Federal Rule of Evidence 1101(d)(3) states that the Rules do not apply to "proceedings with respect to release on bail or otherwise." The report and recommendation cites the Advisory Committee Notes [3] to support the finding that the Rules are inapplicable in "all proceedings *involving* bail" (document # 775, page 13, line 2) (emphasis in original). However, a careful reading of the Advisory Committee Notes will reveal that 18 U.S.C. § 3142(f), to which it refers, no longer exists. Section 3142(f) was deleted by the 1984 amendments to the Bail Reform Act. *See* Act of October 12, 1984, Pub.L. 98-473, Title II, c. 1, § 203(a), 98 Stat. 1976. Furthermore, originally enacted as part of the Bail Reform Act of 1966, section 3142(f) only exempted "orders entered pursuant to this section," *i.e.*, section 3146. Section 3146 governed release of defendants in noncapital cases. Section 3142(f) was consistent with Fed.R.Evid. 1101(d)(3) in exempting orders and proceedings regarding *release* of a defendant. Nowhere in the Bail Reform Act of 1966, nor in the current Act, are the Federal Rules of Evidence exempted from bail forfeiture proceedings.

The only language regarding rules of evidence in the current revision of the Bail Reform Act is located in section 3142(f). Section 3142(f) relates to detention hearings, held immediately upon the defendant's first appearance before a judicial officer, to determine whether any conditions of release will assure the appearance of the defendant and the safety of the community. This section provides that the "rules concerning admissibility of evidence in criminal trials do not apply to the presentation and consideration of information at the hearing." 18 U.S.C. § 3142(f). This allows the judicial officer discretion to consider diverse information when determining appropriate conditions upon which a defendant may be released. *See* Act of October 10, 1984, Pub.L. No. 98-473, 1984 U.S.Code Cong. & Admin.News (98 Stat) 3182, 3203-05. However, that language only applies to detention hearings; the Act gives no indication that bail forfeiture hearings should not be held in accordance with the rules of evidence.

[4] Because we read Fed.R.Evid. 1101(d)(3) narrowly, because bond forfei-

3. The Advisory Committee notes on Fed.R.Evid. 1101(d)(3) states that:

> Proceedings with respect to release on bail or otherwise do not call for application of the rules of evidence. The governing statute specifically provides:
>
> "Information stated in, or offered in connection with, any order entered pursuant to this section need not conform to the rules pertaining to the admissibility of evidence in a court of law."

18 U.S.C.A. § 3142(f). This provision is consistent with the type of inquiry contemplated in A.B.A. Project on Minimum Standards for Criminal Justice, Standards Relating to Pretrial Release, § 4.5(b), (c), p. 16 (1968). The references to the weight of the evidence against the accused, in Rule 46(a)(1), (c) of the Federal Rules of Criminal Procedure and in 18 U.S.C.A. § 3146(b), as a factor to be considered, clearly do not have in view evidence introduced at a hearing under the rules of evidence.

ture hearings have not been specifically exempted, and because the Bail Reform Act only exempts detention hearings from application of the rules of evidence, we hold that the Federal Rules of Evidence should apply to proceedings relating to forfeiture of bond under Rule 46(e).

3. Burden of Proof

[5] It appears from the record that the original goals of the hearing held by Magistrate Atkins on October 5 and 6, 1987, were revocation of Vaccaro's release, detention of Vaccaro without bail, and forfeiture of Vaccaro's bond. *See* Motion to Revoke Conditions of Release and to Forfeit Bail, document # 662. However, because Vaccaro was already in custody on other federal charges at the time of the so-called revocation and detention hearing, and because Vaccaro conceded the issue of revocation of his release, the only issue remaining for the Magistrate was forfeiture of Vaccaro's bond. *See* Transcript of Hearing, pages 3, 5. The issue before us is whether the Magistrate should have required proof of breach by a preponderance of the evidence, instead of proof of breach by probable cause only.

18 U.S.C. § 3148(b) requires a judicial officer to enter an order of revocation and detention if, after a hearing, the officer finds that a) there is probable cause to believe that the defendant committed a crime while on release, and b) that no condition or combination of conditions will reasonably assure the appearance of the defendant and the safety of the community.[4] The government argued, and the Magistrate agreed, that if she found probable cause to believe that Vaccaro had violated the law while on release, she was required to forfeit his bond. *See* document # 775, page 16, lines 14–25; page 25, lines 6–15. We do not adhere to such an application of section 3148.

If the Magistrate had been ruling on revocation of release or detention, utilization of the probable cause standard would have been appropriate. However, since the issue was forfeiture of Vaccaro's bond, the probable cause standard was not appropriate.

[6] According to *Plechner*, 577 F.2d at 597, enforcement of a bond forfeiture is a civil case arising from a prior criminal proceedings. Civil actions generally require findings to be by a preponderance of the evidence. We see no significant difference between declaration of a bond forfeiture, sought by the government here, and the forfeiture enforcement action in *Plechner*. We believe both are civil proceedings, to which the rules governing civil proceedings generally should apply. Therefore, we hold that forfeiture of a bond is limited to those cases where it can be shown by a preponderance of the evidence that a defendant has violated a condition of release.

[7] To summarize, we hold that an evidentiary hearing should be held on the issue of whether a condition of release has been breached, when requested by the defendant. We hold that where a defendant requests an evidentiary hearing for a bail forfeiture, the Federal Rules of Evidence shall apply. We further hold that where breach of a condition of release is determined for purposes of a bail forfeiture proceeding, the court's findings should be supported by a preponderance of the evidence.[5]

C. *Construction of Bonds*

We now turn our discussion to the bonds in the instant case.

1. Conditions of Bond # 1

[8] The first bond was issued on July 5, 1984, in the amount of $100,000. The first document issued was entitled "Appearance Bond." This was signed by Vaccaro and

4. Section 3148(b) also mandates detention and revocation upon a finding, by clear and convincing evidence, that the defendant violated any other condition of release. 18 U.S.C. § 3148(b)(1)(B) (1988).

5. Vaccaro's request that a jury determine his bond forfeiture is denied. Rule 46(e) states that the "district court shall" declare any forfeiture. This authority is appropriately delegated to magistrates under Local Rule 11(d). Denying Vaccaro a jury trial does not violate his Constitutional rights.

Bernadine D'Anna of Rusty's Bail Bonds. Certain conditions are set forth in this appearance bond, most dealing with defendant's required appearance for court proceedings. The bond also contains the following language:

> If the defendant appears as ordered and otherwise obeys and performs the foregoing conditions of this bond, then this bond is to be void, but if the defendant fails to obey or perform any of these conditions, payment to the amount of this bond shall be due forthwith. Forfeiture of the bond for any breach of its conditions may be declared by any United States District Court having cognizance of the above entitled matter at the time of such breach and if the bond is forfeited and forfeiture is not set aside or remitted, judgment may be entered upon motion in such United States District Court against each debtor jointly and severally for the amount above stated, together with interest and costs, and execution may be issued and payment secured as provided by the Federal Rules of Criminal Procedure and by other laws of the United States.
>
> . . . . . .
>
> SEE, ALSO, ORDER SPECIFYING METHODS AND CONDITIONS OF RELEASE ATTACHED HERETO AND MADE A PART HEREOF.[6]

The separate Order Specifying Methods and Conditions of Release contained additional restrictions with which Vaccaro agreed to comply. One of these was that he not "violate any local, state or federal laws or regulations."

Defendants contend that the "violate no laws" condition was not part of the appearance bond, and therefore that they are not liable for any breach of that condition which may have occurred. We disagree.

[9] A bail bond is a contract between the government and the defendant and his surety. *Plechner*, 577 F.2d at 598. The language of the bond contract is to be strictly construed in accordance with the terms contained therein. *Lujan*, 589 F.2d at 438.

In holding that the "violate no laws" condition should be considered part of the appearance bond, we rely on general contract law and a reasonable construction of all documents entered into by the parties. First, and most significant, is the reference in the appearance bond to the Order Specifying Methods and Conditions of Release, "attached hereto and made a part hereof." It is generally accepted contract law that incorporation of another document makes that document a part of the agreement for the purpose specified. *See Carnation Co. v. C.I.R.*, 640 F.2d 1010, 81-1 USTC 9263 (9th Cir.1981), *cert. denied* 454 U.S. 965, 102 S.Ct. 506, 70 L.Ed.2d 381 (1981); *Union Pac. R.R. Co. v. Chicago, Milwaukee, St. Paul, and Pac. R.R. Co.*, 549 F.2d 114 (9th Cir.1976); *Lodges 743 and 1746 Int'l Ass'n of Machinists and Aerospace Workers, AFL-CIO v. United Aircraft Corp.*, 534 F.2d 422 (2nd Cir.1975), *cert. denied*, 429 U.S. 825, 97 S.Ct. 79, 50 L.Ed.2d 87 (1976); *Giacona v. Marubeni Oceano (Panama) Corp.*, 623 F.Supp. 1560 (S.D. Tex.1985); *Paley Assocs., Inc. v. Universal Woolens, Inc.*, 446 F.Supp. 212 (S.D.N.Y. 1978).

The appearance bond clearly incorporates the Order Specifying Methods and Conditions of Release. The incorporating language is in all capital letters, and in larger type than that of the preceding language. A reasonable reading of the appearance bond would put a surety on notice that the Order Specifying Methods and Conditions of Release might contain additional conditions by which the surety would be bound. We find that the "violate no laws" condition of Bond # 1 is one to which the surety, Allied, obligated itself when its agent signed the appearance bond.

6. Defendants place great importance on the language "foregoing conditions," arguing that this precludes forfeiture for breach of any condition listed after that language. However, we read the document as a whole, applying a reasonable interpretation to the language. Defendant's interpretation does not consider the context of the whole document, and therefore must be rejected.

In further support of this conclusion, we look to two additional documents, executed contemporaneously with the appearance bond and the Order Specifying Methods and Conditions of Release. In addition to signing the appearance bond, Allied's agent, Ms. D'Anna also signed a document entitled "Notice to Surety." This notice informs the surety that forfeiture of the bond amount could follow from a violation of "*any* conditions of release" (emphasis in original). The surety is further warned that "[i]t is important that you read and understand all of the Conditions of Release which must be complied with by the defendant." The violate no laws condition of Vaccaro's release is found in section II of the Order Specifying Methods and Conditions of Release, entitled "Conditions of Release." This notice further serves to inform Allied of the extent of its undertaking.

Furthermore, the separate Bail Bond executed contemporaneously, printed by Allied, guarantees not only the appearance of the defendant, but also that the defendant "shall at all times render himself amendable to the orders and the process of the Court." This language certainly anticipates additional orders of the Court binding defendant, and clarifies Allied's intention to guarantee Vaccaro's compliance with all such orders. The consideration of all these documents strengthens our holding that Allied was put on sufficient notice that the violate no laws condition was one by which they would be bound.

[10] Another argument propounded by Allied in an effort to escape liability is that their agent, Ms. D'Anna, exceeded the authority of her power of attorney. The power of attorney states that its authority "is limited to appearance bonds and cannot be construed to guarantee for failure to provide payments, back alimony payments, fines or wage law claims." Allied argues that it cannot be held responsible for Vaccaro's alleged breach of the violate no laws condition, since its agent only had authority to bind them to "appearance bonds." This argument is unpersuasive for two reasons. First, the power of attorney specifically lists four types of payments which cannot be guaranteed. Based upon the maxim *inclusio unius est exclusio alterius*, other types of payments could potentially be guaranteed, because they are not specifically excluded. Also, the guarantee in question, that Vaccaro would violate no laws, is entirely different from any sort of payment. It more closely resembles the surety's guarantee that Vaccaro would appear.

The second reason we hold that agent D'Anna did have authority to bind Allied to all conditions set forth in the Order Specifying Methods and Conditions of Release is based on our earlier construction of the appearance bond. The Order Specifying Methods and Conditions of Release was incorporated into the appearance bond, forming one document. Therefore, holding the surety Allied responsible for all conditions in the Order Specifying Methods and Conditions of Release does not exceed the authority of the power of attorney, since we are only holding Allied responsible for the appearance bond. We read "appearance bond" to include those additional conditions found in the Order Specifying Methods and Conditions of Release.

2. Breach of Bond # 1

[11] We are able to rule on Vaccaro's alleged breach of the violate no laws condition of Bond # 1, based on the record before us. Further hearing on this issue is not necessary. Vaccaro pled guilty to count 6 of the California indictment, for criminal acts committed on or about August 4, 1984.[7] On that date, Vaccaro was on release under the terms of Bond # 1, issued July 5, 1984. Vaccaro's plea agree-

7. Vaccaro contends that the Magistrate improperly received information relating to his California plea agreement. Indeed, the Magistrate's report does refer to the plea agreement, although no evidence of the plea was presented at Vaccaro's hearing. Furthermore, upon hearing of Vaccaro's plea, the Magistrate assumed that the plea covered acts committed between August, 1984 and August, 1985, since those are the dates specified in the indictment. However, the plea agreement itself, which apparently was not seen by the Magistrate, limits Vaccaro's culpability to an act occurring on or about August 10, 1984, and definitely before October, 1984.

ient is now a part of the record (document = 778). Furthermore, Vaccaro does not ontest the validity or terms of the plea greement. Therefore, we find the preponerance of the evidence supports the conlusion that Vaccaro did violate a federal aw while on release. On that basis, we eclare a forfeiture of the $100,000 bond ssued July 5, 1984, (Bond # 1). Fed.R. rim.P. 46(e). This declaration of forfeiure is made without abridging the right of he surety to move to set aside or remit the orfeiture, consistent with Fed.R.Crim.P. 46(e)(2) and (4).

3. Conditions of Bond # 2

[12] Bond # 2 presents slightly different issues to us. Bond # 2 is the $250,000 appeal bond, issued on June 11, 1985. The bond documents consist of the appearance bond (document # 502) (which is a printed form identical to the appearance bond issued in Bond # 1), a power of attorney (attached to document # 502), and an Order Specifying Methods and Conditions of Release (document # 503).

The Appearance Bond contains the same general guarantee found in Bond # 1 by the surety that the defendant shall appear in compliance with all court orders; defendant's failure to comply with the "foregoing conditions" would result in forfeiture of the bond amount. The bond also includes the sentence, "SEE, ALSO, ORDER SPECIFYING METHODS AND CONDITIONS OF RELEASE ATTACHED HERETO AND MADE A PART HEREOF." This sentence is in all capital letters, and a type larger than the previous paragraphs, just as in Bond # 1.

The Order Specifying Methods and Conditions of Release places additional restrictions on Vaccaro's release pending appeal, but is in a slightly different form than the Order in Bond # 1.[8] The form lists several possible restrictions; in all instances, save one, a space appears where certain applicable conditions may be designated with a check mark or an "X". The one exception is condition number 1, which states as a condition of release that the defendant "shall not commit a Federal, State, or local crime during the period of release." There is no space provided for a check mark or an "X" next to this condition. A reasonable understanding of this is that this one condition applies to *all* defendants receiving this form. It is not an optional condition that may or may not be designated, depending on the circumstances.

Indeed, this construction is consistent with the 1984 revision of the Bail Reform Act. Pursuant to the Act, the "commit no crimes" language is a condition imposed on all those released under 18 U.S.C. § 3142(c). Additional restrictions may apply, if the judicial officer deems it necessary. *See* 18 U.S.C. § 3142(c). But the "commit no crimes" condition definitely applied to Vaccaro when he signed the June 11, 1985, Order Specifying Methods and Conditions of Release.

In holding that the "commit no crime" condition is part of the appearance bond, we apply the same reasoning to Bond # 2 as we did to Bond # 1. The same language incorporates the Order Specifying Methods and Conditions of Release into the appearance bond. A reasonable reading of the bond contract should have put Classified, the surety on Bond # 2, on notice that additional conditions might be found in the Order Specifying Methods and Conditions of Release. In guaranteeing the appearance bond, Classified not only guaranteed that Vaccaro would appear, but that he would comply with all other conditions of his release. Any violation by Vaccaro will subject Classified to liability on Bond # 2.

In further support of our finding that the "commit no crimes" condition is one to which the surety was obligated, we refer to *United States v. Chapel*, 480 F.Supp. 588 (D.P.R.1979). In that case, the district court ordered forfeiture of a bond based on facts similar to those at hand. In *Chapel*, defendant posted a cash bond through a surety, under conditions that defendant appear at all court proceedings. A separate Order Specifying Methods and Conditions

8. The different format of the Order Specifying Methods and Conditions of Release used in Bond # 2 reflects the 1984 amendments to the Bail Reform Act.

of Release required that defendant "surrender any passport he may possess." *Id.* at 590. Upon his failure to do so, the court ordered defendant's bond forfeited.

The district court dismissed defendant's contention that his failure to comply with the nonappearance-related condition did not constitute a violation of an "appearance bond," and therefore could not be the basis for confiscation of the bond. The court held that both defendant and surety were obligated to pay the amount of the bond. Even though the surety was unaware of the passport condition when he signed the bond, and even though the appearance bond did not contain language whereby the Order Specifying Methods and Conditions of Release was incorporated into the appearance bond, the court charged the surety with constructive knowledge of the court's use of separate Orders Specifying Methods and Conditions of Release. Because the surety was an experienced criminal attorney who had used a similar Orders Specifying Methods and Conditions of Release in previous cases, and since the surety became actually aware of the passport condition after reading it in the newspaper, the court held that its violation was one by which the surety was obligated.

Likewise, in the instant case, Classified is a professional corporation in the business of underwriting bail bonds. It is presumed that they are familiar with appearance bonds and separate orders specifying methods and conditions of release. Furthermore, our holding is not as onerous as that in *Chapel*, because Classified had full notice that the Order Specifying Methods and Conditions of Release was to be incorporated into the appearance bond. Because we read the two documents together, we hold that the "commit no crimes" condition of Vaccaro's release was one by which the surety Classified is bound.

4. Breach of Bond # 2

[13] Having determined that the "commit no crimes" condition is a part of the appearance bond, the next step is to determine whether Vaccaro breached that condition. It should be noted that the two conditions, found in Bond # 1 and Bond # 2, differ. In Bond # 1, Vaccaro promised that he would "break no laws" while on release. In Bond # 2, Vaccaro's promise was that he would "commit no crimes." Presumably, the purpose behind each condition is the same, i.e., to keep defendants from engaging in further criminal activity. However, we find troublesome the phraseology of the "commit no crime" condition. Instead of proscribing merely the violation of laws, which violation can occur without intervention of the criminal justice system, the condition of Bond # 2 cannot be broken without some declaration by a judicial officer that a crime has been committed. For example, when a person runs a red light, a law has been violated; however, a crime may or may not have been committed, depending on whether there exists some defense, such as necessity.

The only case we found dealing with breach of a "commit no crimes" condition is *United States v. Santiago*, 826 F.2d 499 (7th Cir.1987). There, Santiago was arrested and charged with drug trafficking on July 23, 1985; a personal friend posted real estate as security in lieu of a cash bond of $25,000. One condition of Santiago's bond was that he "not commit a Federal, state, or local crime during the period of his release." *Id.* at 501. On February 3, 1986, Santiago was named in an indictment that superceded the original indictment of July 22, 1985. Additional drug offenses were charged in the superceding indictment. On February 7, 1986, Santiago was arrested and charged with an additional drug offense, not listed in the superceding indictment, that occurred between January 24 and February 5, 1986.

A magistrate held a detention hearing, at which the Federal Rules of Evidence did not apply, *see* 18 U.S.C. § 3142(f). At the hearing, extensive testimony was given by an FBI agent relating to Santiago's drug activities in late February. After hearing the testimony, the magistrate revoked Santiago's release and ordered him detained pursuant to his findings that probable cause existed that Santiago had committed a crime while on release, that he posed a danger to the community, and that no con-

ons of release would reasonably assure safety of persons and the community. These are the findings required in or- to revoke the release of a person under U.S.C. § 3148(b).

antiago subsequently pled guilty to e counts charged in the superceding tment. In the plea agreement, the ernment agreed not to prosecute Santi- for crimes charged in the February 7, 6, complaint, but stated that it would rm the district court of Santiago's ac- ies and those charges, for purposes of tencing. It was not until after accept- the guilty plea that the district court ered Santiago's bond be forfeited.

n appeal, the surety on Santiago's bond ued, *inter alia*, (1) that Santiago never ached any condition of his release bond, (2) that a judicial officer never made a ding that Santiago had breached a condi- n of his release bond. In finding that a icial officer did make such a finding, the th Circuit relied on the Magistrate's dings at the detention hearing, which ring was held, at least in part, to deter- ne whether Santiago should be detained l his bond revoked. The Magistrate de findings sufficient to justify Santia- 's detention and revocation of release ording to 18 U.S.C. § 3148(b). *Santia-*, 826 F.2d at 504–05. Section 3148(b) ly requires a finding of probable cause to lieve that a person has committed a ime while on release. But, as we stated rlier in this decision, we do not believe e probable cause standard is sufficient ien ruling on a Rule 46(e) forfeiture and termining whether a condition of release s been violated. Therefore, we disagree ith the *Santiago* decision, insofar as it ggests that forfeiture of bond is permis- ble upon showing probable cause of each.

An issue not raised by the appellant in *antiago*, and therefore not addressed by ie court, is whether the "commit no ime" condition can be shown by anything less than *conviction* of a crime committed on release. None of the defendants in the instant case raise this issue, either, but this Court feels compelled to address it.

The condition of release signed by Vaccaro in Bond # 2 was that he would "commit no ... *crime*" (emphasis added). The government suggests that the California indictment charging violations of Federal law while Vaccaro was on release, is a sufficient basis on which to forfeit Vaccaro's appeal bond. We disagree. An indictment does not constitute proof that a crime has been committed, *Tot v. United States*, 319 U.S. 463, 63 S.Ct. 1241, 87 L.Ed. 1519 (1943); rather, it contains charges that must be proved beyond a reasonable doubt. *Ex parte Bain*, 121 U.S. 1, 7 S.Ct. 781, 30 L.Ed. 849 (1887). Although we don't believe a conviction for a crime committed on release is a prerequisite to a Rule 46(e) forfeiture, we do hold that mere indictment is not enough.

We remand[9] this case to Magistrate Phyllis Halsey Atkins for a further hearing at which evidence will be heard on whether defendant John Vaccaro breached the condition of Bond # 2 (the appeal bond), that he commit no federal, state, or local crimes.[10] Bond # 2 should not be forfeited unless the Magistrate finds, by a preponderance of the evidence, that a breach has occurred. The hearing shall be consistent with the terms of this Order.

IT IS, THEREFORE, HEREBY ORDERED that Bond # 1, issued July 5, 1984, is declared *Forfeited*, in the amount of $100,000.

IT IS FURTHER ORDERED that this cause is *Remanded* to Magistrate Phyllis Halsey Atkins for the sole purpose of determining whether Vaccaro committed a crime after July 11, 1985, in violation of Bond # 2. The Magistrate shall hold a hearing on this issue, at which the Federal Rules of Evidence shall apply. She shall

9. We find no basis to disqualify Magistrate Atkins from presiding over further proceedings in this case.

10. We point out that Vaccaro's guilty plea to count six of the California indictment will not serve as a basis to forfeit Bond # 2, since the plea was for an act committed before Bond # 2 was issued.

thereafter file her report and recommendation which shall incorporate her findings.

IT IS FURTHER ORDERED that Bond # 2 shall not be forfeited unless the Magistrate finds by a preponderance of the evidence that Vaccaro did commit a crime.

ON MOTION FOR RECONSIDERATION

Plaintiff, the United States, has filed a motion for reconsideration (document # 789) of our Order filed April 4, 1989 (document # 788). Specifically, plaintiff objects to our ruling that the Federal Rules of Evidence shall apply in all bond forfeiture proceedings, and that the party seeking forfeiture of the bond shall prove breach of the bond agreement by a preponderance of the evidence. Defendant has filed his opposition to the motion for reconsideration (document # 808), and the government has filed its reply (document # 810). For the reasons stated hereinafter, the government's motion for reconsideration is denied.

Contrary to plaintiff's allegation, the Court has not "completely ignored" the provisions of Fed.R.Evid. 1101(d). Rather, the Court's interpretation of that rule is at variance with plaintiff's. This Court's conclusion that the rules of evidence shall apply to bond forfeiture proceedings is not in abrogation of Rule 1101(d), because we do not classify bond forfeiture proceedings as "proceedings with respect to release on bail or otherwise." Fed.R.Evid. 1101(d). While "proceedings with respect to release on bail or otherwise" are specifically excepted from application of the Rules of Evidence, we do not read that exception to include bond forfeiture proceedings, which are basically civil contract actions. Nor do we find any authority supporting the classification proposed by plaintiff.

Furthermore, the Court does not rest its conclusion regarding applicability of the Federal Rules of Evidence upon the language of section 3142(f) of the Bail Reform Act, but rather on the absence of a specific exception to their applicability in bond forfeiture proceedings.

The issue to be determined at a bond forfeiture proceeding is whether a condition of the bond has been breached. In order to do this in a manner that affords all parties with due process of law, the bond agreement must be construed, and factual findings must be made to determine whether the defendant did, in fact, perform some prohibited act, or fail to perform some obligatory act. This proceeding is far enough removed from the issue of revocation of a defendant's release that we do not believe that it falls within the exception of Rule 1101(d).

For the same reasons, the burden of proof must be a preponderance of the evidence. The *in rem* forfeiture statutes and cases to which plaintiff refers are inapposite. The burden of proof in most of those cases is set by statute; there is no such statute governing bond forfeitures. In the absence of a statutory directive to the contrary, we believe it prudent to adhere to the generally accepted burden of proof in civil actions, i.e., preponderance of the evidence.*

We further point out the distinction we see between deprivations of liberty or property that are followed by an opportunity to contest such deprivation, and those deprivations that are more final in nature. We see bond forfeiture proceedings to be of the latter type and believe that proof must be by a preponderance. That some deprivations of the former type are possible upon a lesser showing is of little import here.

IT IS, THEREFORE, HEREBY ORDERED that plaintiff's motion for reconsideration (document # 789) is DENIED.

IT IS FURTHER ORDERED that defendant's request for reconsideration of our

* The Court takes notice of the decision in *Heacock v. Commonwealth*, 228 Va. 235, 321 S.E.2d 645 (1984), wherein the analysis of the Virginia Supreme Court parallels our own. Although not binding precedent on this court, we do not lightly disregard a well-reasoned opinion of another court, where the analysis of the facts and law can inform our own decision. In that case, the court also concluded that proof in a civil forfeiture action must be by a preponderance of the evidence.

)rder denying defendant a jury trial on the 'orfeiture issue is DENIED.

Ramona Raye MATLOCK, Phillip A. Shepherd, Farley Gene Jordan, and Hubert Coy Gilbert, Plaintiffs,

v.

TOWN OF HARRAH, OKLAHOMA; Board of Trustees of the Town of Harrah, Oklahoma; Gary Mixon, individually and as a Trustee of the Town of Harrah; Kevin Spaeth, individually and as a Trustee of the Town of Harrah; Ben Jorski, individually and as a Trustee of the Town of Harrah; Louie Anderson, individually and as a Trustee of the Town of Harrah; and Bob J. Collier, individually, Defendants.

No. CIV-88-1097-A.

United States District Court, W.D. Oklahoma.

Aug. 24, 1989.

Former town employees brought action against town and town trustees, alleging civil rights and state law violations. On cross motions for summary judgment, the District Court, Alley, J., held that: (1) employees who resigned could not prosecute § 1983 action; (2) employees had no property interest in jobs at time of discharge; (3) material issue of fact existed as to whether expressions protected by First Amendment were motivating factors underlying discharge of employees; and (4) employees' state law tort claims were barred by Oklahoma's Governmental Tort Claims Act.

Plaintiff's motion denied; defendant's motion granted in part and denied in part.

1. Civil Rights ⇐198(2)

Given that individual defendants were municipal officials, state action required for liability under § 1983 was present. 42 U.S.C.A. § 1983.

2. Civil Rights ⇐206(1)

Discharged town employees needed only to establish unconstitutional conduct of town trustees to sustain their § 1983 action, notwithstanding that the trustees allegedly treated employees in unprecedented manner, since trustees were unquestionably policymakers. 42 U.S.C.A. § 1983.

3. Civil Rights ⇐145

Absent evidence that employees who resigned from their employment with town were constructively discharged, employees could not prosecute § 1983 action. 42 U.S.C.A. § 1983.

4. Administrative Law and Procedure ⇐501
Civil Rights ⇐210
Social Security and Public Welfare ⇐619.5

Town and town trustees were not estopped from asserting resignation of former employees as defense to employees' § 1983 action by findings of Oklahoma Employment Security Commission that employees were free of misconduct and acted on belief that, if they did not resign, they would soon be discharged; it was doubtful that Commission was acting in judicial capacity when findings at issue were made and legal significance of the findings largely turned on determination that employees had constitutionally protected property interest in their jobs, which they did not. U.S.C.A. Const.Amend. 14; 42 U.S.C.A. § 1983.

5. Constitutional Law ⇐277(2)

Notwithstanding ordinance setting out number of bases for removal of town employees in classified service, town employees had no protected property interest in their jobs at time of their discharge in light of Oklahoma statute providing that "removals, demotions, suspensions, and layoffs shall be made solely for the good of the service," and accordingly, employees could not maintain § 1983 action for deprivation of property without due process.

Agenda Item III C 11

MEMO TO: **Members, Criminal Rules Advisory Committee**

FROM: **Professor Dave Schlueter, Reporter**

RE: **Proposed Amendment to Rule 49(c) Regarding Notice by Fax**

DATE: **March 27, 1998**

Attached is a portion of the report on the "Eastern District of Pennsylvania Fax Noticing Local Pilot Program." Members of the Committee may have received the entire report as part of a mailing last fall; the entire report is approximately 100 pages long and is bound in a powder blue cover.

Also attached are several pieces of correspondence urging the various rules committees to adopt the amendments proposed in the Report.

Of particular concern to the Committee is the proposal to amend Criminal Rule 49(c) which would permit the clerk of the court to "...forward by facsimile or electronic means, consistent with any technical standards that the Judicial Conference of the United States may establish,..." Virtually identical language was proposed for Appellate Rule 3(d) and Civil Rule 77(d).

This matter is on the agenda for the April meeting.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF PENNSYLVANIA
U.S. COURTHOUSE
INDEPENDENCE MALL WEST
601 MARKET STREET
PHILADELPHIA PA 19106-1797

MICHAEL E. KUNZ
CLERK OF COURT

CLERK'S OFFICE
ROOM 2609
TELEPHONE
(215) 597-7704

September 10, 1997

Peter F. McCabe, Secretary
Committee on Rules of Practice and Procedures
of the Judicial Conference of the United States
Thurgood Marshall Federal Judiciary Building
Washington, DC 20544

Re: Federal Rule of Civil Procedure 5(b)
Federal Rule of Civil Procedure 77(d)
Federal Rule of Criminal Procedure 49(c)
Federal Rule of Appellate Procedure 3(d)

Dear Mr. McCabe:

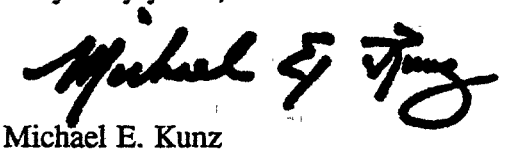
Enclosed please find recommended amendments to the above-referenced rules of procedure. This submission includes an executive summary and recommendations, the Eastern District of Pennsylvania Fax Noticing Local Pilot Program report, our February 1995 recommendation for amendment to Rules of Civil Procedure 5(b) and 77(d), and the current Eastern District of Pennsylvania Report of Automated Systems and Technological Services.

Please let me know if I can provide any additional information which may be of use to the committee in considering these amendments. I am available to appear personally to provide any additional information on this matter that the committee requires. Also, I would like to extend an invitation to any member or representative of the committee to visit our court to observe our programs.

I understand that the newly established Technology Subcommittee of the Committee on Rules of Practice and Procedures of the Judicial Conference of the United States has been charged with considering our proposed amendments to Federal Rule of Civil Procedure 5(b) and 77(d), as set forth herein. Since there have been membership changes in Judicial Conference rules advisory committees, I have included our prior submissions along with this submission to all current applicable committee members.

Thank you for your time and consideration.

Very truly yours,



Michael E. Kunz
Clerk of Court

c: Honorable James K. Logan
Honorable Will L. Garwood
Honorable Alex Kozinski
Honorable Diana Gribbon Motz
Honorable Pascal F. Calogero, Jr.
Luther T. Munford, Esquire
Michael J. Meehan, Esquire
Honorable John Charles Thomas
Honorable Walter Dellinger
Robert E. Kopp, Esquire
Professor Carol Ann Mooney
Honorable Frank H. Easterbrook
Honorable Paul V. Niemeyer
Honorable Anthony J. Scirica
Honorable David S. Doty
Honorable C. Roger Vinson
Honorable David F. Levi
Honorable Lee H. Rosenthal
Honorable John L. Carroll
Honorable Christine M. Durham
Professor Thomas D. Rowe, Jr.
Carol J. Hansen Posegate, Esquire
Mark O. Kasanin, Esquire
Francis H. Fox, Esquire
Phillip A. Wittmann, Esquire
Honorable Frank W. Hunger
Honorable Adrian G. Duplantier

c: Sol Schreiber, Esquire
Professor Edward H. Cooper
Honorable D. Lowell Jensen
Honorable W. Eugene Davis
Honorable Edward E. Carnes
Honorable George M. Marovich
Honorable David D. Dowd, Jr.
Honorable D. Brooks Smith
Honorable B. Waugh Crigler
Honorable Daniel E. Wathen
Professor Kate Stith
Robert C. Josefsberg, Esquire
Darryl W. Jackson, Esquire
Henry A. Martin, Esquire
Roger A. Pauley, Esquire
Professor David A. Schlueter
Honorable William R. Wilson, Jr.
Honorable A. Jay Christol
Honorable James T. Turner
Richard G. Hetzel
Professor Daniel R. Coquillette
Professor Alan N. Resnick
Professor Daniel J. Cupra
Gene W. Lafitte, Esquire

Executive Summary and Recommendations

Fax Noticing

Based on the positive experience acquired during the United States District Court for the Eastern District of Pennsylvania's fax noticing local pilot program, we respectfully request reconsideration of our recommendation to amend Federal Rules of Civil Procedure 5(b) and 77(d) and further recommend that consideration be given to amending Federal Rule of Criminal Procedure 49(c) and Federal Rule of Appellate Procedure 3(d).

The Eastern District's program was designed to expedite case processing procedures by providing required notice of judicial opinions and orders which rule on motions or schedule judicial proceedings or trial dates, in a more timely manner via facsimile with the consent of the recipients and at considerably less cost to the federal judiciary.

The fax noticing local pilot program has been operational for 15 months. Participation in the local pilot program is voluntary and has been endorsed by the judges of this court and enthusiastically supported by members of the bar. Since May of 1996, the average monthly rate of fax noticing for all civil and criminal docketed orders and judgments is 67 percent. This rate would be even higher were it not for the considerable volume of pro se litigation filed in this district and managed by the court. In our experience, pro se litigants are less likely to have access to facsimile equipment.

This local pilot program is consistent with the philosophy of the Judicial Conference of the United States to better utilize available budgetary resources. The issue of resources is addressed in the *Long Range Plan for the Federal Courts* as follows:

"RESOURCES-human and economic-provide the means for the federal courts to carry out their mission. The near future will continue to be an era of austerity as far as federal budgets are concerned, and the judicial branch will have to do more with less. The plan contemplates that the federal courts will have to redouble previous efforts to cut red tape, streamline the budget process, add flexibility to personnel and procurement practices, decentralize decision making, and eliminate inefficient and unnecessary activities."[1]

After only 15 months of program experience, the statistics demonstrate that fax noticing produces substantial cost savings while increasing efficiency and productivity.

This local pilot program is also consistent with Judicial Conference technology goals set forth in long range plan recommendations 69 and 70 as restated below:

"Recommendation 69: Use of court related technology should be expanded to improve the ability of the federal courts to provide efficient, fair, and comprehensible service to the public."[2]

"Recommendation 70: The courts must remain current with emerging technologies and how they can be employed to improve the administration of justice generally."[3]

If approved, these proposed amendments will support the Judicial Conference vision of the role of technology in United States courts. In addition, fax noticing will equip clerks of court with a modern technological resource, which is readily available at minimal cost, to process the massive volume of work typical in clerks' offices across the country. We can identify no downside to this program.

Further, this pilot program is in keeping with Judicial Conference philosophy on the use

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[1]Long Range Plan for the Federal Courts, Judicial Conference of the United States, December 1995, p. 107.

[2]Ibid., p. 106.

[3]Ibid.

of technology in civil litigation. In *The Civil Justice Reform Act of 1990, Final Report*, the Judicial Conference acknowledged the potential savings which could be realized through the appropriate use of technology and indicated that these initiatives should be encouraged. The recommendation is set forth in Measure 8, and it reads:

> **"The Use of Electronic Technologies in the District Courts, Where Appropriate, Should be Encouraged.**
> The prudent use of modern telecommunication and other electronic technologies has the potential to save a significant amount of time and cost in civil litigation. The federal courts have been expanding the use of such technologies and are planning a number of future initiatives in this area."[4]

We respectfully renew our suggestion that Rule 5(b), which provides for service of papers by hand delivery or by mail, be amended to allow for service by litigants by facsimile or electronic means, as follows:

> "...Service upon the attorney or upon a party shall be made by mailing it to the attorney or party, or by mailing it to the attorney or party at the attorney's or party's last known address or, if no address is know, by leaving it with the clerk of the court, or sending a facsimile to the attorney or party or by utilizing electronic means consistent with any technical standards that the Judicial Conference of the United States may establish. If the judge to whom the case is assigned determines that because of economic disadvantage by a party that service by means other than personal hand delivery or mailing would not be in the interest of justice, he may enter a scheduling order mandating that service may only be made by hand delivery or mailing. Delivery of a copy...."

In view of the overwhelming success of the program, we recommend that the first sentence of F.R.C.P. 77(d) be amended in order to permit the clerk to serve notice by facsimile or

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[4]The Civil Justice Reform Act of 1990, Final Report, The Judicial Conference of the United States, May 1997, p. 4.

electronic means, as follows:

> "...the clerk shall serve a notice of the entry by mail, facsimile or electronic means, which must be consistent with any technical standards that the Judicial Conference of the United States may establish, in the manner provided for in Rule 5...."

We also recommend that F.R.Crim.P. 49(c) be amended to permit the clerk to serve notice by facsimile or electronic means, as follows:

> "...the clerk shall mail to each party, or forward by facsimile or electronic means, consistent with any technical standards that the Judicial Conference of the United States may establish, a notice thereof...."

We further recommend that F.R.A.P. 3(d) be amended to permit the clerk to serve notice of appeal, as follows:

> "The clerk of the district court shall serve notice of the filing of a notice of appeal by mailing, or forwarding by facsimile or electronic means, consistent with any technical standards that the Judicial Conference of the United States may establish, a copy to each party's counsel...".

The proposed amendments would afford clerks of court maximum flexibility in performing the noticing task by providing two additional forms of notice, facsimile or electronic means. District courts would be authorized to implement one, both, or neither of these provisions of the rule. Facsimile or electronic noticing would not be mandated.

As predicted in the original proposal (Section 2), as a large metropolitan court, the Eastern District of Pennsylvania's overall time and cost savings are impressive in view of the substantial volume of orders processed in this district. The savings attributable to fax noticing include postage, photocopying, envelopes, and most importantly staff time associated with first class mail

noticing. In addition to cost savings, this rule change would enhance the administration of justice, both in areas of procedural fairness and in the public perception of the court as dedicated to the prompt handling of civil and criminal matters.

We recommend and strongly support these proposed amendments, because the Eastern District fax noticing local pilot program has unequivocally demonstrated that fax noticing of orders and judgments is an effective and economical alternative to notice by first class mail. A program achievement report documents our research and provides empirical information and analysis to support our findings (Section 1). Fax noticing implemented under our procedures reduces the staff time required to process orders and judgments by 40 percent. Each time counsel who is a recipient of an order or judgment opts for fax notice rather than first class mail, we realize a 72 percent cost savings. We are also impressed with the high level of attorney satisfaction and the absence of complaints concerning the program. Fax noticing represents an opportunity for the judiciary to implement a cost saving measure while providing required notice more efficiently. Our experience with this program should benefit the entire federal court system.

Clearly, fax noticing cannot categorically replace first class mail, because some parties and attorneys do not have access to fax technology. Unrepresented parties and prisoner litigants will continue to require first class mail notice, and extensive administrative attention will be required to process these cases. The administrative demands resulting from the burden of sending orders to "notice counsel" also add significantly to the workload in clerks' offices here and throughout the country. While fax noticing cannot address these issues or the substantial administrative costs of pro se litigation, it can offer a notice alternative which greatly improves administrative efficiency and reduces administrative overhead in the majority of cases. Achieving this blend is essential in the current administrative environment.

In order to adjust to the current austere budget climate, we must contain and reduce costs whenever possible, without compromising our mission. The Rules Committee should not discount the time and cost savings these proposed amendments will produce for the entire federal court system if approved. Since the Rules Enabling Act contains procedures to expedite the amendment

process, we respectfully submit that these proposed amendments merit such treatment and that authorization should be provided to establish a national pilot program in a select number of district courts.

For the reasons set forth above, we strongly recommend consideration of the proposed amendments to Federal Rule of Civil Procedure 77(d), Federal Rule of Criminal Procedure 49(c), and Federal Rule of Appellate Procedure 3(d). We also respectfully renew our request for consideration of our proposed amendment to Rule 5(b), which would permit service by electronic means.

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DISTRICT CLERKS ADVISORY GROUP

97-AP-K

97-CV-Q

97-CR-J

October 20, 1997

Michael E. Kunz, Clerk
United States District Court
Independence Mall West
601 Market Street
Philadelphia, PA 19106-1797

Dear Mike:

I write to advise you that the District Clerks Advisory Group met on October 15, 1997 by conference call and that we support the proposed amendments to F.R.Civ.P. 5(b) and 77(d), F.R.Crim.P. 49(c), and F.R.A.P. 3(d) regarding the facsimile service of notice to counsel. We understand that fax noticing is a process being used successfully in several districts, that it has proven to be an effective and economical procedure in court operations, and that it has been enthusiastically supported by the bar.

We appreciate the valuable work undertaken by the Eastern District of Pennsylvania during the pilot portion of this project.

Sincerely,

Bill Brownell

William S. Brownell

WSB/er

cc: George Ray, DCAD

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF PENNSYLVANIA
US COURTHOUSE
601 MARKET STREET
PHILADELPHIA PA 19106-1797

MICHAEL E. KUNZ
CLERK OF COURT

CLERK'S OFFICE
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October 20, 1997

Peter F. McCabe, Secretary
Committee on Rules of Practice and Procedures
of the Judicial Conference of the United States
Thurgood Marshall Federal Judiciary Building
Washington DC 20544

Dear Mr. McCabe:

Enclosed please find a letter from the District Clerks Advisory Group supporting the proposed amendments to F.R.Civ.P 5(b) and 77(d), F.R.Crim.P. 49(c), and F.R.A.P. 3(d) regarding the facsimile/electronic service of notice.

I respectfully request that this be furnished to the committee members who will be evaluating the proposed amendments.

Should you require any additional information concerning the recommendation for amendment, please do not hesitate to contact me.

Very truly yours,

MICHAEL E. KUNZ
Clerk of Court

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

November 24, 1997

William S. Brownell
Clerk
District Clerks Advisory Group
156 Federal Street
Portland, Maine 04101

Dear Mr. Brownell:

Thank you for your suggestions on behalf of the District Clerks Advisory Group to Appellate Rule 3(d), Civil Rule 5(b) and 77(d), and Criminal Rule 49(c).

The proposed suggestions on fax noticing were received and will be reviewed by the chairs and reporters of the Appellate, Civil, and Criminal Rules Committees; the Civil Rules Agenda and Policy Subcommittee; and Gene W. Lafitte, Chair of the Technology Subcommittee of the Committee on Rules of Practice and Procedure.

We welcome your suggestions and appreciate your interest in the rulemaking process.

Sincerely,

Peter G. McCabe
Secretary

cc: Honorable Alicemarie H. Stotler
Chairs and Reporters of the Appellate, Civil, and Criminal Rules Committees
Civil Rules Subcommittee on Agenda and Policy
Gene W. Lafitte, Esq.
Professor Daniel R. Coquillette

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF TEXAS

MICHAEL N. MILBY
CLERK OF COURT
P.O. BOX 61010
HOUSTON, TEXAS 77208

(713) 250-5400
Fax (713) 250-5014
www.txs.uscourts.gov

October 10, 1997

97-AP-JV

97-CV-P

97-CR-H

Michael E. Kunz
Clerk of Court
United States District Court
Room 2609
601 Market Street
Philadelphia, PA 19106-1797

Dear Mr. Kunz:

Thank you for forwarding your recommendation for amendment to the Federal Rules of Civil, Criminal and Appellate Procedure to allow electronic noticing of orders and judgments. I certainly endorse this amendment.

As you know, the Southern District of Texas has been faxing orders and judgments in civil, criminal and bankruptcy cases since June, 1994. Our program, like yours, has been enthusiastically supported by the court and the bar. Presently, approximately 80% of all orders noticed to attorneys are faxed to their offices. Our system differs somewhat from yours in that we image the orders on high speed scanners and then electronically transmit the image to the parties via a pool of fax modems. We have reports from a database that reflect the party to whom notice was given, case and instrument number, fax number, time of fax, and duration of transmission confirming receipt. I am enclosing a copy of a video presentation we prepared explaining our system and its benefits. Please feel free to use it as supportive of the concept to electronically notice judgments and orders.

Sincerely,

Michael N. Milby

Michael N. Milby
Clerk of Court

Encl. -Tape (to Rules)

cc: Hon. Lee H. Rosenthal
Mr. Peter F. McCabe (w/encl.) ✓

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

ALICEMARIE H. STOTLER
CHAIR

PETER G. McCABE
SECRETARY

CHAIRS OF ADVISORY COMMITTEES

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CIVIL RULES

W. EUGENE DAVIS
CRIMINAL RULES

FERN M. SMITH
EVIDENCE RULES

November 20, 1997

Michael N. Milby
Clerk of Court
P.O. Box 61010
Houston, Texas 77208

Dear Mr. Milby:

Thank you for forwarding to me a video explaining your system of electronic noticing of orders and judgments.

I will circulate your video to the reporters of the Appellate, Bankruptcy, Civil and Criminal Rules Committees for their review.

We welcome your suggestions and appreciate your interest in the rulemaking process.

Sincerely,

Peter G. McCabe
Secretary

cc: Honorable Alicemarie H. Stotler
Chairs and Reporters of the Appellate, Bankruptcy
Civil, and Criminal Rules Committees
Civil Rules Subcommittee on Agenda and Policy
Honorable Lee H. Rosenthal
Gene W. Lafitte, Esquire
Professor Daniel R. Coquillette

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF PENNSYLVANIA
U.S. COURTHOUSE
INDEPENDENCE MALL WEST
601 MARKET STREET
PHILADELPHIA PA 19106-1797

MICHAEL E. KUNZ
CLERK OF COURT

CLERK'S OFFICE
ROOM 2609
TELEPHONE
(215) 597-7704

97-AP-I

97-CV-N

97-CR-G

September 9, 1997

Peter F. McCabe, Secretary
Committee on Rules of Practice and Procedures
of the Judicial Conference of the United States
Thurgood Marshall Federal Judiciary Building
Washington, DC 20544

Re: Federal Rule of Civil Procedure 5(b)
Federal Rule of Civil Procedure 77(d)
Federal Rule of Criminal Procedure 49(c)
Federal Rule of Appellate Procedure 3(d)

Dear Mr. Pete McCabe:

Enclosed please find three copies of recommended amendments to the above-referenced rules of procedure.

Should you require additional copies of the recommendation or if I can provide any further information concerning this recommendation, please contact me.

Kind personal regards.

Sincerely,

Mike

Michael E. Kunz
Clerk of Court

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

November 19, 1997

Michael E. Kunz
Clerk of Court
United States District Court
Room 2609
601 Market Street
Philadelphia, Pennsylvania 19106-1797

Dear Mr. Kunz:

Thank you for your suggestions to Appellate Rule 3(d), Civil Rule 5(b) and 77(d), and Criminal Rule 49(c).

The proposed suggestions on fax noticing were received and will be reviewed by the chairs and reporters of the Appellate, Civil, and Criminal Rules Committees; the Civil Rules Agenda and Policy Subcommittee; and Gene W. Lafitte, Chair of the Technology Subcommittee of the Committee on Rules of Practice and Procedure.

We welcome your suggestions and appreciate your interest in the rulemaking process.

Sincerely,

Peter G. McCabe
Secretary

cc: Honorable Alicemarie H. Stotler
Chairs and Reporters of the Appellate, Civil, and Criminal Rules Committees
Civil Rules Subcommittee on Agenda and Policy
Gene W. Lafitte, Esq.
Professor Daniel R. Coquillette

Agenda Item III C 12

MEMO TO: **Members, Criminal Rules Advisory Committee**

FROM: **Professor David A. Schlueter, Reporter**

RE: **Report of Subcommittee on Rules Governing § 2254 Proceedings (State Custody) and Rules Governing § 2255 Proceedings (Federal Custody)**

DATE: **March 28, 1998**

After the Committee's meeting in Monterey, Judge Davis appointed a subcommittee to study the rules governing §§ 2254 and 2255 proceedings: Judge Carnes (Chair), Judge Miller, Mr. Jackson, and Mr. Pauley or Ms. Harkenrider.

The subcommittee's report and related materials are attached.

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT
556 JEFFERSON STREET
SUITE 300
LAFAYETTE, LOUISIANA 70501

W. EUGENE DAVIS
CIRCUIT JUDGE

October 20, 1997

Honorable Edward E. Carnes
United States Circuit Judge'
Frank M. Johnson, Jr., Federal
Building and Courthouse
15 Lee Street
Montgomery, AL 36104

Roger A. Pauley, Esq.
Director, Criminal Legislation
U.S. Department of Justice
950 Pennyslvania Ave., N.W.
Room 2244
Washington, D.C. 20530

or

Darryl W. Jackson, Esq.
Arnold & Porter
555 Twelfth Street, N.W.
Washington, D.C. 20004

Mary Frances Harkenrider, Esq.
U.S. Department of Justice
950 Pennsylvania Ave., N.W.
Room 2212
Washington, D.C. 20530

Honorable Tommy E. Miller
United States Magistrate Judge
173 Walter E.Hoffman Courthouse
600 Grandby Street
Norfolk, VA 23510

Dear Colleagues:

Confirming our conversation in Monterey, I ask that you (with Judge Carnes as chair) serve on a subcommittee to deal with our agenda item II-E-10 concerning rules governing §§ 2254 and 2255 proceedings.

Dave Schlueter's September 10, 1997 memo summarizes the problems that seem to me to need addressing. After a little digging, you may find other areas that should be addressed. If we are going out for comment for changes in these rules, it would be better to send them all out at one time.

We, of course, have no jurisdiction over Civil Rule 81 but I'm sure the Civil Rules Committee would be receptive to our recommendation on any changes we think they should make to that rule to harmonize it with our proposed changes.

My thanks to all of you. If I can help, please call me. Dave Schlueter offers any support that you may need from him.

Sincerely,

WED/df

W. Eugene Davis

UNITED STATES COURT OF APPEALS
For the Fifth Circuit

Date: November 17, 1997

TO: Dave Schlueter

FROM: W. Eugene Davis

SUBJECT: Minutes

==========

Dear Dave,

I only have one change for the minutes. Under Item K on page 11, the subcommittee members are Judges Carnes, Chair, along with Darryl Jackson, Tommy Miller, and either Roger Pauley or Mary Frances Harkenrider.

My letter appointing the subcommittee is attached. I'm sorry I overlooked sending you a copy.

Sincerely,

W. Eugene Davis

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT
556 JEFFERSON STREET
SUITE 300
LAFAYETTE, LOUISIANA 70501

W. EUGENE DAVIS
CIRCUIT JUDGE

(318) 262-6664
FAX (318) 262-6685

January 27, 1998

Honorable Edward E. Carnes
United States Circuit Judge
Frank M. Johnson, Jr., Federal Bldg. & Courthouse
15 Lee Street
Montgomery, AL 36104

Dear Ed:

I do not know whether the problem raised by Judge Dorsey in this attached letter relates to your work on possible amendments to the rules relating to § 2254 and § 2255 actions. But in case it does, I pass it on to you for your consideration.

Sincerely,

W. Eugene Davis

WED/lhw

cc: Professor David A. Schlueter

97-CR-F

United States District Court
District of Connecticut
141 CHURCH STREET
NEW HAVEN, CT 06510

JUL 14 3 38 PM '97

(203) 773-2427

Chambers Of
Peter C. Dorsey
Chief Judge

RECEIVED 8/9/97

July 9, 1997

Honorable Alicemarie H. Stotler
U.S. Courthouse
751 West Santa Ana Boulevard
Santa Ana, California 92701

Dear Judge Stotler:

It has come to my attention that there is an apparent mistake in Rule 8(c) of the Federal Rules Governing § 2255 proceedings. In relevant part, Rule 8(c) states: "If an evidentiary hearing is required, the judge shall appoint counsel for a movant who qualifies for the appointment of counsel under 18 U.S.C. § 3006A(g) . . ." *See* Exh 1. The problem is that § 3006A(g), which used to address discretionary appointment of counsel in proceedings under §§ 2241, 2254, and 2255, was repealed in 1986. *See* Exh. 2 and Exh. 3. Courts still have discretion to appoint counsel in such cases, but their authority is now pursuant to subsection (a). *See* Exh. 4. The reference to subsection (g) in Rule 8(c) seemingly should be eliminated.

Rule 8(c) of the Federal Rules Governing § 2254 proceedings appears to contain the same error.

Very truly yours,

Peter C. Dorsey
Chief Judge

PCD/km

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

ALICEMARIE H. STOTLER
CHAIR

PETER G. McCABE
SECRETARY

CHAIRS OF ADVISORY COMMITTEES

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APPELLATE RULES

ADRIAN G. DUPLANTIER
BANKRUPTCY RULES

PAUL V. NIEMEYER
CIVIL RULES

D. LOWELL JENSEN
CRIMINAL RULES

FERN M. SMITH
EVIDENCE RULES

July 28, 1997

Honorable Peter C. Dorsey
Chief Judge
United States District Court
141 Church Street
New Haven, CT 06510

Re: Mistake in Rule 8(c) of § 2255 Rules

Dear Chief Judge Dorsey:

I very much appreciate the time and trouble that went into your letter of July 9. Somehow the attachments went astray, but we are tracking down the problem to find out how this got by us. As you know, the Administrative Office founded a "Rules Committee Support Office" (only in 1992) whose staff's duties include combing through recent legislation to prevent just these types of problems from occurring.

I am forwarding your letter to Judge Niemeyer, chair of the Advisory Committee on Civil Rules, Professor Ed Cooper, the Reporter, and to Mr. Rabiej who heads the Rules Committee Support Office. The Support Office maintains a docket of all correspondence received, and as soon as a plan is formulated to correct the rules defects identified in your letter, you will hear from me, perhaps Judge Niemeyer, and probably also from Peter McCabe, formal secretary to the rules committees.

Thank you again for taking the time to write, and I hope that no more rules errors ever come to your attention.

Sincerely,

Alicemarie H. Stotler

cc: Judge Paul V. Niemeyer
Professor Edward H. Cooper
John K. Rabiej, Esq.

G:\Docs\AHSC\rules\civ\3c-S2255.pcd

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

ALICEMARIE H. STOTLER
CHAIR

PETER G. McCABE
SECRETARY

CHAIRS OF ADVISORY COMMITTEES

JAMES K. LOGAN
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ADRIAN G. DUPLANTIER
BANKRUPTCY RULES

PAUL V. NIEMEYER
CIVIL RULES

D. LOWELL JENSEN
CRIMINAL RULES

FERN M. SMITH
EVIDENCE RULES

August 18, 1997

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

Dear Judge Dorsey:

Thank you for your suggestion to Rule 8(c) of the Federal Rules Governing § 2255 proceedings. A copy of your letter had been sent to the chair and reporter of the Advisory Committee on Civil Rules. The issues raised by your suggestion are also relevant to review by the Advisory Committee on Criminal Rules. Accordingly, I am sending a copy of your letter to the chair and reporter of the Advisory Committee on Criminal Rules for their consideration.

We welcome your suggestion and appreciate your interest in the rulemaking process.

Sincerely,

John K. Rabiej

for Peter G. McCabe
Secretary

cc: Honorable Alicemarie H. Stotler
Honorable W. Eugene Davis
Professor David A. Schlueter

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

January 16, 1998

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

Dear Judge Dorsey:

I am writing to update you regarding the status of your suggestion to delete the outdated statutory citation in Rule 8(c) of the Federal Rules Governing § 2255 proceedings, which was presented to the Advisory Committee on Criminal Rules. The Advisory Committee reviewed it at its October 1997 meeting. The committee voted to refer your proposal to a subcommittee, which is to undertake a comprehensive review of the Rules Governing §§ 2254 & 2255. I will advise you regarding further developments.

I again thank you for your suggestion and interest in the rulemaking process.

Sincerely,

Peter G. McCabe
Secretary

cc: Honorable Alicemarie H. Stotler
Honorable W. Eugene Davis
Professor David A. Schlueter

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

Hon. Ed Carnes
U.S. Circuit Judge

Frank M. Johnson Jr. Federal Bldg.
& U.S. Courthouse
15 Lee Street, Room 408
Montgomery, Alabama 36104
(334) 223-7132

TO: **Criminal Rules Advisory Committee**

FROM: **Habeas Corpus Rules Subcommittee**
(Ed Carnes, Darryl Jackson, Tommy Miller, Mary Francis Harkenrider, Roger Pauley)

RE: **Proposals for Modification to the Rules Relating to Actions Filed Pursuant to 28 U.S.C. § § 2241, 2254, and 2255**

DATE: **March 27, 1998**

Having studied and conferred about whether changes are needed in the rules relating to 28 U.S.C. §§ 2241, 2254, and 2255 proceedings, the Habeas Corpus Subcommittee makes the following proposals.

A. REFERENCES IN THE RULES TO 18 U.S.C. § 3006(A)

The last sentence of Rule 6(a) of the rules governing § 2254 cases now refers to "the appointment of counsel under 18 U.S.C. § 3006A(g)." Likewise, the first sentence of Rule 8(c) of the rules governing § 2255 proceedings also refers to "the appointment of counsel under 18 U.S.C. § 3006A(g)." That specific statutory subsection has been repealed, and the authority for appointment of counsel in such cases is now contained in 18 U.S.C. §

3006A(a). The references in those two rules to the statutory authority for appointment of counsel needs to be updated. In order to leave some wiggle room in case Congress rearranges the statutory subsections again, we recommend that the references in both of these rules be changed to 18 U.S.C. § 3006A, instead of to § 3006A(a).

B. THE RULES APPLICABLE TO 28 U.S.C. § 2241 PROCEEDINGS

In connection with the Committee meeting last fall, it was brought to our attention that there are problems and inconsistencies with various rules as they relate to a period of time for a response to a habeas petition or § 2255 motion, and there is confusion about which rules govern § 2241 cases. Those problems and inconsistencies involve the wording of the rules applicable to § 2254 and § 2255 cases, as well as the wording of Federal Rule of Civil Procedure 81(a)(2).

After considering the matter, we recommend that Rule 1(b) of both the § 2254 and § 2255 rules, as well as Civil Rule 81(a)(2), be amended as indicated in the first three attachments to this memorandum (each of which is labelled "Proposal B").

We believe that the changes we propose will clarify that in all §§ 2241, 2254, and 2255 proceedings, the answer or other responsive pleading shall be filed by the respondent "within the period of time fixed by the court" as provided in Rule 4 of the rules governing § 2254 cases and Rule 4(b) of the rules governing § 2255 cases. The proposed changes will provide a uniform rule for the filing of all such petitions and motions.

We do recognize that our proposed changes in the three rules will not remove the outdated language in 28 U.S.C. § 2243 requiring that a response be filed "within three days unless for good cause additional time, not exceeding twenty days, is allowed," and that "a day shall be set for hearing, not more than five days after the return unless for good cause additional time is allowed." We believe that that conflict between § 2243 and the rules is taken care of by the Rules Enabling Act and that there is nothing that the Committee can do about § 2243.

C. JUDGE MILLER'S PROPOSALS

Subcommittee member Judge Miller volunteered to survey the remainder of the § 2254 and § 2255 Rules in order to see if any other changes needed to be made, particularly in light of the Antiterrorism and Effective Death Penalty Act of 1996. He did an excellent job, and his report to the other subcommittee members ("Comments on the Habeas Corpus Rules") is attached hereto. After considering his proposals, we make the following recommendations concerning them:

I. & II. The Proposals Concerning the Provisions About Return of a Petition or Motion that Does Not Comply with the Rules (pp. 1-3):

We were divided over these two proposals and agreed to forward them to the Committee for discussion and debate.

III. Statement in the Petition or Motion and in the Answer Concerning Second Application Permission and the Statute of Limitations (pp. 3-4):

We recommend adoption of Proposal III. In addition, we also recommend that similar changes be made to Rule 2(c) of the § 2254 rules and to Rule 2(b) of the § 2255 rules. More specifically, we recommend that Rule 2(c) of the § 2254 Rules be amended as follows:

> **(c) Form of Petition.** The petition shall be in substantially the form annexed to these rules, except that any district court may by local rule require that petitions filed with it shall be in a form prescribed by the local rule. Blank petitions in the prescribed form shall be made available without charge by the clerk of the district court to applicants upon their request. It shall specify all the grounds for relief which are available to the petitioner and of which he has or by the exercise of reasonable diligence should have knowledge and shall set forth in summary form the facts supporting each of the grounds thus specified. It shall ~~also~~ state <u>whether a previous petition has been filed in this matter and, if so, whether the appropriate court of appeals has authorized the filing of this petition. The petition shall also state whether it complies with the applicable limitations period, and shall specify</u> the relief requested. The petition shall be typewritten or legibly handwritten and shall be signed under penalty of perjury by the petitioner.

Likewise, for Rule 2(b) of the § 2255 Rules, we recommend the following amendment:

> **(b) Form of Motion.** The motion shall be in substantially the form annexed to these rules, except that any district court may by local rule require that motions filed with it shall be in a form prescribed by the local rule. Blank motions in the prescribed form shall be made available without charge by the clerk of the district court to applicants upon their request. It shall specify all the grounds for relief which are available to the movant and of which he has or, by the exercise of reasonable diligence, should have knowledge and shall set forth in summary form the facts supporting each of the grounds thus specified. It shall ~~also~~ state <u>whether a previous motion has been filed in this matter and, if so, whether the appropriate court of appeals has authorized the filing of this motion. The motion shall also state whether it complies with the applicable limitations period, and shall specify</u> the relief requested. The

motion shall be typewritten or legibly handwritten and shall be signed under penalty of perjury by the petitioner.

IV. The Outdated References to 18 U.S.C. § 3006A (p. 5):

This proposal involves the same subject as Proposal A, which is discussed on pp. 1-2 of this memorandum, above.

V. The Provision in 28 U.S.C. § 2243 Regarding the Time for an Answer or Response and the Time for a Hearing.

This proposal involves the same subject as our Proposal B, which is discussed on pp. 2-3 of this memorandum, above.

VI. The § 2254 and § 2255 Rules 9(a) Concerning Delayed Petitions (pp. 6-8):

After discussing this matter, all of us including Judge Miller, initially agreed to recommend that Rule 9(a) of both the § 2254 and § 2255 Rules be deleted. We believed that the statutes of limitation that were enacted as part of the Antiterrorism and Effective Death Penalty Act of 1996 were intended to and do have the effect of superseding the rule provisions concerning delayed petitions. However, after our conference, Roger Pauley and Mary Harkenrider gave the matter some more thought and came to the conclusion that there may be some limited circumstances in which Rule 9(a) could continue to have some field of operation. They will present their concerns at the Committee meeting.

VII. The § 2254 and § 2255 Rules 9(b) Concerning Second Petitions (pp. 10-11):

We recommend that Rule 9(b) of both the § 2254 and § 2255 Rules be deleted. We believe that the statutory provisions relating to second or successive petitions, that were

enacted as part of the Antiterrorism and Effective Death Penalty Act of 1996, were intended to and do have the effect of superseding the rule provisions regarding the same subject.

[Proposal B]

Rule 1 of the Rules Governing Section 2254 Cases

Rule 1. Scope of Rules

(a) Applicable to cases involving custody pursuant to a judgment of a state court. These rules govern the procedure in the United States district courts on applications under 28 U.S.C. § 2254:

(1) by a person in custody pursuant to a judgment of a state court, for a determination that such custody is in violation of the Constitution, laws, or treaties of the United States; and

(2) by a person in custody pursuant to a judgment of either a state or a federal court, who makes application for a determination that custody to which he may be subject in the future under a judgment of a state court will be in violation of the Constitution, laws, or treaties of the United States.

(b) Other situations. In applications for habeas corpus in cases not covered by subdivision (a), including petitions filed under 28 U.S.C. § 2241 by state prisoners or detainees, Rule 4 of these rules shall apply and other relevant parts of these rules may be applied at the discretion of the United States district court.

[Proposal B]

Rule 1 of the Rules Governing Section 2255 Cases

Rule 1. Scope of Rules

(a) These rules govern the procedure in the district court on a motion under 28 U.S.C. § 2255:

(1) by a person in custody pursuant to a judgment of that court for a determination that the judgment was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such judgment, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack; and

(2) by a person in custody pursuant to a judgment of a state or other federal court and subject to future custody under a judgment of the district court for a determination that such future custody will be in violation of the Constitution or laws of the United States, or that the district court was without jurisdiction to impose such judgment, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack.

(b) Rule 4(b) of these rules shall apply and other relevant parts of these rules may be applied at the discretion of the United States district court in proceedings filed under 28 U.S.C. § 2241 by federal prisoners or detainees.

[Proposal B]

Rules of Civil Procedure

Rule 81. Applicability in General

(a) To What Proceedings Applicable

(1) These rules do not apply to prize proceedings in admiralty governed by Title 10, U.S.C., §§ 7651-7681. They do not apply to proceedings in bankruptcy or proceedings in copyright under Title 17, U.S.C., except in so far as they may be made applicable thereto by rules promulgated by the Supreme Court of the United States. They do not apply to mental health proceedings in the United States District Court for the District of Columbia.

(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 or rules of the United States 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.~~

COMMENTS ON THE HABEAS CORPUS RULES

Tommy E. Miller
United States Magistrate Judge
Norfolk, Virginia
February 17, 1998

I

Federal Rule of Civil Procedure 5(e), which defines filing with the Court, was amended in 1991 so that its final sentence now reads:

> The clerk shall not refuse to accept for filing any paper presented for that purpose solely because it is not presented in proper form as required by these rules or any local rules or practices.

The Advisory Committee Notes of 1991 explain why this change was made.

> Several local district rules have directed the office of the clerk to refuse to accept for filing papers not conforming to certain requirements of form imposed by local rules or practice. This is not a suitable role for the office of the clerk, and the practice exposes litigants to the hazards of time bars; for these reasons, such rules are proscribed by this revision. The enforcement of these rules and of the local rules is a role for a judicial officer. A clerk may of course advise a party or counsel that a particular instrument is not in proper form, and may be directed to so inform the court.

Thus in the usual civil case the clerk does not have the discretion as to whether to file a "paper." If there is a problem the clerk may call it to the attention of the court.

Section 2254 Rule 2(e) and Section 2255 Rule 2(d) conflict with Fed. R. Civ. P. 5(e).

Section 2254 Rule 2(e) reads:

> **(e) Return of insufficient petition.** If a petition <u>received</u> by the clerk of a district court does not substantially comply with the requirements of rule 2 or rule 3, it may be returned to the petitioner, if a judge of the court so directs, together with a statement of the reason for its return. The clerk shall retain a copy of the petition.

Section 2255 Rule 2(d) reads:

> **(d) Return of insufficient motion.** If a motion received by the clerk of a district court does not substantially comply with the requirements of rule 2 or rule 3, it may be returned to the movant, if a judge of the court so directs, together with a statement of the reason for its return. The clerk shall retain a copy of the motion.

RECOMMENDATION:

The underlined word "received" be changed to "filed" to bring these rules into conformity with Fed. R. Civ. P. 5(e).

II

Similarly, Section 2254 Rule 3(b) and Section 2255 Rule 3(b) conflict with Fed. R. Civ. P. 5(e).

Section 2254 Rule 3(b) reads:

> **(b) Filing and service.** Upon receipt of the petition and the filing fee, or an order granting leave to the petitioner to proceed in forma pauperis, and having ascertained that the petition appears on its face to comply with rules 2 and 3, the clerk of the district court shall file the petition and enter it on the docket in his office. The filing of the petition shall not require the respondent to answer the petition or otherwise move with respect to it unless so ordered by the court.

Section 2255 Rule 3(b) reads:

> **(b) Filing and service.** Upon receipt of the motion and having ascertained that it appears on its face to comply with rules 2 and 3, the clerk of the district court shall file the motion and enter it on the docket in his office in the criminal action in which was entered the judgment to which it is directed. He shall thereupon deliver or serve a copy of the motion together with a notice of its filing on the United States Attorney of the district in which the judgment under attack was entered. The filing of the motion shall not require said United States Attorney to answer the motion or otherwise move with respect to it unless so ordered by the court.

The underlined portion of each rule conflicts with Fed. R. Civ. P. 5(e)'s requirement that the clerk file the papers. As a practical matter I believe that the practice is for the clerk to file the petition and refer it to a judge for consideration of any defects. The current habeas corpus rules burden the clerk with a decision-making responsibility that should not be placed on a clerk and conflict with the requirements of Fed. R. Civ. P. 5(e).

RECOMMENDATION:

The above underlined portions of Section 2254 Rule 3(b) and Section 2255 Rule 3(b) should be deleted in order to conform to Fed. R. Civ. P. 5(e) and current practice.

III

Section 2254 Rule 5 and Section 2255 Rule 5(a) describe the contents of the answer by the state or U.S. Attorney. Two procedural hurdles were added for the petitioner or movant in both Section 2254 and Section 2255 actions by the Antiterrorism and Effective Death Penalty Act of 1996.

The first hurdle is that a one-year period of limitation applies to both state habeas petitions under 28 U.S.C. § 2254 (see § 2244(d), reproduced in part VI of this outline) and federal motions attacking sentence under 28 U.S.C. § 2255 (see § 2255, ¶6, reproduced in part VI of this outline).

The second hurdle is that the petitioner or movant may not file a second petition or motion attacking sentence without obtaining permission from the appropriate court of appeals. See 28 U.S.C. § 2244(b), reproduced in part VII of this outline, for state habeas and 28 U.S.C. § 2255, ¶8, reproduced in part VII of this outline, for federal motions.

The question has occurred to me whether the rules should affirmatively require the answer to contain information so that the court can determine whether the statute of limitations has run and whether the papers before the court are in fact second petitions. I believe that the sooner the court has all the information that it needs to decide a matter, the better off everyone is.

RECOMMENDATION:

The following language in italics be added at the appropriate place.

Section 2254 Rule 5:

Rule 5. Answer; Contents

The answer shall respond to the allegations of the petition. In addition it shall state whether the petitioner has exhausted his state remedies including any post-conviction remedies available to him under the statutes or procedural rules of the state and including also his right of appeal both from the judgment of conviction and from any adverse judgment or order in the post-conviction proceeding. The answer shall indicate what transcripts (of pretrial, trial, sentencing, and post-conviction proceedings) are available, when they can be furnished, and also what proceedings have been recorded and not transcribed. There shall be attached to the answer such portions of the transcripts as the answering party deems relevant. The court on its own motion or upon request of the petitioner may order that further portions of the existing transcripts be furnished or that certain portions of the non-transcribed proceedings be transcribed and furnished. If a transcript is neither available nor procurable, a narrative summary of the evidence may be submitted. If the petitioner appealed from the judgment of conviction or from an adverse judgment or order in a post-conviction proceeding, a copy of the petitioner's brief on appeal and of the opinion of the appellate court, if any, shall also be filed by the respondent with the answer. *The answer shall state whether a previous federal petition has been filed in this matter and whether the appropriate court of appeals has authorized the filing of this petition. The answer shall also state whether the petition complies with the applicable limitation period.*

Section 2255 Rule 5(a):

Rule 5. Answer; Contents

(a) Contents of answer. The answer shall respond to the allegations of the motion. In addition it shall state whether the movant has used any other available federal remedies including any prior post-conviction motions under these rules or those existing previous to the adoption of the present rules. The answer shall also state whether an evidentiary hearing was accorded the movant in a federal court. *The answer shall state whether the appropriate court of appeals has authorized the filing of a successive motion. The answer shall also state whether the motion complies with the applicable limitations period.*

IV

Section 2254 Rules 6(a) and 8(c) and Section 2255 Rules 6(a) and 8(c) should be amended to refer to 18 U.S.C. § 3006A instead of 18 U.S.C. § 3006A(g).

V

We have discussed the conflict between the fourth paragraph of 28 U.S.C. § 2243 and Section § 2254 Rule 8(c) regarding the timing of a hearing. The 1976 Advisory Committee Notes recognize this conflict. Recognition of the conflict, combined with the Rules Enabling Act, seems to confirm that the timing in Section 2254 Rule 8(c) trumps the time limit in 28 U.S.C. § 2243, ¶4.

RECOMMENDATION:

Do nothing.

VI

"Delayed Petitions or Motions"

State Prisoners

Section 2254 Rule 9(a) provides:

(a) Delayed petitions. A petition may be dismissed if it appears that the state of which the respondent is an officer has been prejudiced in its ability to respond to the petition by delay in its filing unless the petitioner shows that it is based on grounds of which he could not have had knowledge by the exercise of reasonable diligence before the circumstances prejudicial to the state occurred.

Section 2244(d), effective April 24, 1996, provides:

(d)(1) A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of--

(A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;

(B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;

(C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

(D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

(2) The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.

Federal Prisoners

Section 2255 Rule 9(a) provides:

> **(a) Delayed motions.** A motion for relief made pursuant to these rules may be dismissed if it appears that the government has been prejudiced in its ability to respond to the motion by delay in its filing unless the movant shows that it is based on grounds of which he could not have had knowledge by the exercise of reasonable diligence before the circumstances prejudicial to the government occurred.

Section 2255, ¶6, effective April 24, 1996, provides:

> A 1-year period of limitation shall apply to a motion under this section. The limitation period shall run from the latest of--
>
> (1) the date on which the judgment of conviction becomes final;
>
> (2) the date on which the impediment to making a motion created by governmental action in violation of the Constitution or laws of the United States is removed, if the movant was prevented from making a motion by such governmental action;
>
> (3) the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
>
> (4) the date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence.

The Antiterrorism and Effective Death Penalty Act of 1996 provides for a limitation period in both Section 2254 and Section 2255 cases. When I first examined the two Rules 9(a) and compared them to the new limitation statute, I thought that the rules should be amended to reflect the new statute of limitations. I am not so certain any more.

If the petitioner or movant is beyond one year in filing the petition or motion, then the responding attorney should assert the specific limitation period in the answer. If we amend the two Rule 5(a)'s as I have previously suggested, then the answer will almost certainly contain a section discussing the statutory limitation issues.

Under some circumstances I can foresee cases which pend for

years on state appeal and state post-conviction proceedings before reaching the federal system. This time is not counted in the one-year limitation period. However, such a petition timely filed within the 28 U.S.C. § 2244(d) limitation period may run afoul of the "prejudicial" requirements of both Rules 9(a). After thinking it over I suggest that at this time we make no change.

RECOMMENDATION:

Do nothing.

VII

Successive Petitions

State Prisoners

Section 2254 Rule 9(b) provides:

> **(b) Successive petitions.** A second or successive petition may be dismissed if the judge finds that it fails to allege new or different grounds for relief and the prior determination was on the merits or, if new and different grounds are alleged, the judge finds that the failure of the petitioner to assert those grounds in a prior petition constituted an abuse of the writ.

Section 2244(b), effective April 24, 1996, provides:

> (b)(1) A claim presented in a second or successive habeas corpus application under Section 2254 that was presented in a prior application shall be dismissed.
>
> (2) A claim presented in a second or successive habeas corpus application under Section 2254 that was not presented in a prior application shall be dismissed unless--
>
> (A) the applicant shows that the claim relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or
>
> (B)(i) the factual predicate for the claim could not have been discovered previously through the exercise of due diligence; and
>
> (ii) the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

(3)(A) Before a second or successive application permitted by this section is filed in the district court, the applicant shall move in the appropriate court of appeals for an order authorizing the district court to consider the application.

(B) A motion in the court of appeals for an order authorizing the district court to consider a second or successive application shall be determined by a three-judge panel of the court of appeals.

(C) The court of appeals may authorize the filing of a second or successive application only if it determines that the application makes a prima facie showing that the application satisfies the requirements of this subsection.

(D) The court of appeals shall grant or deny the authorization to file a second or successive application not later than 30 days after the filing of the motion.

(E) The grant or denial of an authorization by a court of appeals to file a second or successive application shall not be appealable and shall not be the subject of a petition for rehearing or for a writ of certiorari.

(4) A district court shall dismiss any claim presented in a second or successive application that the court of appeals has authorized to be filed unless the applicant shows that the claim satisfies the requirements of this section.

Federal Prisoners

Section 2255 Rule 9(b) provides:

(b) Successive motions. A second or successive motion may be dismissed if the judge finds that it fails to allege new or different grounds for relief and the prior determination was on the merits or, if new and different grounds are alleged, the judge finds that the failure of the movant to assert those grounds in a prior motion constituted an abuse of the procedure governed by these rules.

Section 2244(a) provides:

(a) No circuit or district judge shall be required to entertain an application for a writ of habeas corpus to inquire into the detention of a person pursuant to a

judgment of a court of the United States if it appears that the legality of such detention has been determined by a judge or court of the United States on a prior application for a writ of habeas corpus, except as provided in Section 2255.

Section 2255, final paragraph, effective 4-24-96, provides:

> A second or successive motion must be certified as provided in section 2244 by a panel of the appropriate court of appeals to contain--
>
> (1) newly discovered evidence that, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that no reasonable factfinder would have found the movant guilty of the offense; or
>
> (2) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable.

The Antiterrorism and Effective Death Penalty Act of 1996 completely changed the procedure and standards for deciding whether to consider successive petitions and motions. The change is so radical that the only solution that I see is to delete both Section 2254 Rule 9(b) and Section 2255 Rule 9(b). If we leave them in these rules they will simply create confusion.

Other than simply tracking the statutory language, I do not believe that amending these rules will have any use.

One thing that might be beneficial would be to refer the prisoner to the procedure used by the appropriate court of appeals. John Rabiej tells me that there is no move to amend the Federal Rules of Appellate Procedure to provide a procedure for this second or successive petition or motion language. Attached is the procedure used by the Court of Appeals for the Fourth Circuit.

We could recommend amending each of the Rules 9(b) to read:

> 9(b) Successive petitions (or motions):
>
> Before a second or successive petition (or motion) is presented to the district court, the applicant shall move in the appropriate court of appeals for an order authorizing the district court to consider the petition (motion).

RECOMMENDATION:

Delete both Rules (b) and possibly replace with a reference to the appellate procedure.

VIII

There may be other changes needed in these rules that I have missed. Most of the rules have not been amended since their creation in 1976. I hope that if we publish these changes for comment any other needed amendments will surface.

Agenda Item III D1

MEMO TO: **Members, Criminal Rules Advisory Committee**

FROM: **Professor D. Schlueter, Reporter**

RE: **Rules Governing Attorney Conduct**

DATE: **March 26, 1998**

Professor Dan Coquillette., Reporter to the Standing Committee, has been working for several years on the issue of whether there ought to be separate rules governing attorney conduct for lawyers practicing before federal courts. The Standing Committee is interested in hearing the views of the various Advisory Committees on the matter.

Professor Coquillette will present the various options for adopting one or more such rules at the April meeting in Washington. Necessary materials will be provided at that time.

TO: Chairs and Reporters, Advisory Committees

FROM: Daniel R. Coquillette
Reporter, Standing Committee

CC: Hon. Alicemarie Stotler, Chair
Standing Committee

DATE: February 11, 1998

RE: Federal Rules of Attorney Conduct

I. Introduction

The Standing Committee is charged by 28 U.S.C. § 2073 (b) "to maintain consistency" among the federal rules and "otherwise promote the interest of justice." Attorney conduct in the federal courts is now governed by literally hundreds of local rules, many of which are inconsistent with each other and with the rules of the relevant state courts. Our studies show a genuine and persistent problem, at least in district and bankruptcy courts. Whether the Congress will subscribe to any additional national rules is an issue to be met in the future, but federal rules regulating attorney conduct already exist in abundance. Moreover, the ABA, through its "Ethics 2000" Project, has expressed initial concern about the relationship between state and federal rules governing attorney conduct, a concern also shared by the Department of Justice and the Conference of Chief Justices, although these three entities may have very different views about appropriate solutions.

II. Status

As you know, the Standing Committee voted at its January 8-9, 1998 meeting to refer the draft Federal Rules of Attorney Conduct to the Advisory Committees for comment. At the suggestion of the Honorable Alicemarie Stotler, Chair, I am writing to indicate what help is expected from the Advisory Committees.

With this memo, you should receive two additional items for circulation to your Committees: 1) a memorandum from me to the Standing Committee of December 1, 1997, describing the fundamental options before the Committees (hereafter "Options Memo") and 2) a draft set of Federal Rules of Attorney Conduct, slightly amended for technical reasons from the set distributed with the Standing Committee Agenda in January (hereafter the "Draft Rules").

You will also recall a discussion about whether such Federal Rules of Attorney Conduct, if adopted through the Rules Enabling Act, would be best enacted as a free

standing set of federal rules, or included as an appendix to the Federal Rules of Civil Procedure. The advice of your committees is being sought on this issue. To aid discussion, a draft of possible amendments to Fed. R. Civ. P. 83 (1) and Fed. R. App. P. 46 is included. In addition, the "Options Memo" includes a possible amendment to Fed. R. Crim. P. 57 (d), at page 3.

Finally, every member of your Committees should have received a copy of the Working Papers of the Committee on Rules of Practice and Procedure: Special Studies of Federal Rules Governing Attorney Conduct (September, 1997). These Working Papers include seven extensive studies prepared by me and by the Federal Judicial Center over a four year period, including studies specially focused on Courts of Appeals (Study V, June 20, 1997) and on Bankruptcy Cases (Study VI, June 20, 1997). The "Options Memo" and the "Draft Rules" are cross-referenced throughout to these Working Papers.

III. What is Expected of the Advisory Committees?

The Standing Committee has been reviewing four different options, and has not yet decided which one to pursue. See Options Memo, pages 1-2. One option is to do nothing. A second is to adopt a single uniform federal rule that adopts the current rules of the relevant state courts as the federal rule in the district courts, with a "choice of law" rule for courts of appeals. This, the so-called "dynamic conformity" option, could be achieved by just adopting Rule 1 of the draft Federal Rules of Attorney Conduct. A third option is to apply state standards to all but a "core" of federal rules narrowly drafted to cover only attorney conduct before federal judges or closely related to federal proceedings. (This could be achieved by adopting all ten of the draft Federal Rules of Attorney Conduct.) A fourth option would be to have even fewer "core" federal rules, and adopt only some of the ten draft rules.

The Standing Committee seeks the advice of your Committees on these fundamental options, set out in the "Options Memo." Further, the Standing Committee requests your Committees to examine the "Draft Rules" in light of the special expertise of your Committee. The purpose is not to ask you to redraft these rules yourself, but rather to point out to the Standing Committee where improvements can be made. My task will then be to coordinate the suggestions from all of the Advisory Committees into new drafts and proposals to be considered at the June, 1998 Standing Committee Meeting.

It is expected that certain Advisory Committees will have much less to do than others. In particular, as Study V (1997) of the Working Papers demonstrates, there are almost no attorney conduct cases in the Courts of Appeals, even though the Courts of Appeals have many inconsistent local rules. Apparently, there is no particular problem with attorney conduct at that level. Thus, the Chair and Reporter of the Appellate Advisory Committee have already suggested that they "wait and see" what is decided

for the district and bankruptcy courts, where the problems are much more serious. This is perfectly reasonable.

Bankruptcy proceedings also present a special situation, as Study VI (1997) of the Working Papers demonstrates. There is much to be said for at least considering separate rules governing attorneys in bankruptcy cases, both because of the importance of the Bankruptcy Code, particularly § 327 (11 U.S.C. § 327 (a)), and because bankruptcy cases can present very different issues for public policy and efficiency. See Study VI (June 20, 1997), Working Papers, 294-332. The Bankruptcy Advisory Committee may prefer to focus on developing their own solutions to balkanized local rules in bankruptcy proceedings, rather than comment extensively on the "Draft Rules" included in the memorandum.

The Evidence Advisory Committee also has a relatively specialized frame of reference. Thus, the Standing Committee will be looking to the Civil and Criminal Rules Advisory Committees for the bulk of the assistance. I will be attending all three of these meetings, and will be available to help in any way.

IV. Specific Requests to Individual Committees

In addition to the general advice sought above, there are some specific areas where specialized help would be welcome.

A. Civil Rules Advisory Committee

Should Fed. R. Civ. P. 83 (c) be amended as proposed by the "Draft Rules," or should the Federal Rules of Attorney Conduct be adopted as a new "free standing" set of federal rules? Are there additional changes in the Fed. R. Civ. P. that should be considered in either case? What if the decision is to adopt only Rule 1 of the "Draft Rules," the so-called state "dynamic conformity" approach? Should that one rule be incorporated within the Fed. R. Civ. P., and, if so, where?

B. Criminal Rules Advisory Committee

Should Fed. R. Crim. P. 57 (d) be amended as suggested by Professor Schlueter at pages 2-3 of the "Options Memo"? Does the Committee have comments on "Draft Rule 10," which is based on the most recent discussion draft of a revised ABA Model Rule 4.2, resulting from extensive negotiation between the Conference of Chief Justices and the Department of Justice? Are there other Draft Rules which should get special attention because of their application in criminal matters? Finally, should any new Federal Rules of Attorney Conduct be "free standing," or incorporated within the Fed. R. Civ. P. as an appendix to Fed. R. Civ. P. 83, or as an appendix to Fed. R. Crim. P. 57 (d), or both? What if only Draft Rule 1 is adopted, the so-called state "dynamic conformity" approach?

C. Appellate Rules Advisory Committee

It is understood that this Committee may take a "wait and see" approach on the fundamental policy issues, as discussed above. Nevertheless, it would be appreciated if the proposed new draft of Fed. R. App. P. 46 be reviewed for technical errors and drafting suggestions.

D. Evidence Rules Advisory Committee

I am already indebted to Professor Capra for several most useful suggestions. It is understood that the expertise of this Advisory Committee is not directly involved with these proposals, although suggestions relating to unwanted or unforeseen effects by the Draft Rules on evidentiary privileges or other evidence matters would be gratefully received.

E. Bankruptcy Rules Advisory Committee

As suggested before, the Bankruptcy Committee may wish to consider a separate system of rules governing bankruptcy proceeding. Such a system is discussed at length in Study VI (June 20, 1997), Working Papers, 294-332. The Federal Judicial Center has volunteered to assist by conducting an empirical study of bankruptcy proceedings similar to that completed for district courts generally last June. See Study VII (June, 1997), Working Papers, 335-410.

Two specific questions remain. First, Study VI indicates that most bankruptcy proceedings are, at least technically, governed by the local rules of the relevant district courts, although those rules are often ignored. Should any adoption of a Federal Rules of Attorney Conduct replacing such district court local rules await resolution of the problems in bankruptcy proceedings? Second, bankruptcy policy is currently under review in a number of forums. Will these reviews impact rules governing attorney conduct?

V. Next Steps

At the meeting on June 18-19 in Santa Fe, the Standing Committee will consider all suggestions and criticism from the Advisory Committees. It may then issue the Federal Rules of Attorney Conduct for public comment, which does not imply ultimate approval, or it may amend the Draft Rules and resubmit them to the Advisory Committees for further work. It could also hold the Draft Rules and await a coordinated package of rules governing attorney conduct in bankruptcy procedures, or input from the ABA's "Ethics 2000" Project (chaired by Chief Justice Norman Veasey), or both.

In any case, the Standing Committee is most grateful for all the help it has already received from you and your Committees, and greatly appreciates your further efforts and suggestions.

FEDERAL RULES OF APPELLATE PROCEDURE

Rule 46. Attorneys

(a) Admission to the Bar.

(1) **Eligibility.** An attorney is eligible for admission to the bar of a court of appeals if that attorney is of good moral and professional character and has been admitted to practice before the Supreme Court of the United States, the highest court of a state, another United States court of appeals, or a United States district court (including the district courts for Guam, the Northern Mariana Islands, and the Virgin Islands).

(2) **Application.** An applicant must file an application for admission, on a court-approved form that contains the applicant's personal statement showing eligibility for membership. The applicant must subscribe to the following oath or affirmation:

> "I,_____, do solemnly swear [or affirm] that I will conduct myself as an attorney and counselor of this court, uprightly and according to law; and that I will support the Constitution of the United States."

(3) **Admission Procedures.** On written or oral motion of a member of the court's bar, the court will act on the application. An applicant may be admitted by oral motion in open court. But unless the court orders otherwise, an applicant need not appear before the court to be admitted. Upon admission, an applicant must pay the clerk the fee prescribed by local rule or court order.

(b) Suspension or Disbarment.

(1) Standard. A member of the court's bar is subject to suspension or disbarment by the court if the member:

(A) has been suspended or disbarred from practice in any other court; or

(B) has failed to comply with the court's standards governing attorney conduct. ~~is guilty of conduct unbecoming a member of the court's bar~~.

(2) Procedure. The member must be given an opportunity to show good cause, within the time prescribed by the court, why the member should not be suspended or disbarred.

(3) Order. The court must enter an appropriate order after the member responds and a hearing (if requested) is held, or after the time prescribed for a response expires, if no response is made.

(c) Discipline. A court of appeals may discipline an attorney who practices before it ~~for conduct unbecoming a member of the bar or~~ for *violating* ~~failure to comply with~~ *the court's standards governing attorney conduct or any of these rules.* ~~any court rule~~. First, however, the court must afford the attorney reasonable notice, an opportunity to show cause to the contrary, and, if requested, a hearing.

(d) Attorney Conduct. *The court's standards governing attorney conduct are as follows:*

(1) Proceedings Before District or Other Court. The standards of attorney conduct of a district or other court govern any act or omission of an attorney connected with proceedings before that court; and

(2) Any Other Act or Omission by Attorney. The standards of the Federal Rules of Attorney Conduct, together with other rules adopted under 28 U.S.C. § 2072, govern any other act or omission by an attorney.

NOTE

The changes to Fed. R. App. P. 46(b) (1) (B) and (c) eliminate the vague "conduct unbecoming" text and replace it with the more specific standards of the new section (d). This permanently resolves the concerns about ambiguity voiced by the Supreme Court in In re Snyder, 472 U.S. 634, 645 (1985). See also Matter of Hendrix, 986 F. 2d. 195, 201 (7th Cir. 1993) and In re Bithony, 486 F. 2d 319, 324 (1st Cir. 1973). See the full discussion in D.R. Coquillette, M. Leary, Working Papers of the Committee on Rules of Practice and Procedure: Special Studies of Federal Rules Governing Attorney Conduct (1997), 235-247. (Hereafter, "Working Papers.")

The new Section (d) eliminates the many inconsistent local standards that have previously governed attorney conduct issues in the courts of appeals. See the extensive studies in Working Papers, supra, 10, 73-77, 235-247, 289-291. Section (d) (1) requires that the court of appeal look to the standards of the relevant district or other court when considering an attorney's act or omission before such courts. Otherwise, the court should look to the new Federal Rules of Attorney Conduct, set out as Fed. R. Civ. P. Appendix 1. The standards of all district courts will also be established by the Federal Rules of Attorney Conduct under the new Fed. R. Civ. P. 83(c), but bankruptcy proceedings may be governed by different standards due to the Bankruptcy Code, particularly 11 U.S.C. § 327 (a). See discussion in Working Papers, supra, 293-333.

It should be noted that, by adopting the Federal Rules of Attorney Conduct, the new Fed. R. App. P. 46 (d) incorporates a choice of law rule, Rule 1 (a) of the Federal Rules of Attorney Conduct, closely modeled after Rule 8.5 (b) (1) of the ABA Model Rules.

FEDERAL RULES OF CIVIL PROCEDURE

(Addition of a new Fed. R. Civ. P. 83(c))

RULE 83: RULES BY DISTRICT COURTS

(c) *ATTORNEY CONDUCT. The standards of attorney conduct in the district courts are established by the Federal Rules of Attorney Conduct, enacted as an Appendix to these rules, together with other rules adopted under 28 U.S.C. § 2072.*

NOTE

The new part (c) of this rule promotes uniformity in the standards of conduct for all attorneys admitted to practice before federal district courts. In the past, the federal district courts relied upon many different local rules to prescribe standards of attorney conduct. See, D.R. Coquillette, *Report on Local Rules Regulating Attorney Conduct in the Federal Courts,* 1-3 (July 5, 1995) (Appendices I and II charted the many different attorney conduct rules in the 94 districts). These local rules took many forms. Some were ambiguously drafted. Others adopted conflicting standards of conduct. Still others adopted standards so vague they may have violated constitutional due process principles. See Report, supra, at 11-23, Appendix IV (Appendix IV contains Professor Linda Mullinex's article entitled, *Multiforum Federal Practice: Ethics and Erie,* in 9 Geo. J. Legal Ethics 89 (1995)); Eli J. Richardson, *Demystifying the Federal Law of Attorney Ethics,* 29 Geo. L. Rev. 137, 151-58 (1994). Finally, some districts failed to incorporate any standards of conduct in their local rules, leaving attorneys to guess the applicable standards. See Report, supra, at 8-11; Richardson, supra, at 152. This rule, applicable in all districts, seeks to eliminate the confusion. See D.R. Coquillette, *Study of Recent Federal Cases (1990-1995) Involving Rules of Attorney Conduct,* Appendix IV (Dec. 1, 1995) (containing: Bruce A. Green, *Whose Rules of Professional Conduct Should Govern Lawyers in Federal Court and How Should the Rules be Created,* 64 Geo. Wash. L. Rev. (1996)); Roger C. Cramton, *Memorandum to Participants of the Special Study Conference,* 3 (Jan. 8, 1996). See also D.R. Coquillette, M. Leary, Working Papers of the Committee on Rules of Practice and Procedure: Special Studies of Federal Rules Governing Attorney Conduct (1997), which contains the reports cited above, among others. (Hereafter, "Working Papers.")

The new part (c) leaves unchanged other uniform federal rules that already govern attorney conduct. See, for example, Fed. R. Civ. P. 11, 26(g), 30(d), and 37(b).

The proposed new Fed. R. App. P. 46 would also institute the Federal Rules of Attorney Conduct in the courts of appeals, but bankruptcy proceedings are not included due to special policy concerns and the provisions of the Bankruptcy Code, especially § 327. See 11 U.S.C. § 327(a). See D.R. Coquillette, Study of Recent Bankruptcy Cases (1990-1996) Involving Rules of Attorney Conduct, May 11, 1997, set out in Working Papers, supra, 293-333.

Appendix

Federal Rules of Attorney Conduct

RULE 1. GENERAL RULE

(a) **Standards for Attorney Conduct.** Except as provided by subdivision (c) of this rule, or a rule adopted in accordance with 28 U.S.C. §§ 2072, or a rule of the Federal Rules of Attorney Conduct, the standards for attorney conduct for United States district courts and courts of appeals are as follows:

(1) **Conduct in Proceedings Before District Court.** For conduct in connection with a case or proceeding pending in a district court before which a lawyer has been admitted to practice (either generally or for purposes of that proceeding), the standards to be applied must be the standards of attorney conduct currently adopted by the state authority responsible for adopting rules of attorney conduct of the state in which the district court sits; and

(2) **All Other Conduct.** For any other act or omission by an attorney admitted to practice before a district court or court of appeals, the standards for attorney conduct are:

(A) if the attorney is licensed to practice only in one state, the rules of that state as currently adopted by its highest court, or

(B) if the attorney is licensed to practice in more than one state, the rules of the state in which the attorney principally practices as currently adopted by its highest court; but if particular conduct has its predominant effect in another state in which the attorney is licensed to practice, then the rules of that state as currently adopted by its highest court.

(3) **Violation as Misconduct.** If an attorney violates these rules — whether individually or in concert with others, and whether or not the violation occurred in the course of the attorney-client relationship — the violation constitutes misconduct and is grounds for discipline.

(b) **Sanctions.** For misconduct defined in the Federal Rules of Attorney Conduct, for good cause shown, and after notice and opportunity to be heard, an attorney admitted to practice before a district court or court of appeals may be disbarred, suspended, reprimanded, or subjected to any other disciplinary action that the court deems appropriate. The same misconduct may also subject an attorney to the disciplinary authority of the state or states where the attorney is admitted to practice.

(c) **Applicability.** Rules 2-10 of the Federal Rules of Attorney Conduct apply only in a case or proceeding pending in a United States district court or court of appeals. Rule 1(a) and (b) and Rules 2-10 of the Federal Rules of Attorney Conduct do not apply in a case or proceeding pending in the district court within the jurisdiction conferred by 28 U.S.C. §§ 1334 or 158, or in a case or proceeding referred to a bankruptcy judge under 28 U.S.C. § 157(a), unless otherwise provided by the Federal Rules of Bankruptcy Procedure or by local bankruptcy rules promulgated in accordance with F.R. Bankr. P. 9029.

NOTE

This rule is based on Model Local Rule IV of the Federal Rules of Disciplinary Enforcement as recommended by the Committee on Court Administration and Case Management in 1978 and ABA Model Rule of Professional Conduct 8.5 governing choice of law for disciplinary authority. See D.R. Coquillette, *Report on Local Rules Regulating Attorney Conduct in the Federal Courts,* Appendix V (July 5, 1995) (original version of Rule IV of the Federal Rules of Disciplinary Enforcement), republished in D.R. Coquillette, M. Leary, Working Papers of the Committee on Rules of Practice and Procedure: Special Studies of Federal Rules Governing Attorney Conduct (1997), 1-95. (Hereafter, "Working Papers.")

The words "case or proceeding pending before" a court mean any matter which is actually before such a court, or is certain to be before such a court.

The Federal Rules of Attorney Conduct were not designed to govern bankruptcy cases and proceedings. The Committee on Rules of Practice and Procedure recognizes that there may be situations in which standards for attorney conduct in bankruptcy cases and proceedings should or must differ in some respects from standards applicable in other federal cases. First, there are statutory provisions that govern aspects of attorney conduct in bankruptcy cases, but have no

application in other federal litigation. The Bankruptcy Code contains several provisions that govern attorney conduct, such as the requirement that an attorney for a trustee or committee be "disinterested," limitations on compensation, and a prohibition against sharing compensation. See 11 U.S.C. §§ 327-331, 504. Second, the Federal Rules of Bankruptcy Procedure contain several rules governing aspects of attorney conduct, such as Rule 2014 on disclosures of relationships with parties in interest.

Rule 1(c) renders the Federal Rules of Attorney Conduct generally inapplicable in bankruptcy cases and proceedings. It is anticipated that the Advisory Committee on Bankruptcy Rules will consider formulating additional standards for attorney conduct applicable in bankruptcy cases and proceedings if, by local bankruptcy rule, the attorney conduct standards of the district court are made applicable.

RULE 2. CONFIDENTIALITY OF INFORMATION

(a) A lawyer must not reveal information relating to representation of a client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation, for disclosures required by law or court order, and except as stated in paragraph (b).

(b) A lawyer may reveal, and to the extent required by Federal Rules of Attorney Conduct 7 and 9(b) must reveal, such information to the extent the lawyer reasonably believes necessary:

(1) to prevent the client from committing a criminal or fraudulent act that the lawyer believes is likely to result in death or substantial bodily harm, or in substantial injury to another's financial interests or property; or

(2) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client.

NOTE

This rule adopts ABA Model Rule of Professional Conduct 1.6 almost in its entirety. There is one significant exception. The rule modifies Rule 1.6 to permit disclosures of confidential information in order to prevent a fraudulent act which would result in substantial injury to the financial interests or property of another. (The ABA Model Rule 1.6 only permits such disclosure in the cases of criminal acts "likely to result in imminent death or substantial bodily harm.") The rule was modified to reflect prevailing state views which permit this type of disclosure. Thirty-six states permit disclosure under these circumstances, and five states mandate disclosure in these circumstances. By permitting disclosure, the federal rule comports with or avoids conflict with forty-one jurisdictions, and follows the trend in the most recent state adoption of the Model Rules, such as in Massachusetts, effective Jan. 1, 1998. See Roger C. Cramton, *Memorandum to Participants of the Special Study Conference, 2* (Jan. 8, 1996). In addition, an exception for disclosures "required by law or court order" has been added. See ABA Code of Professional Responsibility DR-4-101 (C) (2). Finally, the rule

provides a reference to Federal Rules of Attorney Conduct 7 and 9 which are based on the ABA Model Rules of Professional Conduct 3.3 and 4.1 respectively. This reference emphasizes that Federal Rule of Attorney Conduct 2(b) is not the only provision of these rules which deals with disclosure of information and that in some circumstances disclosure of such information may be required and not merely permitted.

Small stylistic changes have been made in all of the ABA Model Rules, even those adopted without substantive changes. For example, in Rule 2 the ABA Model Rule 1.6 (a) uses "shall," and the Federal Rule 2(a) uses "must." This is to comport with uniform federal drafting guidelines. See Bryan A. Garner, Guidelines for Drafting and Editing Court Rules (1997), 29.

While the "Comments" published with the ABA Model Rules have not been formally adopted, even for those federal rules that closely follow the ABA models, they are useful as "guides to interpretation." See ABA Model Rules, "Preamble," Sec. 21, in Model Rules of Professional Conduct (1998 ed.), 8.

RULE 3. CONFLICT OF INTEREST: GENERAL RULE

(a) A lawyer must not represent a client if that representation will be directly adverse to another client, unless:

(1) the lawyer reasonably believes the representation will not adversely affect the relationship with the other client; and

(2) each client consents after consultation.

(b) A lawyer must not represent a client if that representation may be materially limited by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interests, unless:

(1) the lawyer reasonably believes the representation will not be adversely affected; and

(2) the client consents after consultation; when representation of multiple clients in a single matter is undertaken, the consultation must include explanation of the implications of the common representation and the advantages and risks involved.

NOTE

This rule adopts ABA Model Rule of Professional Conduct 1.7 in its entirety, with small stylistic changes. Over the last five years, the largest number of federal disputes involving attorney conduct concerned conflict of interest rules. See Daniel R. Coquillette, *Study of Recent Federal Cases (1990-95) Involving Rules of Attorney Conduct,* 3 (Dec. 1, 1995) (forty-six percent of reported federal disputes involved conflict of interest rules). See Working Papers, supra, 100-102, 107-116, 189-210.

This Rule, and Rules 5, 6 and 8, do not prevent a trial judge from disqualifying an attorney when necessary to protect the integrity of a judicial proceeding, despite client consent to the representation. See Wheat v. United States, 486 U.S. 153 (1988).

RULE 4. CONFLICT OF INTEREST: PROHIBITED TRANSACTIONS

(a) A lawyer must not enter into a business transaction with a client or knowingly acquire an ownership, possessory, security, or other pecuniary interest adverse to a client unless:

(1) the transaction and terms on which the lawyer acquires the interest are fair and reasonable to the client and are fully disclosed and transmitted in writing to the client in a manner that can be reasonably understood by the client;

(2) the client is given reasonable opportunity to seek the advice of independent counsel in the transaction; and

(3) the client consents in writing.

(b) A lawyer must not use information relating to representation of a client to the client's disadvantage unless the client consents after consultation, except as permitted or required by Federal Rules of Attorney Conduct 2 or 7.

(c) A lawyer must not prepare an instrument giving the lawyer or a person related to the lawyer as parent, child, sibling, or spouse any substantial gift from a client, including a testamentary gift, except where the client is related to the donee.

(d) Until the representation of a client ends, a lawyer must not make or negotiate an agreement giving the lawyer literary or media rights to a portrayal or account based in substantial part on information relating to the representation.

(e) A lawyer must not provide financial assistance to a client in connection with pending or contemplated litigation, except that:

(1) a lawyer may advance court costs and expenses of litigation, the repayment of which may be contingent on the outcome of the matter; and

(2) a lawyer representing an indigent client may pay court costs and expenses of litigation on the client's behalf.

(f) A lawyer must not accept compensation for representing a client from one other than the client unless:

(1) the client consents after consultation;

(2) there is no interference with the lawyer's independence of professional judgment or with the attorney-client relationship; and

(3) information relating to the representation of a client is protected as required by Federal Rules of Attorney Conduct 2, 7, and 9.

(g) A lawyer who represents two or more clients must not participate in making aggregate settlement of claims of or against the clients, or in a criminal case an aggregated agreement on guilty or nolo contendere pleas, unless each client consents after consultation, including disclosure of the existence and nature of all the claims or pleas involved and of the participation of each person in the settlement.

(h) A lawyer must not make an agreement prospectively limiting the lawyer's liability to a client for malpractice unless permitted by law and the client is independently represented in making the agreement. Nor may a lawyer settle a claim for such liability with an unrepresented person or former client without first advising that person in writing to seek independent representation.

(i) A lawyer related to another lawyer as parent, child, sibling, or spouse must not represent a client whose interests in that matter are directly adverse to a person whom the lawyer knows is represented by the other lawyer unless the client consents after a consultation about the relationship.

(j) A lawyer must not acquire a proprietary interest in a claim or in the subject matter of litigation that the lawyer is conducting for a client, except that the lawyer may:

(1) acquire a lien granted by law to secure the lawyer's fee or expenses; and

(2) contract with a client for a reasonable contingent fee in a civil case.

NOTE

This rule adopts ABA Model Rule of Professional Conduct 1.8 in its entirety except for small stylistic changes and cross references to these rules. Again, over the last five years, the largest category of federal disputes involving attorney conduct centered on conflict of interest rules. See Daniel R. Coquillette, *Study of Recent Federal Cases (1990-95) Involving Rules of Attorney Conduct,* 3 (Dec. 1, 1995) (forty-six percent of reported federal disputes involved conflict of interest rules). See Working Papers, supra, 100-102, 107-116. DR 4-101(B)(2) and (3), DR 5-103, DR 5-104, DR 5-106, DR 5-107(A) and (B), DR 5-108 and DR 6-102 are the corresponding provisions of the ABA Code of Professional Responsibility. See Working Papers, supra, 115-116, 199-200, 205-210.

RULE 5. CONFLICT OF INTEREST: FORMER CLIENT

(a) A lawyer who has formerly represented a client in a matter must not later represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the former client's interests unless the former client consents after consultation.

(b) (1) Except as noted in (b)(2), a lawyer must not knowingly represent a person in the same or a substantially related matter in which a firm with which the lawyer was formerly associated had previously represented a client:

(A) whose interests are materially adverse to that person; and

(B) about whom the lawyer had acquired information protected by Federal Rules of Attorney Conduct 2 and 5(c), that is material to the matter.

(2) The former client may, after consultation, consent to the type of representation described in (b)(1).

(c) A lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter must not later:

(1) use information relating to the representation to the disadvantage of the former client except as Federal Rule of Attorney Conduct 2 and 7 would permit or require with respect to a client, or when the information has become generally known; or

(2) reveal information relating to the representation except as Federal Rule of Attorney Conduct 2 or 7 would permit or require with respect to a client.

NOTE

This rule adopts the substance of ABA Model Rule of Professional Conduct 1.9 in its entirety except for the cross references to these rules. DR 4-101(B) and (C) and DR 5-105(C) are the corresponding provisions of the ABA Code of

Professional Responsibility. See Working Papers, supra, 100-102, 107-116, 189-210.

RULE 6. IMPUTED DISQUALIFICATION: GENERAL RULE

(a) While lawyers are associated in a firm, they must not knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Federal Rules of Attorney Conduct 4, 5(c), or 6.

(b) When a lawyer has terminated an association with a firm, the firm is not prohibited from later representing a person with interests materially adverse to those of a client represented by the formerly associated lawyer, and not currently represented by the firm, unless:

(1) the matter is the same or substantially related to that in which the formerly associated lawyer represented the client; and

(2) any lawyer remaining in the firm has information that is both protected by Federal Rules of Attorney Conduct 2 and 5(c), and material to the matter.

(c) A disqualification prescribed by this rule may be waived by the affected client under the conditions stated in Federal Rule of Attorney Conduct 3.

NOTE

This rule adopts ABA Model Rule of Professional Conduct 1.10 almost in its entirety except for small stylistic changes and cross references to these rules. The rule does not include a federal rule similar to ABA Model Rule 2.2, dealing with the lawyer as an intermediary. No recent federal cases have involved ABA Model Rule 2.2, and the matter should be left to state rules. See Daniel R. Coquillette, *Study of Recent Federal Cases (1990-95) Involving Rules of Attorney Conduct,* 3 (Dec. 1, 1995) (no reported federal disputes involve Model Rule 2.2). See Working Papers, supra, 189-210. DR 5-105(D) is the corresponding provision of the ABA Code of Professional Responsibility. See Working Papers, supra, 115-116, 199-200, 209-210.

RULE 7. CANDOR TOWARD THE TRIBUNAL

(a) A lawyer must not knowingly:

(1) make a false statement of material fact or law to a tribunal;

(2) fail to disclose a material fact to a tribunal when disclosure is necessary to avoid assisting a criminal or fraudulent act by the client;

(3) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the client's position and not disclosed by opposing counsel; or

(4) offer evidence that the lawyer knows to be false. If a lawyer has offered material evidence and comes to know of its falsity, the lawyer must take reasonable remedial measures.

(b) The duties stated in paragraph (a) continue to the conclusion of the proceeding, and apply even if compliance requires disclosure of information otherwise protected by Federal Rule of Attorney Conduct 2.

(c) A lawyer may refuse to offer evidence that the lawyer reasonably believes is false.

(d) In an ex parte proceeding, a lawyer must inform the tribunal of all known material facts that will enable the tribunal to make an informed decision, even if the facts are adverse.

NOTE

This rule adopts ABA Model Rule of Professional Conduct 3.3 in its entirety except for small stylistic changes and a cross reference to these rules. To preserve the integrity of the court proceedings, candor toward the tribunal is a matter of significant federal interest, and as such, requires a single uniform standard applicable in all federal courts. See Roger C. Cramton, *Memorandum to Participants of the Special Study Conference,* 2-3 (Jan. 8, 1996). The rule is also needed in continuing Federal Rules of Attorney Conduct Rule 2 and 4, where it is cross-cited. DR 7-102 and DR 7-106(B) are the corresponding provisions of

the ABA Code of Professional Responsibility. See Working Papers, supra, 100-102, 107-116, 189-210.

RULE 8. LAWYER AS WITNESS

(a) A lawyer must not act as an advocate at a trial in which the lawyer is likely to be a necessary witness except where:

(1) the testimony relates to an uncontested issue;

(2) the testimony relates to the nature and value of legal services rendered in the case; or

(3) the lawyer's disqualification would work a substantial hardship on the client.

(b) A lawyer may act as advocate in a trial in which another lawyer in the lawyer's firm is likely to be called as a witness unless precluded from so doing by Federal Rules of Attorney Conduct 3 or 5.

NOTE

This rule adopts ABA Model Rule of Professional Conduct 3.7 in its entirety, except for small stylistic changes and a cross reference to these rules. Between 1990-1995, ten percent of reported federal disputes involve lawyer as witness rules. See Daniel R. Coquillette, *Study of Recent Federal Cases (1990-95) Involving Rules of Attorney Conduct,* 3 (Dec. 1, 1995). See Working Papers, supra, 100-102, 107-116, 189-210. This trend dropped to five percent between July 1, 1995 and March 23, 1996, id., 196, but the 1990-1996 culminated totals are still high at 49 cases, or more than nine percent. Id., 203. Thus, a federal lawyer as witness rule is needed to create uniform standards of conduct for attorneys practicing in the federal courts. The corresponding provisions of the ABA Code of Professional Responsibility are DR 5-101(B) and DR 5-102. See Working Papers, supra, 115-116, 199-200, 209-210.

RULE 9. TRUTHFULNESS IN STATEMENTS TO OTHERS

In the course of representing a client a lawyer must not knowingly:

(a) make a false statement of material fact or law to a third person; or

(b) fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting in a criminal or fraudulent act by a client, unless disclosure is prohibited by Federal Rule of Attorney Conduct 2.

NOTE

This rule adopts ABA Model Rule of Professional Conduct 4.1 in its entirety except for a small stylistic change and a cross reference to these rules. This rule is rarely invoked in federal court proceedings, but it is a central rule of conduct. See Working Papers, supra, 203. See Roger C. Cramton, Memorandum to Participants of the Special Study Conference (Jan. 8, 1996). It is also needed in applying Rule 2, supra, where it is cross-cited. The corresponding provision of the ABA Model Code of Professional Responsibility is DR 7-102. See Working Papers, supra, pp. 116, 210.

RULE 10. COMMUNICATIONS WITH PERSONS REPRESENTED BY COUNSEL

(a) **General Rule.** A lawyer who is representing a client in a matter must not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by:

(1) constitutional law, statute, or an agency regulation having the force of law;

(2) a decision or a rule of a court of competent jurisdiction;

(3) a prior written authorization by a court of competent jurisdiction obtained by the lawyer in good faith; or

(4) paragraph (b) of this rule.

(b) **Rules Relating to Government Lawyers Engaged in Civil or Criminal Law Enforcement.** A government lawyer engaged in a criminal or civil law enforcement matter, or a person acting under the lawyer's direction, may communicate with a person known by the government lawyer to be represented by a lawyer in the matter if:

(1) the communication occurs prior to the person's having been arrested, charged in a criminal case, or named as a defendant in a civil law enforcement proceeding brought by the governmental agency that seeks to engage in the communication, and the communication relates to the investigation of criminal activity or other unlawful conduct; or

(2) the communication occurs after the represented person has been arrested, charged in a criminal case, or named as a defendant in a civil law enforcement proceeding brought by the governmental agency that seeks to engage in the communication, and the communication is:

(A) made in the course of any investigation of additional, different, or ongoing criminal activity or other unlawful conduct; or

(B) made to protect against a risk of death or bodily harm that the government lawyer reasonably believes may occur; or

(C) made at the time of the arrest of the represented person and after he or she is advised of his or her rights to remain silent and to counsel and voluntarily and knowingly waives those rights; or

(D) initiated by the represented person, either directly or through an intermediary, if prior to the communication the represented person has given a written or recorded voluntary and informed waiver of counsel for that communication.

(c) Organizations as Represented Persons.

(1) When the represented "person" is an organization, an individual is "represented" by counsel for the organization if the individual is not seperately represented with respect to the subject matter of the communication, and

(A) with respect to a communication by a government lawyer in a civil or criminal law enforcement matter, is known by the government lawyer to be a current member of the control group of the represented organization; or

(B) with respect to a communication by a lawyer in any other matter, is known by the lawyer to be

(i) a current member of the control group of the represented organization; or

(ii) a representative of the organization whose acts or omissions in the matter may be imputed to the organization under applicable law; or

(iii) a representative of the organization whose statements under applicable rules of evidence would have the effect of binding

the organization with respect to proof of the matter.

(2) The term "control group" means the following persons (A) the chief executive officer, chief operating officer, chief financial officer, and chief legal officer of the organization; and (B) to the extent not encompassed by the foregoing, the chair of the organization's governing body, president, treasurer, and secretary, and a vice-president or vice-chair who is in charge of a principal business unit, division, or function (such as salaries, administration, or finance) or performs a major policy making function for the organization; and (C) any other current employee or official who is known to be participating as a principal decision maker in the determination of the organization's legal position in the matter.

(d) **Limitations on Communications.** When communicating with a represented person pursuant to this Rule, a lawyer must not:

(1) inquire about information regarding litigation strategy or legal arguments for counsel, or seek to induce the person to forego representation or disregard the advice of the person's counsel; or

(2) engage in negotiations of a plea agreement, settlement, statutory or non-statutory immunity agreement, or other disposition of actual or potential criminal charges or civil enforcement claims, or sentences or penalties with respect to the matter in which the person is represented by counsel unless such negotiations are permitted by paragraph (a) or (b) (2) (D).

NOTE

This rule is based on the tentative outcome of negotiations between the Department of Justice and the Conference of Chief Justices, "Discussion Draft, December 19, 1997," with the addition of some technical stylistic changes. As such, it differs from the comparable ABA rule, ABA Model Rule 4.2, in many respects. See ABA Formal Opinion 97-408 (1997); ABA Formal Opinion 95-396 (1995) and ABA Informal Opinion 1377 (1997). This rule, as negotiated, has an extensive "Comment." See "Discussion Draft, December 19, 1997," "Comment," pp. 1-6.

The Conference of Chief Justices considered this "Discussion Draft" at its regular Midwinter Meeting on January 25-29, 1998. At the request of officials of the American Bar Association and others, the Conference postponed the matter to its next meeting, scheduled for August 2-6, 1998. See Memorandum of February 6, 1998 from Chief Justice Thomas R. Phillips, President, Conference of Chief Justices. Obviously, if the Conference of Chief Justices, the Department of Justice, and the American Bar Association can agree on a draft rule, it will be the presumptive candidate for the final version of Rule 10.

From 1990-1995, twelve percent of reported federal cases involve rules governing communications with represented persons. See Daniel R. Coquillette, *Study of Recent Federal Cases* (1990-95) *Involving Rules of Attorney Conduct*, 3 (Dec. 1, 1995). See Working Papers, supra, 99-211. This trend increased between July 1, 1995 and March 23, 1996, to sixteen percent. Id., 196. Thus, a federal rule is needed to create uniform standards of conduct for attorneys practicing in the federal courts. The corresponding provision of the ABA Code of Professional Responsibility is DR 7-104. See id., 115-116, 199-200, 209-210.

Agenda Item III P2

MEMO TO: Members, Criminal Rules Advisory Committee

FROM: Professor Dave Schlueter, Reporter

RE: Local Rules: Proposed Change to Rule 57; Uniform Effective Date for Local Rules, Misc.

DATE: March 28, 1998

The Standing Committee at its January 1998, meeting voted to place on the Advisory Committee agendas, the question of whether there should be a uniform effective date for local rules. One idea suggested at that meeting was that all local rules should be effective on January 1st of each year, unless some emergency existed for making them effective on some other date.

The issue before this Committee is whether the idea of a uniform date is a worthy goal and if so, what that date should be. While the Committee could certainly propose specific language in Rule 57 for doing so, the final language will be the result of working out whatever differences may exist in the various federal rules. I propose that Rule 57 be amended as follows:

Rule 57. Rules by District Courts

* * * * *

(c) EFFECTIVE DATE AND NOTICE. A local rule so adopted shall take effect on January 1 of the year following adoption of the rule, unless otherwise ordered by the district court to meet a special need, ~~upon the date specified by the district court~~ and shall remain in effect unless amended by the district court....

Some members of the Standing Committee are clearly concerned about the proliferation of local rules and the question of whether sanctions may be imposed for counsel's failure to follow a local rule of form. At that meeting there was also some discussion regarding whether it might be wise to include language which would prevent a local rule from being enforced until it had been received by the Administrative Office of the United States Courts.

I am also attaching other matters relating to the Local Rules project.

Memorandum

TO: Honorable Alicemarie Stotler, Chair
Committee on Rules of Practice and Procedure

FROM: Mary P. Squiers

RE: Status on Uniform Renumbering of Local Rules

DATE: January 1998

The Judicial Conference authorized this Committee to undertake a study of local rules of the district courts at its September 1984 meeting. As a result, the Local Rules Project was formed. During its initial activity, this Committee noted that there was no uniform numbering system for federal district court local rules relating to civil practice. Since there are many advantages of such a system, *e.g.*, to help the bar in locating rules applicable to a particular subject and to ease the incorporation of local rules into indexing services and computer services, the Conference approved and urged each district court to adopt a uniform numbering system for its local rules addressing civil practice, patterned upon the Federal Rules of Civil Procedure, at its September 1988 meeting. Report of the Judicial Conference, 103 (Sept. 1988).

Amendments were made to the Federal Rules of Appellate, Bankruptcy, Civil, and Criminal Procedure, effective December 1, 1995, which provide that all local rules of court "must conform to any uniform numbering system prescribed by the Judicial Conference." (*See* Fed.R.App.P. 47, Fed.R.Civ.P. 83, Fed.R.Crim.P. 57, and Fed.R.Bank.P. 8018 and 9029.) On March 12, 1996, the Judicial Conference approved the recommendation of this Committee to adopt a local rule numbering system which corresponds to the local rules' respective Federal Rules. The Judicial Conference also set April 15, 1997 as the date of compliance with these numbering systems.

In preparation for the June 1997 meeting of this Committee, I reviewed the table of contents of the local rules of ninety of the ninety-four district courts on WestLaw to determine whether the jurisdictions met this April 15 deadline. (The local rules for the Districts of Guam, the Virgin

Islands, Puerto Rico, and the Northern Mariana Islands were unavailable.) At that time and out of the ninety sets of local rules examined, 41 per cent (37 courts) were numbered in compliance with the Judicial Conference recommendation and the Federal Rules. The other 59 per cent (53 courts) had not yet been renumbered.

In preparation for this meeting, I again reviewed the table of contents of the local rules of the ninety district courts on WestLaw to determine whether more jurisdictions had renumbered their rules. As of last month, compliance had increased, but there are still a substantial number of districts courts who have not renumbered. At present, 58 per cent (52 courts) were numbered in compliance with the Federal Rules. (Please see Appendix A, attached, for a list of those district courts that have numbered their local rules.) The other 42 per cent (38 courts) had not renumbered. (Please see Appendix B, attached, for a list of those districts that have not yet renumbered their local rules.)

Appendix A

Jurisdictions With Local Rules in Conformance with the Judicial Conference Recommendation

N.D.Ala.	D.Idaho	D.Minn.	N.D.Okla.
M.D.Ala.	C.D.Ill.	D.Neb.	W.D.Okla.
S.D.Ala.	N.D.Ind.	D.Nev.	E.D.Pa.
D.Alaska	S.D.Ind..	D.N.H.	M.D.Pa.
N.D.Cal.	N.D.Iowa	D.N.J.	W.D.Pa.
E.D.Cal..	S.D.Iowa	D.N.M.	D.S.Car.
S.D.Cal.	D.Kan.	N.D.N.Y.	D.S.Dak.
D.Colo.	E.D.La.	W.D.N.Y.	E.D.Tenn.
D.Del.	M.D.La.	M.D.N.Car.	W.D.Tenn.
N.D.Fla.	W.D.La.	D.N.Dak.	W.D.Tex.
S.D.Fla.	D.Maine	N.D.Ohio	E.D.Wash.
M.D.Ga.	D.Mass.	S.D.Ohio	W.D.Wis.
S.D.Ga.	E.D.Mich.	E.D.Okla.	D.Wyo.

As of December 19, 1997

Appendix B

Jurisdictions With Local Rules that Do Not Conform to the Judicial Conference Recommendation

D.Ariz.	D.Haw.	S.D.Miss.	D.Ore.	E.D.Va.
E.D.Ark.	N.D.Ill.	E.D.Mo.	D.R.I.	W.D.Va.
W.D.Ark.	S.D.Ill.	W.D.Mo.	M.D.Tenn.	W.D.Wash.
C.D.Cal.	E.D.Ky.	D.Mont.	E.D.Tex.	N.D.W.Va.
D.Conn.	W.D.Ky.	E.D.N.Y.	N.D.Tex.	S.D.W.Va.
D.D.C.	D.Md.	S.D.N.Y.	S.D.Tex.	E.D.Wis.
M.D.Fla.	W.D.Mich.	E.D.N.Car.	D.Utah	
N.D.Ga.	N.D.Miss.	W.D.N.Car.	D.Vt.	

As of December 19, 1997

Agenda Item III D3

MEMO TO: **Members, Criminal Rules Advisory Committee**

FROM: **Professor Dave Schlueter, Reporter**

RE: **Electronic Filing of Comments on Proposed Rules**

DATE: **March 28, 1998**

Attached are materials on a proposal to accept electronic comments on rules published for public comment.

This matter is on the agenda for the April meeting in Washington

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AUSTIN W. LEWIS (1910-1974)

SCOTT C. SEILER
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New Orleans, Louisiana
March 11, 1998

To: Advisory Committee Chairs
Advisory Committee Reporters

From: Gene W. Lafittte

Re. Comments on Proposed Rules via the Internet

Attached is a copy of a memorandum to me from John Rabiej, dated October 31, 1997, concerning the capability of the Rules Committee Support Office to receive public comments on proposed rule changes directly on the Internet via e-mail. You will note that in the memorandum Mr. Rabiej mentioned arguments in favor of electronic comments, and arguments against comments via e-mail. Judge Stotler requested that the Technology Subcommittee of the Standing Rules Committee consider the proposal and provide its recommendations to the Advisory Committees for consideration at their Spring, 1998 meetings. It is contemplated that the Advisory Committees could then respond to the Subcommittee with their views, and the Subcommittee, with the benefit of those responses, will then make a final recommendation to the Standing Committee when the matter is submitted for decision at its meeting in June. The Technology Subcommittee has considered the issue, and this is to report its recommendations at this point.

The Technology Subcommittee takes the view that the use of e-mail to submit comments should be permitted, at least on a trial basis, in order to make the rule-making process as open and accessible as possible. Our recommendation is that e-mail comments be allowed for a trial period of two years, without any requirement that the e-mail comments be summarized by reporters. We suggest that at the end of the trial period the use of e-mail comments be reviewed to determined whether they should be a permanent part of the rule-making process. We also suggest that, if feasible, the Rules Support Office continue to acknowledge each comment, by e-mail, and that the Support Office make available on the Internet a generic explanation of action of the Advisory Committees in response to comments received

If you have any questions or comments concerning the Technology Subcommittee recommendation, please feel free to call.

GWL:ed
Attachment to all recipients

cc: The Honorable Alicemarie H. Stotler
Liaison Members to Technology Subcommittee
Professor Daniel R. Coquillette
Mr. John K. Rabiej

128449:LAFITGE

LEONIDAS RALPH MECHAM
Director

CLARENCE A. LEE, JR.
Associate Director

ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS

WASHINGTON, D.C. 20544

JOHN K. RABIEJ
Chief
Rules Committee Support Office

October 31, 1997

MEMORANDUM TO GENE W. LAFITTE

SUBJECT: *Receipt of Comments on the Internet*

The proposed amendments to the federal rules, which were published for comment on August 15, 1997, are located on the Judiciary's Home Page on the Internet <http://www.uscourts.gov>. My office now has the capability to receive public comments on the proposed amendments directly on the Internet via E-mail. An E-mail address can be established at my office and we could receive all electronic comments, reproduce them, and circulate hard copies to each committee member.

Although we considered receiving comments electronically, a final decision was deferred. We need now to reach a consensus among our advisory rules committees on this issue. As we earlier discussed, your subcommittee could review this matter and report back to their respective committees the subcommittee's conclusions and recommendations. Hopefully the advisory rules committees will be able to agree on the subcommittee's proposals so that we can present the Standing Rules Committee with a uniform recommendation.

We have identified several arguments for and against the proposal, which may help the subcommittee's deliberations.

<u>Arguments in Favor of Electronic Comments</u>

- Electronic submission of comments would be consistent with the rules committees' policy of reaching out to the bar and public and informing them of proposed rules changes and encouraging public input.

- Electronic submission of comments meets recommendation No. 5 of the Standing

Committee's Self-Study Plan, which recommends to the Administrative Office that: "Electronic technologies should be used to promote rapid dissemination of proposals, receipt of comments, and the work of the rules committees." The text of the plan includes a specific recommendation that "Persons should be permitted to lodge their comments online for collection and transmittal to the Advisory Committee."

Arguments Against Electronic Comments

- Comments via E-mail are less likely to be as well thought out as comments submitted in writing, and many may not be serious.

- Under the Judicial Conference rulemaking procedures, each reporter must "prepare a summary of the written comments received and the testimony presented at the public hearings." Summarizing all Internet comments may be burdensome. Online comments may be viewed as non-written comments, or a clear disclaimer could be included on the Internet Home Page stating that all electronic comments will be circulated to each committee member, but will not be included in the summary of comments. But such treatment may perceived as establishing a "second-class" category of comments.

- Although not required by the Judicial Conference rulemaking procedures, my office has acknowledged each comment and followed it up with a communication explaining the advisory committee's response. Continuing to respond to each electronic comment would probably be impossible, but we could provide a generic explanation of the committee's actions and place it on the Internet.

John K. Rabiej

Agenda Item IV D4

MEMO TO: Members, Criminal Rules Advisory Committee

FROM: Professor Dave Schlueter, Reporter

RE: Consideration of Amendments by Civil Rules and Evidence Advisory Committees Which May Impact on Rule 27 (Proof of Official Record).

DATE: March 27, 1998

Judge Stotler, Chair of the Standing Committee, has referred the attached materials to the Advisory Committee for its consideration. As those materials indicate, the Evidence Committee is considering whether Civil Rule 44 is redundant with the Evidence rules.

Because Criminal Rule 27 indicates that proof of an official record, etc. may be proved in the same manner as in civil actions, this Committee may have an interest in whatever amendment is made to Civil Rule 44.

This matter is on the agenda for the April meeting, more as a matter of information at this point.

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

ALICEMARIE H. STOTLER
CHAIR

PETER G. McCABE
SECRETARY

CHAIRS OF ADVISORY COMMITTEES

WILL L. GARWOOD
APPELLATE RULES

ADRIAN G. DUPLANTIER
BANKRUPTCY RULES

PAUL V. NIEMEYER
CIVIL RULES

W. EUGENE DAVIS
CRIMINAL RULES

FERN M. SMITH
EVIDENCE RULES

MEMORANDUM

March 16, 1998

To: Judge W. Eugene Davis
Professor David A. Schlueter

From: Judge Alicemarie H. Stotler (by JKR)

Re: Overlapping Information from Civil Rules

In reviewing the agenda book for the upcoming Civil Rules meeting, I noted that they are considering an amendment to Civil Rule 51 similar to the amendment to Criminal Rule 30 published for comment last fall. Beyond the question of the timing of the submission of jury instructions, however, Professor Cooper identifies several other issues that may need to be addressed if the rule is amended. In light of the similarities between the two rules, I am enclosing a copy of Professor Cooper's memo on the subject for the consideration of your committee.

Also, John Rabiej may have already forwarded to you the correspondence between Professors Cooper and Capra on the subject of Civil Rule 44. If not, I have enclosed it now for your information. As you can see, Criminal Rule 27 may be implicated.

I look forward to seeing you both next month in Washington.

enclosures

cc (all w/o enc.):
Judge Paul V. Niemeyer
Professor Edward H. Cooper
Professor Daniel J. Capra
Mr. John K. Rabiej

g:\docs\ahscommo\rules\crim\r30-civ51.wed

From Civil Agenda, 3/98
To Criminal: Rule 27

Reporter's Note For Information

The Evidence Rules Committee suggested in its report to the January Standing Committee meeting that perhaps Civil Rule 44 is redundant with the Evidence Rules. Rule 44 governs proof of domestic and foreign "official records."

The following correspondence indicates that for the moment, this matter is back with the Evidence Committee. The only trick to reading the correspondence comes with the first page of email messages, which should be read from the bottom up. The last message on the page is Capra's response to Cooper's February 2 letter; the next item up is Cooper to Capra; and the top item is Capra to Cooper. The next two follow in time sequence. There was a final note from Cooper to Capra, lost somewhere in cyberspace, suggesting that there still may be a point in seeing whether Rule 44 can be incorporated into the Evidence Rules. The existence of two parallel sets of rules may prove confusing, at least on occasion.

For the moment, there is nothing to be done. The question was raised by the Evidence Committee, and involves matters peculiarly within their province. It seems better to let them wrestle with the question for now.

THE UNIVERSITY OF MICHIGAN
LAW SCHOOL
ANN ARBOR, MICHIGAN 48109-1215

EDWARD H. COOPER
Thomas M. Cooley Professor of Law

HUTCHINS HALL
(313)7644347
FAX: (313)763-9375
coopere@umich.edu

February 2, 1998

Professor Daniel J. Capra
Fordham University School of Law
140 West 62nd Street
New York, New York 10023

Re: Congruance of Civil Rule 44 with Evidence Rules

Dear Dan:

This note is a somewhat belated sequel to our one-minute conversation at the Standing Committee meeting, as inspired by the one-paragraph reference to Civil Rule 44 on page 5 of the Minutes for the Criminal Rule Advisory Committee October, 1997 meeting.

My understanding is that you agree that nothing in the proposed amendments to Evidence Rules 803(6), 902(11), and 902(12) bears on Civil Rule 44. But the Minutes suggest that present Evidence Rules 803(8) and 902 do overlap with Civil Rule 44, and that it may be appropriate to consider the continued need for Civil Rule 44.

As a first matter, my instinctive reaction is that it is better to have all the evidence rules set out in the Evidence Rules, not divided between the Civil Rules, Criminal Rules, and Evidence Rules. There was good reason to have these provisions in the Civil Rules before there were any Evidence Rules, but that reason has vanished. The risk of inconsistency and confusion is always present. And even if there is no inconsistency, the need to continually check two different sets of rules is a nuisance. Or worse.

Beyond that point, I am not qualified to have a view on the specific overlaps suggested. It would take a long time for me to develop a view. Let me illustrate briefly, and then offer a suggestion.

Criminal Rule 27 seems to adopt, among other things, Civil Rule 44. It provides: "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." That seems to give the Criminal Rules Advisory Committee a stake in these questions.

Evidence Rule 803(8), noted in the minutes, provides that designated official records are not hearsay. This does not seem to overlap Civil Rule 44, which does not speak to

admissibility. Rule 44 applies only to official records that are "admissible for any purpose."

Evidence Rules 902(1), (2), (3), (4), and (5) do obviously bear on common subjects — proof by certification or other means, without extrinsic evidence of authenticity, of domestic public documents under seal, domestic public documents not under seal, foreign public documents, certified copies of public records, and official publications.

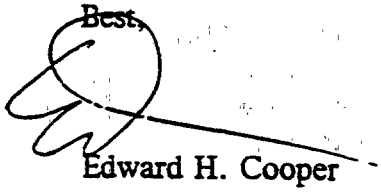
Also relevant are various other Evidence Rules. Rule 803(10) provides for proving the lack of an official record or entry, in common with Rule 44(b). Evidence Rule 1005 bears on proof of "public records," incorporating the certification provisions of Rule 902, allowing testimony by a witness who has compared a copy with the original, and permitting other evidence if a copy cannot be provided by certification or comparison testimony. Evidence Rule 901(7) provides examples of authentication of public records or reports. Rule 901(10) allows any method of authentication provided by other rules prescribed by the Supreme Court, neatly avoiding any conflict with Civil Rule 44 if indeed Rule 44 provides alternative means of proof that are not caught up in all of these Evidence Rules.

Figuring out whether Civil Rule 44 permits anything that cannot be done under one or another of the Evidence Rules would take me a great, long while. Let me offer two perplexities that come to mind on simply brushing through the rules. Rules 44(a)(1) and (2) permit proof of a domestic or foreign official record "by an official publication thereof." Evidence Rule 902(5) allows as evidence, without extrinsic evidence of authenticity, "Official publications. — Books, pamphlets, or other *publications* purporting to be issued by public authority." The use of "publications" in Rule 902(5) appears to be different from the use in Rule 44, but I do not know. For the second, Rule 44(a)(2) allows certification of a foreign official document without the ordinarily required "final certification" if a treaty provides for that. I do not see a parallel provision in Rule 902(3).

As you surely have guessed by now, I think these topics lie within the special competence of the Evidence Rules Advisory Committee and its Reporter. Two things are needed before Civil Rule 44 can be abrogated: a complete comparison of Rule 44 with all possible Evidence Rules, and incorporation into the Evidence Rules of any provision of Rule 44 that is not now in the Evidence Rules. The Criminal Rules Committee also may have an interest.

Let me know how you react to my befuddlement and suggestion.

Best,



Edward H. Cooper

EHC/lm
c: Hon. Paul V. Niemeyer
John K. Rabiej, Esq.

X-Mailer: Novell GroupWise 5.2
Date: Wed, 11 Feb 1998 10:18:07 -0500
From: "Daniel Capra" <DCAPRA@MAIL.LAWNET.FORDHAM.EDU>
To: coopere@umich.edu
Subject: Re: Civil Rule 44

Ed,
I think it's a good plan. I will prepare a memo for my committee's April meeting. Perhaps you can just inform your committee that we are looking into it. I'll see what my committee wants to do. I agree that the whole thing is not an emergency. We have had the Rule 44--Evidence Rules interface for some time, with no apparent untoward effect.

>>> Ed Cooper <coopere@umich.edu> 02/10 5:26 PM >>>
Dan:

Thanks for your message. It was exactly what I hoped for. And most particularly so if the result is an identification of any existing differences between Civil Rule 44 and the Evidence Rules, with an evaluation that supports a determination whether the present Evidence Rules should rule, or whether some portion of our poor little Rule 44 deserves to be adopted into the Evidence Rules.

The Civil Rules Committee meets on March 16 and 17, and perhaps again at the end of April. Clearly the March meeting is too early to consider the topic. I am sure there is no rush that would make it important to be prepared for a possible April meeting. For that matter, if your committee thinks it wise to deliberate beyond your April meeting, that should be fine. You are the experts, and I, at least, look to be guided by you.

Again, Thanks. Ed

A t 03:00 PM 2/10/98 -0500, you wrote:
>I received your letter and I must say that it struck me, as I am sure it was intended to do, that the problem is more complex than was originally thought. Here are my initial reactions.
>
>I agree with you that Evidence Rules should be in the Evidence Rules, and that any inconsistency between Civil Rule 44 and the Evidence Rules is especially problematic. Also, I agree with you that the amendments to the Evidence Rules to be released for public comment in August have nothing to do with Rule 44. Finally, I agree that if Rule 44 is abrogated, Criminal Rule 27 should receive similar treatment.
>
>I am not sure, however, that it is necessary to do a complete workup on the relationship between Rule 44 and the Evidence Rules. More specifically, I am not sure that any provision of Rule 44 not currently in the Evidence Rules should now be placed there. Rules 803-8, 901, 902, etc. provide a comprehensive means of admitting public records. They were drafted to be comprehensive, obviously without regard to the content of Rule 44. To the extent that there might be anything "missing", my belief is that it was intentional--or at least that there was no thought given to the fact that whatever was missing would be handled by Rule 44. Of course, these Rules can always be revisited, but that is not necessarily tied into a decision to abrogate Rule 44.
>
>Obviously though, this is not my decision to make. I propose that I bring the matter to the Evidence Rules Committee at its April meeting, to get their reaction. By that time, I will have done a little more research into the surprisingly complex relationship between Rule 44 and the Evidence Rules, and I will prepare a preliminary memo on the subject.
>
>Thanks for your incisive thoughts. Best regards.
>
>Dan
>
>
>

X-Mailer: Novell GroupWise 5.2
Date: Tue, 17 Feb 1998 14:03:35 -0500
From: "Daniel Capra" <DCAPRA@MAIL.LAWNET.FORDHAM.EDU>
To: coopere@umich.edu
Cc: Fern_Smith@ce9.uscourts.gov, josepgr@ffhsj.com
Subject: Rule 44

My preliminary research indicates that Rule 44 has been used mainly in immigration cases--where the Federal Rules of Evidence do not apply. My initial reaction to this finding is that we should leave things as they are. Certainly, if makes no sense to delete Rule 44 if it is in use in an area that cannot be accommodated by the Federal Rules. The alternative, to amend the Federal Rules to apply to immigration cases, presents policy questions that appear to be beyond the committee of limited jurisdiction which we are. I will continue to research the Rule 44 issue, but I thought you might be interested in this preliminary report

X-Mailer: Novell GroupWise 5.2
Date: Wed, 18 Feb 1998 10:42:09 -0500
From: "Daniel Capra" <DCAPRA@MAIL.LAWNET.FORDHAM.EDU>
To: coopere@umich.edu
Subject: Re: Rule 44

I will get a specific answer on what I mean by "immigration cases" once I look over everything in detail. That will be by Monday. Do you agree with my general point, i.e. that if Rule 44 is covering a type of case that is not covered by the Federal Rules, then that Rule should be retained? If so, I believe that this project approaches termination. The fact that Rule 44 might overlap with Rule803(8) in other cases is really not something that causes me much concern--so long as Rule 44 has some independent content completely outside the jurisdiction of the Federal Rules of Evidence.

>>> Ed Cooper <coopere@umich.edu> 02/18 8:26 AM >>>
Dan:

Thanks for the message. I am not entirely confident that I understand your reference to "immigration cases." Does this mean "proceedings for admission to citizenship," which under Civil Rule 81(a)(2) are governed by the Civil Rules? Or to administrative proceedings? Not, I suppose, to proceedings on judicial review of Boards of Immigration Appeals, which (if memory serves) go to the courts of appeals? Whatever the answer is, it is something I would not have thought even to look for. I had expected that turning this sort of question over to an evidence expert would yield a good answer. Just how good, how fast, I had not expected. --Ed Cooper
At 02:03 PM 2/17/98 -0500, you wrote:
>My preliminary research indicates that Rule 44 has been used mainly in immigration cases--where the Federal Rules of Evidence do not apply. My initial reaction to this finding is that we should leave things as they are. Certainly, if makes no sense to delete Rule 44 if it is in use in an area that cannot be accommodated by the Federal Rules. The alternative, to amend the Federal Rules to apply to immigration cases, presents policy questions that appear to be beyond the committee of limited jurisdiction which we are. I will continue to research the Rule 44 issue, but I thought you might be interested in this preliminary report
>
>
>

Agenda Item III D5

MEMO TO: **Members, Criminal Rules Advisory Committee**

FROM: **Professor Dave Schlueter, Reporter**

RE: **Update on Restyling of Criminal Rules**

DATE: **March 28, 1998**

The attached letter provides an update on the status of efforts to restyle the Criminal Rules.

UNITED STATES DISTRICT COURT
DISTRICT OF NEW MEXICO
POST OFFICE BOX 566
ALBUQUERQUE, NEW MEXICO 87103

JAMES A. PARKER
JUDGE

MEMORANDUM

TO: **SUBCOMMITTEE ON STYLE—**
Honorable William R. Wilson, Jr.
Professor Geoffrey C. Hazard, Jr.
Bryan A. Garner, Esq.
Joseph F. Spaniol, Jr., Esq.

FROM: **Judge James A. Parker**

DATE: **March 17, 1998**

RE: **STYLISTIC REVISION OF CRIMINAL RULES**

During the January meeting in Santa Barbara Bryan Garner said that he plans to complete his initial stylistic editing of Criminal Rules 13 through 60 during May and June, 1998.

Bryan has previously proposed edits to and has made written comments about Rules 1 through 12.3. Judge Wilson also has done considerable work on Rules 1 through 9.

To bring all of you and Judge Stotler up to date, I am sending to you and Judge Stotler with this memo a copy of Rules 1 through 9 showing Bryan's edits and comments, Judge Wilson's edits and suggestions, and some additional suggestions that I noted. In addition, I enclose a copy of Bryan's edits and comments on Rules 10 through 12.3.

Also enclosed is a copy of my November 17, 1997 letter to Judge Wilson about legal research related to proposed changes to Rules 1 through 9. Judge Wilson will report to us when he completes the research. John Rabiej mentioned at the Santa Barbara meeting that the Administrative Office has judicial fellows available to research issues involving proposed rule changes. As you consider stylistic revisions of the Criminal Rules, please think of legal research that should be done as a consequence of proposed language deletion or modification. As issues requiring research are identified, John Rabiej can assign the research projects to judicial fellows.

I told Judge Davis and Professor Schleuter that the Style Subcommittee will submit, in a single package, proposed stylistic revisions of Rules 1 through 60 to the Criminal Rules Advisory Committee after December 1, 1998, the anticipated effective date of the stylistically revised Rules of Appellate Procedure. If adoption of the new Appellate Rules is sidetracked for any reason, stylistic revision of the Criminal Rules may be reconsidered.

cc: Honorable Alicemarie H. Stotler
Honorable Eugene Davis
Professor David Schleuter
John Rabiej, Esq.