AGENDA
CRIMINAL RULES COMMITTEE MEETING

October 16-17, 1995
Manchester Village, Vermont

I. PRELIMINARY MATTERS

A. Administrative Announcements and Comments by Chair

B. Approval of Minutes of April 1995, Meeting in Washington, D.C.

II CRIMINAL RULES UNDER CONSIDERATION

A. Rules Approved by the Supreme Court and Forwarded to Congress: Effective December 1, 1995 Absent Action by Congress (Memo).

1. Rule 5(a), Initial Appearance Before the Magistrate
2. Rule 43, Presence of Defendant
3. Rule 49(e), Filing of Dangerous Offender Notice (Repeal of Provision).
4. Rule 57, Rules by District Courts

B. Rules Approved by Judicial Conference and Forwarded to Supreme Court (Memo)

1. Rule 16(a), (b), Discovery and Inspection (Pretrial disclosure of names of witnesses and disclosure of expert's testimony re defendant's mental condition).
2. Rule 32(d)(2), Criminal Forfeiture.

C. Rules Published for Public Comment & Pending Further Review by Advisory Committee:

1. Rule 24(a), Voir Dire (Memo).

D. Proposed Amendments to Rules

1. Rule 11, Pleas; Settlement Conferences Before Judge (Memo)

2. Rule 12. Pleadings and Motions Before Trial; Defenses and Objections; Proposal to Abolish Rule (Memo)

3. Rule 26.2, Production of Witness Statements

   a. Rule 26.2(f) (Definition of Statement) (Memo).

   b. Rule 26.2(g) (Scope of Rule), Proposal to Expand to Preliminary Hearings (Memo).

4. Rule 31(d), Poll of Jury; Polling Individually (Memo).

5. Rule 35(b), Reduction of Sentence for Changed Circumstances; Caselaw interpretation of Rule (Memo).

6. Proposed Amendments to Rules; Report on Uniform Numbering System Regarding Criminal Rules (Local Rules Project) (Memo)

E. Rules and Projects Pending Before Standing Committee and Judicial Conference

1. Status Report on Crime Bill Amendments Affecting Federal Rules of Criminal Procedure

2. Status Report on Proposed Federal Rules of Evidence 413-415.

III. MISCELLANEOUS

A. Restyling the Rules of Criminal Procedure (Memo).

B.. Long-Range Planning Subcommittee Report (Memo).

IV. DESIGNATION OF TIME AND PLACE OF NEXT MEETING

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Agenda Item I

MINUTES
of
THE ADVISORY COMMITTEE
on
FEDERAL RULES OF CRIMINAL PROCEDURE

April 10, 1995
Washington, D.C.

The Advisory Committee on the Federal Rules of Criminal Procedure met at Administrative Office of the United States Courts in Washington, D.C. on April 10, 1995. These minutes reflect the actions taken at that meeting.

I. CALL TO ORDER & ANNOUNCEMENTS

Judge Jensen, Chair of the Committee, called the meeting to order at 8:30 a.m. on Monday, April 10, 1995. The following persons were present for all or a part of the Committee's meeting:

Hon. D. Lowell Jensen, Chair
Hon. W. Eugene Davis
Hon. Sam A. Crow
Hon. George M. Marovich
Hon. David D. Dowd, Jr.
Hon. D. Brooks Smith
Hon. B. Waugh Crigler
Hon. Daniel E. Wathen
Prof. Stephen A. Saltzburg
Mr. Robert C. Josefsberg, Esq.
Mr. Darryl W. Jackson, Esq.
Mr. Henry A. Martin, Esq.
Mr. Roger Pauley, Jr., designate of Ms. Jo Ann Harris, Asst. Attorney General
Professor David A. Schlueter, Reporter

Also present at the meeting were: Judge William R. Wilson, Jr., a member of the Standing Committee on Rules of Practice and Procedure and a liaison to the Committee, Mr. Peter McCabe and Mr. John Rabiej from the Administrative Office of the United States Courts; and Mr. James Eaglin from the Federal Judicial Center.

The attendees were welcomed by the chair, Judge Jensen who introduced a new member of the Committee, Mr. Josefsberg. Judge Jensen also noted that he had asked Judge Crow to serve as the Committee's liaison to a subcommittee of the Court Administration and Case Management Committee; that subcommittee is studying the issue of management of criminal cases. At this point, he noted, no action was required by the Advisory Committee.

II. APPROVAL OF MINUTES OF OCTOBER 1994 MEETING

Judge Marovich moved that the minutes of the Committee's October 1994 meeting in Santa Fe, New Mexico, be approved. Following a second, the motion carried by a unanimous vote.

III. CRIMINAL RULES APPROVED BY THE SUPREME COURT AND FORWARDED TO CONGRESS

The Reporter informed the Committee that the Supreme Court had approved and forwarded to Congress proposed amendments to four rules, which became effective on December 1, 1994: Rule 16(a)(1)(A)(statements of organization defendants); Rule 29(b)(Delayed ruling on judgment of acquittal); Rule 32 (Sentence and Judgment); and Rule 40(d) (Conditional release of probationer). The final version of the amendments to Rule 32 included a victim allocution provision inserted by Congress.

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

The Reporter informed the Committee that the Judicial Conference had approved several proposed amendments and forwarded them to the Supreme Court for its review: Rule 5(a)(Initial Appearance Before the Magistrate); Rule 43 (Presence of Defendant); Rule 49(e) (Repeal of Provision re Filing of Dangerous Offender Notice); and Rule 57 (Rules by District Courts). As of the date of the Committee's meeting, the Supreme Court had not acted on the proposed amendments.

V. RULES APPROVED BY STANDING COMMITTEE FOR PUBLICATION AND COMMENT

The Committee was informed by the Reporter that written comments and testimony had been submitted on the two rules which the Standing Committee had approved publication and comment: Rule 16(a)(1)(E), (b)(1)(C) (Discovery of Experts); Rule 16(a)(1)(F), (b)(1)(D) (Disclosure of Witness' Names and Statements); and Rule 32(d) (Sentence and Judgment; Forfeiture Proceedings Before Sentencing). He informed the Committee that the deadline for submitting written comments on the proposed amendments was February 28, 1995 and that a public hearing on the proposed amendments was held on January 27, 1995 in Los Angeles, California.

A. Rule 16(a)(1)(E), (b)(1)(C) (Discovery of Experts); Rule 16(a)(1)(F), (b)(1)(D) (Disclosure of Witness' Names and Statements)

The Reporter informed the Committee that although several commentators approved of all of the changes in Rule 16, almost all of the comments specifically addressed the proposed amendments in Rule 16(a)(1)(F) and (b)(1)(D) dealing with disclosure of witness names and statements. All of the comments expressed support for the proposed amendments; but some suggested changes to the text. No commentator expressed disagreement with the provision governing discovery of experts in Rule 16(a)(1)(E) and 16(b)(1)(C)..

Following a brief summary of the written comments and testimony, Judge Crigler raised the question of whether the provision addressing disclosure of witness names and statements should apply to misdemeanor cases. He noted that the trial of petty offense and misdemeanor cases does not lend itself to the notification provision proposed in the rule. Other members agreed with Judge Crigler, who ultimately moved that the rule be limited to felony trials. Judge Davis seconded the motion. Following additional brief discussion, which focused on the issue of whether the disclosure provision would ever be practicable in misdemeanor cases, because of the highly abbreviated pretrial processing times, the Committee adopted the proposed change to the amendment by a unanimous vote.

Regarding the seven-day provision in the proposed amendment, Mr. Pauley urged the Committee to reduce the time to three days. He noted that United States attorneys often do not know for sure who their witnesses will be within seven days of trial. In those cases, he stated, the defense will argue that the government has not complied with the rule. He recommended that preclusion of testimony should only take place where the government has intentionally failed to disclose the information. In response to a comment from Professor Saltzburg, Mr. Pauley stated that the Department of Justice's proposed changes were not being offered as a compromise, but rather to improve the rule. Even if all of the amendments were adopted, he said, the Department's opposition to the rule would remain.

Judge Marovich expressed concern about any further delays in considering DOJ proposed changes. The question, he said, is whether the federal courts should adopt a system which is widely used and accepted in the state courts and in most federal trials. In his view, the current draft of the amendment gives the government absolute control over disclosure. The timing issue, he said, was simply a red herring.

Judge Smith echoed the concerns expressed by Professor Saltzburg and Judge Marovich but observed that the Department of Justice had a right to be heard on the issues being discussed. Judge Wilson responded that the Department was making a political issue out of the proposed amendment.

Judge Dowd indicated that perhaps the rule should be amended to extend the time to a period of 14 days before trial. Judge Jensen noted that other rules include a 10-day notice provision. Judge Marovich indicated that at worst, a late disclosure would delay the trial. Mr. Pauley reminded the Committee that Congress has adopted a three-day notice provision in capital cases. Judge Jensen observed that the Department had supported 15-day notice provisions in newly enacted rules of evidence governing use of propensity evidence in sexual assault cases -- Rules 413-415.

Professor Saltzburg observed that the Department of Justice did not oppose the seven-day notice provision in the amendments to Rule 32 dealing with sentencing and he encouraged the Committee to reject any amendment which would focus on the willfulness of delayed notification. Mr. Pauley responded that the Department was not as concerned about losing discovery motions as it was about the practicality of the seven-day provision. Justice Wathen observed that in his experience the parties deal with a more realistic list of witnesses. Judge Marovich added that the hallmark of a federal prosecution should be a good witness list.

Mr. Pauley moved that the rule be amended to reflect a three-day notice provision. The motion failed for lack of a second.

Responding to several commentators who urged the Committee to include provision for disclosure of government witnesses' addresses, Judge Jensen reminded the Committee that the provision had been in an original draft but removed at the urging of the Department of Justice. Judge Crigler expressed serious reservations about requiring the government to produce the witnesses for defense interviews. And Mr. Martin indicated that the Committee Note is silent regarding the Department's assurance that it would assist the defense in speaking to witnesses.

In the absence of any motion to change the draft with regard to disclosure of witness addresses, the discussion turned to the question of whether the rule or the accompanying note should specifically include reference to FBI 302's which may include witness statements. Several members questioned whether such documents were statements within the meaning of Rule 26.2. Judge Jensen pointed out that including such reports within the definition at this point might be considered a major change to the proposed amendment which would probably require re-publication for public comment. Following further discussion, the consensus was that the matter should not be included in the current amendment.

Judge Jensen advised the Committee that several commentators had raised the issue of what was meant by "unreviewable" in the proposed amendment; a number expressed concern that that language placed too much power in the hands of the prosecutor. Judge Wilson responded that the current language was a workable package which would be acceptable to Congress. Judge Marovich noted that the current language

was a major compromise. Mr. Martin raised the question of whether a judge might see nondisclosed evidence in such nonreviewable statements which might later be considered on sentencing. Judge Jensen responded that if the sentencing judge is considering such factors, he or she must disclose that information to the defense.

Following a discussion on how much information the prosecutor should disclose under the amendment, the Reporter suggested a minor amendment in the language. The Committee ultimately voted 9 to 0, with two abstentions, to substitute the following language: "an unreviewable written statement indicating why the government believes in good faith that either the name or statement of a witness cannot be disclosed."

Mr. Pauley expressed concern that in certain types of cases, such as in civil rights cases, a witness may fear economic reprisals, which is not a reason under the proposed amendment for not disclosing the witness' name or statement. Professor Saltzburg pointed out that the Department's position would swallow the rule because the exception proposed would be entirely too large. Judge Marovich noted that the names will become known when the witnesses are called so at the most, the witness may receive some pretrial protection from disclosure. Judge Crigler noted that the Department should protect its witnesses and Judge Smith noted that the same potential problem exists with regard to disclosing the names of jurors. Mr. Jackson observed that the defendant has a strong interest in being presumed innocent.

In the absence of any motion to amend the proposal, Mr. Pauley commented on his continuing concern with the potential conflict with the Jencks Act. He stated that the Advisory Committee had not yet tested the supersession clause in the Rules Enabling Act and argued that the judiciary should pursue the legislative process for seeking a change. Mr. Martin responded by pointing out that the Department's argument had been implicitly rejected in the procedures for establishing and amending the sentencing guidelines. Professor Saltzburg added that the Standing Committee's amendment several years ago to Federal Rule of Evidence 609 was clearly an example of offering an amendment to rules specifically promulgated by Congress.

Judge Dowd raised again the question of whether FBI 302's would be covered under the proposed amendment to Rule 16. Judge Jensen suggested that the matter should be considered at the Committee's next meeting as a possible amendment to Rule 26.2(f). Judge Dowd moved that the Rule 16 be amended to substitute the words, "a brief summary of the witness' testimony." The motion failed for lack of a second. The Reporter indicated that the issue could be addressed in the Committee's report to the Standing Committee.

The discussion turned to the issue of reciprocal discovery under the proposed amendment. The consensus was that the proposed language presented a workable compromise. Mr. Martin moved that the amendment requiring reciprocal defense discovery be revised to make an exception for "impeachment witnesses." The motion

failed for lack of a second. Judge Dowd noted that the defense may not always know who its witnesses will be and Professor Saltzburg responded that both sides have a continuing duty to disclose.

Judge Marovich moved that the amendments to Rule 16 be forwarded to the Standing Committee with a recommendation to approve and forward them to the Judicial Conference. Judge Crow seconded the motion which carried by a vote of 11 to 1.

C. Rule 32(d) (Sentence and Judgment; Forfeiture Proceedings Before Sentencing)

The Reporter summarized the few comments which had been received on the proposed amendment to Rule 32, including a number of proposed changes from the Department of Justice. Mr. Pauley noted the Department's changes focused on three areas. First the newer version of the rule would permit the forfeiture proceedings to begin earlier in the process; second, the newer version of the amendment would remove the requirement of a hearing; and third, the rule would require the judge to enter an order as soon as practicable. He explained that the newer version tracked a version sent to Congress by the Department.

Professor Saltzburg raised the question about the political reality of the Department's proposal. Mr. Pauley responded that he was not sure what Congress would do with the Department's proposed amendment.

Judge Dowd noted that the question about forfeiture proceedings only arises if the indictment raises the issue; the Ninth Circuit has ruled that if the forfeiture proceeding is conducted separately it violates double jeopardy. Following brief discussion about whether the proposed changes by the Department of Justice amounted to major changes, Judge Crigler moved that the amendment, as changed, be forwarded to the Standing Committee. Judge Davis seconded the motion, which carried by a vote of 11 to 0, with Mr. Josefsberg abstaining. It was also suggested that the Committee Note include reference to the fact that the final order might include a modification of the court's preliminary order and that the amendment would benefit the defense because counsel will now know what procedures are to be used.

VI. CRIMINAL RULES CURRENTLY UNDER CONSIDERATION BY ADVISORY COMMITTEE

A. Rule 11(d). Questioning Defendants re Prior Discussions with Attorney for the Government

The Reporter informed the Committee that Judge Sidney Fitzwater had suggested that the Committee consider amending Rule 11(d), which currently requires the court as part of the providency inquiry to ask whether the defendant has engaged in prior discussions with an attorney for the government. Judge Fitzwater believes that the question is often confusing to the defendant. The Reporter provided a brief overview of the requirement, which was added in a 1974 amendment to Rule 11 in an attempt to insure that guilty pleas are voluntary.

Judge Jensen observed that the purpose of the requirement in Rule 11 seemed to serve a sound purpose. Other members expressed the same view.

There was no motion to amend Rule 11.

B. Rule 24(a). Trial Jurors; Proposal re Voir Dire by Counsel

The Reporter and Judge Jensen reviewed the topic of possible amendments to Rule 24(a) regarding attorney participation. They noted that a similar proposal had been considered by the Civil Rules Committee, that a considerable amount of material, including relevant articles and survey materials, had been sent to the Committee members. They added that opposition had been expressed to any attempts to increase the level of participation by attorneys or the parties. Judge Crigler noted that there was strong opposition from the judges in the Fourth Circuit.

Judge Jensen also noted that Judge Easterbrook had forwarded the results of his poll of Seventh Circuit judges; but Judge Jensen raised the questioned whether there should also be some input from the practicing bar. Mr. Josefsberg agreed that non-judges should be polled. Judge Wilson pointed out that there was another important issue which should be addressed, the perception of justice. He noted that people generally do not believe that they are being treated fairly when they cannot take part. Judge Davis agreed with that position but noted that many judges fear the slippery slope of counsel participation. Judge Jensen added that he could not agree with the apparent competition to reduce the time used to select a jury because picking a jury was much too important for that.

Judge Crigler stated that in his experience all judges do permit some supplemental questioning, a point to which Mr. Josefsberg responded that as with the amendments to Rule 16, there was a need to promote consistency re questioning by counsel. Justice Wathen observed that his state does not permit voir dire by counsel, but trial judges permit it anyway.

Judge Marovich provided additional comments about the background of attorney-conducted voir dire and Professor Saltzburg stated that while he believes in participation by counsel, he was generally not in favor of any amendment to Rule 24. He subsequently

moved that a draft amendment presented by the reporter be considered by the Committee. Mr. Jackson seconded the motion. Following additional discussion on the draft and possible amendments to it, the Committee voted 9-2 to forward the amendment to the Standing Committee with the recommendation that the amendment be published for public comment.

C. Rule 26. Proposed Amendment to Require Notification to Defendant of Right to Testify.

The Reporter informed the Committee that Mr. Robert Potter had written to the Committee recommending that the Federal Rules of Criminal Procedure should be amended to require the trial court to advise the defendant of the right to testify. Mr. Potter noted that such an amendment would greatly reduce post-conviction attacks based on the ground that the defendant was never told, by counsel or the court, of the right to testify at trial.

Judge Jensen raised the practical question of how the trial court is supposed to learn whether or not a defendant has been advised of the right. And Judge Marovich observed that it is normally assumed that the defendant is aware of his or her right to testify. While Judge Wilson noted that he might start asking defendants if they are aware of the right, Judge Davis noted that doing so might unnecessarily infringe upon the attorney-client relationship. Mr. Pauley added that the majority of the cases do not support the proposed amendment. While such questioning by the court might be sound practice, if it is started, how could it be determined that failure to give the advice was harmless error. Justice Wathen believed that the proposal was illusory and Judge Dowd indicated that if the court believes that there may be a problem, it may consult with the defense counsel in the same way that counsel may be consulted about proposed instructions where the defendant has not taken the stand. Mr. Josefsberg stated that he was not sure that there was a problem worthy of an amendment; he added that to inquire into whether the defendant had received the advice would be very delicate vis a vis the role of counsel, especially where the defendant wants to be untruthful.

There was no motion to amend the Rules.

D. Rule 35(c). Possible Amendment to Clarify the Term "Imposition of Punishment."

The Reporter indicated that in response to a recent decision from the Ninth Circuit, *United States v. Navarro-Espinosa*, 30 F.3d 1169 (9th Cir. 1994), a question had been raised whether the timing requirements in Rule 35(c) for correcting a sentence ran from the date of the court's oral announcement of the sentence or from the formal entry of the judgment. He noted that his review of the Committee's notes and correspondence had

failed to provide any definitive answer to what the Committee had intended. He added that in any event, a specific amendment to Rule 4 of the Appellate Rules of Procedure provided that filing a notice of appeal does not divest the trial court of jurisdiction to correct its sentence. Following brief additional discussion, it was decided that if any amendment was to be made, it could be made during any subsequent global amendments of the rules.

E. Rule 58. Possible Amendment to Clarify Whether Forfeiture of Collateral Amounts to Conviction.

Magistrate Judge Lowe had recommended that the Committee consider an amendment to Rule 58 to clarify whether forfeiture of collateral amounted to a conviction. Judge Crigler noted that the issue is not covered by Rule 58 and recommended that because the practice seems to vary, it might be better for now not to address the issue in Rule 58. The Committee generally agreed with that view.

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

A. Status Report on Local Rules Project; Compilation of Local Rules for Criminal Cases

The Reporter indicated that Professor Coquillette was still working on the project of compiling local rules dealing with criminal trials. At this point no further action was required by the Advisory Committee.

B. Status Report on Pending Crime Bill Amendments Affecting Rules of Criminal Procedure.

Mr. Pauley and Mr. Rabiej provided a brief review of possible amendments pending in Congress. None required action or attention by the Advisory Committee.

C. Status Report on Federal Rules of Evidence Pending in Congress.

Mr. Rabiej indicated that the Judicial Conference's proposed changes to Federal Rules of Evidence 413-415 had been forwarded to Congress and that although there had been some initial discussions with staffers about the proposals, no action had yet been taken by Congress on the matter.

VIII. MISCELLANEOUS

A. Appointment of Liaisons to Advisory Committees.

The Reporter indicated that the Committee had been contacted by members of the American Bar Association that a formal liaison be recognized by the Committees. Mr. McCabe noted that the matter had been considered by the Civil Rules Committee and that it was not possible to formally appoint any liaisons to the Advisory Committees. Instead, the Committee could informally treat certain persons as points of contact with a particular organization. He indicated that a letter to that effect had been prepared.

B. Forums Conducted by Advisory Committees

The Reporter indicated that the Civil Rules Committee had conducted a successful forum discussion on the Rules of Civil Procedure and questioned whether the Criminal Rules Committee might be interested in a similar project. The Committee members generally agreed that the matter was worth pursuing.

C. Comments on Long Range Planning Report.

Finally, the Reporter reminded the Committee that any comments about the Long Range Planning Subcommittee's Report should be forwarded to Professor Baker. Following brief discussion on the matter, there was a general consensus on the key points raised in the report, especially those portions dealing with the respective roles of the Standing and Advisory Committees.

IX. CONCLUDING REMARKS; DESIGNATION OF TIME AND PLACE OF NEXT MEETING

The Committee was reminded that its next meeting would be held at the Equinox Hotel in Manchester, Vermont on October 16th and 17th.

Respectfully submitted,

David A. Schlueter
Professor of Law
Reporter

Agenda Item II A-C

MEMO TO: Members, Criminal Rules Advisory Committee

FROM: Professor Dave Schlueter, Reporter

RE: Supreme Court's May 1995 Transmission of Rules to Congress

DATE: September 6, 1995

As you may recall, for the past several years considerable attention has been paid by the Advisory Committees and Standing Committee in using the word "must" instead of "shall." when amending the Rules. The Supreme Court, however, indicated in its most recent transmission of rules to Congress that the word "must" had been replaced with "shall." The Court believed that any change in such wording should not occur on a piecemeal basis. For the time being, the word "shall" will apparently suffice.

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

FROM: **Professor Dave Schlueter, Reporter**

RE: **Rules Approved by Standing Committee and Forwarded to Judicial Conference (Rules 16 & 32)**

DATE: **September 6, 1995**

At its April 1995 meeting, this Committee approved amendments to Rules 16 and 32 and forwarded them to the Standing Committee for transmission to the Judicial Conference.

While Rule 32 was approved by the Standing Committee with little fanfare, the discussion concerning the amendments to Rule 16 re production of witness names and statements was lively, and intense. The Justice Department repeated its concerns about the scope and use of the rule and was joined by others in its concern that the amendment was an improper attempt to overrule the Jencks Act. Although the Committee's draft eventually passed with a one-vote margin, concern was expressed some members of the Standing Committee about going forward with a controversial rule with such a narrow margin..

The vote on the amendment was reconsidered and a motion was made to amend the rule by striking references to witness statements. Following additional discussion and last other minor changes to the rule and the committee note, the amendment passed by a substantial majority.

The version of Rule 16 finally approved by the Standing Committee for transmission to the Judicial Conference is attached. As it now stands, the government is only required to produce the names of its witnesses.

Rule 32(d), as approved by the Standing Committee is also attached.

Rule 16. Discovery and Inspection[1]

(a) GOVERNMENTAL DISCLOSURE OF EVIDENCE.

(1) Information Subject to Disclosure.

* * * * *

(E) EXPERT WITNESSES. At the defendant's request, the government shall disclose to the defendant a written summary of testimony that the government intends to use under Rules 702, 703, or 705 of the Federal Rules of Evidence during its case-in-chief at trial. If the government requests discovery under subdivision (b)(1)(C)(ii) of this rule and the defendant complies, the government shall, at the defendant's request, disclose to the defendant a written summary of testimony the government intends to use under Rules 702, 703, and 705 as evidence at trial on the issue of the defendant's mental condition. ~~This~~ The summary provided under this subdivision shall

[1]. New matter is underlined and matter to be omitted is lined through.

~~must~~ describe the witnesses' opinions, the bases and the reasons for those opinions ~~therefor~~, and the witnesses' qualifications.

(F) NAMES OF WITNESSES. At the defendant's request in a noncapital felony case, the government shall, no later than seven days before trial unless the court orders a time closer to trial, disclose to the defendant the names of the witnesses that the government intends to call during its case-in-chief. But disclosure of that information is not required if the attorney for the government believes in good faith that pretrial disclosure of this information might threaten the safety of any person or might lead to an obstruction of justice. If the attorney for the government submits to the court, ex parte and under seal, a written statement indicating why the government believes in good faith that the name of a witness cannot be disclosed, then the witness's

name shall not be disclosed. Such a statement is not reviewable.

(2) *Information Not Subject to Disclosure.* Except as provided in paragraphs (A), (B), (D), ~~and~~ (E), and (F) of subdivision (a)(1), this rule does not authorize the discovery or inspection of reports, memoranda, or other internal government documents made by the attorney for the government or any other government agent ~~agents in connection with the investigation or prosecution of~~ investigating or prosecuting the case. Nor does the rule authorize the discovery or inspection of statements made by government witnesses or prospective government witnesses except as provided in 18 U.S.C. § 3500.

* * * * *

(b) THE DEFENDANT'S DISCLOSURE OF EVIDENCE.

(1) *Information Subject to Disclosure.*

* * * * *

(C) EXPERT WITNESSES. Under the following circumstances, the defendant shall, at the government's request, disclose to the government a written summary of testimony that the defendant intends to use under Rules 702, 703, and 705 of the Federal Rules of Evidence as evidence at trial: (i) if ~~If~~ the defendant requests disclosure under subdivision (a)(1)(E) of this rule and the government complies, or (ii) if the defendant has given notice under Rule 12.2(b) of an intent to present expert testimony on the defendant's mental condition. ~~the defendant, at the government's request, must disclose to the government a written summary of testimony the defendant intends to use under Rules 702, 703 and 705 of the Federal Rules of Evidence as evidence at trial.~~ This summary ~~must~~ shall describe the witnesses' opinions ~~of the witnesses,~~ the bases and reasons for those opinions ~~therefor~~, and the witnesses' qualifications.

(D) NAMES OF WITNESSES. If the defendant requests disclosure under subdivision (a)(1)(F) of this

rule, and the government complies, the defendant shall, at the government's request, disclose to the government before trial the names of witnesses that the defense intends to call during its case-in-chief. The court may limit the government's right to obtain disclosure from the defendant if the government has filed an ex parte statement under subdivision (a)(1)(F).

* * * * *

COMMITTEE NOTE

The amendments to Rule 16 cover two issues. The first addresses the ability of the government to require, upon request, the defense to provide pretrial disclosure of information concerning its expert witnesses on the issue of the defendant's mental condition. The amendment also requires the government to provide reciprocal pretrial disclosure of information about its expert witnesses when the defense has complied. The second amendment provides for pretrial disclosure of witness names.

Subdivision (a)(1)(E). Under Rule 16(a)(1)(E), as amended in 1993, the defense is entitled to disclosure of certain information about expert witnesses which the government intends to call during the trial as well as reciprocal pretrial disclosure by the government upon defense disclosure. This amendment is a parallel reciprocal disclosure provision which is triggered by a government request for information concerning defense expert witnesses as to the defendant's mental condition, which is provided for in an amendment to (b)(1)(C), *infra*.

Subdivision (a)(1)(F). No subject has generated more controversy in the Rules Enabling Act process over many years than pretrial discovery of the witnesses the government intends to call at trial. In 1974, the Supreme Court approved an amendment to Rule 16 that would have provided pretrial disclosure to a defendant of the names of government witnesses, subject to the government's right to seek a protective order. Congress, however, refused to approve the rule in the face of vigorous opposition by the Department of Justice. In recent years, a number of proposals have been made to the Advisory Committee to reconsider the rule approved by the Supreme Court. The opposition of the Department of Justice has remained constant, however, as it has argued that the threats of harm to witnesses and obstruction of justice have increased over the years along with the increase in narcotics offenses, continuing criminal enterprises, and other crimes committed by criminal organizations.

Notwithstanding the absence of an amendment to Rule 16, the federal courts have continued to confront the issue of whether the rule, read in conjunction with the Jencks Act, permits a court to order the government to disclose its witnesses before they have testified at trial. *See United States v. Price*, 448 F.Supp. 503 (D. Colo. 1978)(circuit by circuit summary of whether government is required to disclose names of its witnesses to the defendant).

The Committee has recognized that government witnesses often come forward to testify at risk to their personal safety, privacy, and economic well-being. The Committee recognized, at the same time, that the great majority of cases do not involve any such risks to witnesses.

The Committee shares the concern for safety of witnesses and third persons and the danger of obstruction of justice. But it is also concerned with the burden faced by defendants in attempting to prepare for trial without adequate discovery, as well as the burden placed on court resources and on jurors by unnecessary trial delay. The Federal Rules of Criminal Procedure recognize the importance of discovery in situations in which the government might be unfairly surprised or disadvantaged without it. In several

amendments -- approved by Congress since its rejection of the proposed 1974 amendment to Rule 16 regarding pretrial disclosure of witnesses -- the rules now provide for defense disclosure of certain information. *See, e.g.*, Rule 12.1, Notice of Alibi; Rule 12.2, Notice of Insanity Defense or Expert Testimony of Defendant's Mental Condition; and Rule 12.3, Notice of Defense Based Upon Public Authority. The Committee notes also that both Congress and the Executive Branch have recognized for years the value of liberal pretrial discovery for defendants in military criminal prosecutions. *See* D. Schlueter, *Military Criminal Justice: Practice and Procedure*, § 10-4(A) (3d ed. 1992)(discussing automatic prosecution disclosure of government witnesses and statements). Similarly, pretrial disclosure of prosecution witnesses is provided for in many State criminal justice systems where the caseload and the number of witnesses are much greater than that in the federal system. *See generally* Clennon, *Pre-Trial Discovery of Witness Lists: A Modest Proposal to Improve the Administration of Criminal Justice in the Superior Court of the District of Columbia*, 38 Cath. U. L. Rev. 641, 657-674 (1989)(citing State practices). Moreover, the vast majority of cases involving charges of violence against persons are tried in State courts.

The arguments against similar discovery for defendants in federal criminal trials seem unpersuasive and ignore the fact that the defendant is presumed innocent and therefore is presumptively as much in need of information to avoid surprise as is the government. The fact that the government bears the burden of proving all elements of the charged offense beyond a reasonable doubt is not a compelling reason for denying a defendant adequate means for responding to government evidence. In providing for enhanced discovery for the defense, the Committee believes that the danger of unfair surprise to the defense and the burden on courts and jurors will be reduced in many cases, and that trials in those cases will be fairer and more efficient.

The Committee regards the addition of Rule 16(a)(1)(F) as a reasonable, measured, step forward. In this regard it is noteworthy that the amendment rests on the following three assumptions. First, the government will act in good faith, and there

will be cases in which the information available to the government will support a good faith belief as to danger although it does not constitute "hard" evidence to prove the actual existence of danger. Second, in most cases judges will not be in a better position than the government to gauge potential danger to witnesses. And third, post-trial litigation as to the sufficiency of government reasons in every case of an *ex parte* submission under seal would result in an unacceptable drain on judicial resources.

The Committee considered several approaches to discovery of witness names. In the end, it adopted a middle ground between complete disclosure and the existing Rule 16. The amendment requires the government to provide pretrial disclosure of names of witnesses unless the attorney for the government submits, *ex parte* and under seal, to the trial court written reasons, based upon the facts relating to the individual case, why this information cannot be disclosed. The amendment adopts an approach of presumptive disclosure that is already used in a significant number of United States Attorneys offices. While the amendment recognizes the importance of discovery in all cases, it protects witnesses when the government has a good faith basis for believing that disclosure will pose a threat to the safety of a person or will lead to an obstruction of justice.

The provision that the government provide the names no later than seven days before trial should eliminate some concern about the safety of witnesses and some fears about possible obstruction of justice. The seven-day provision extends only to noncapital felony cases. Currently, in capital cases the government is required to disclose the names of its witnesses at least three days before trial. The Committee believes that the difference in the timing requirements is justified in light of the fact that any danger to witnesses would be greater in capital cases. The rule also recognizes, however, that the trial court may permit the government to disclose the names of its witnesses at a time closer to trial.

The amendment provides that the government's *ex parte* submission of reasons for not disclosing the requested information

will not be reviewed, either by the trial or the appellate court. The Committee considered, but rejected, a mechanism for post-trial review of the government's statement. It was concerned that such *ex parte* statements could become a subject of collateral litigation in every case in which they are made. Although it is true that under the rule the government could refuse to disclose a witness' name even though it lacks sufficient evidence for doing so in an individual case, the Committee found no reason to assume that bad faith on the part of the prosecutor would occur. The Committee was certain, however, that it would require an investment of significant judicial resources to permit post-trial review of all submissions. Thus, the amendment provides for no review of government submissions. No defendant will be worse off under the amended rule than under the current version of Rule 16, because the current version of Rule 16 allows the government to keep secret the information covered by the amended rule whether or not it has a good faith reason for doing so.

It should also be noted that the amendment does not preclude either the defendant or the government from seeking protective or modifying orders or sanctions from the court under subdivision (d) of this rule.

Subdivision (b)(1)(C). Amendments in 1993 to Rule 16 included provisions for pretrial disclosure of information, including names and expected testimony of both defense and government expert witnesses. Those disclosures are triggered by defense requests for the information. If the defense makes such requests and the government complies, the government is entitled to similar, reciprocal discovery. The amendment to Rule 16(b)(1)(C) provides that if the defendant has notified the government under Rule 12.2 of an intent to rely on expert testimony to show the defendant's mental condition, the government may request the defense to disclose information about its expert witnesses. Although Rule 12.2 insures that the government will not be surprised by the nature of the defense or that the defense intends to call an expert witness, that rule makes no provision for discovery of the identity, the expected testimony, or the qualifications of the expert witness. The amendment provides the government with the limited right to

respond to the notice provided under Rule 12.2 by requesting more specific information about the expert. If the government requests the specified information, and the defense complies, the defense is entitled to reciprocal discovery under an amendment to subdivision (a)(1)(E), *supra*.

Subdivision (b)(1)(D). The amendment, which provides for reciprocal discovery of defense witness names, is triggered by compliance with a defense request made under subdivision (a)(1)(F). If the government withholds any information requested under that provision, the court in its discretion may limit the government's right to disclosure under this subdivision. The amendment provides no specific deadline for defense disclosure, as long as it takes place before trial starts.

Rule 32. Sentence and Judgment

(d) JUDGMENT.

* * * * *

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

COMMITTEE NOTE

Subdivision (d)(2). A provision for including a verdict of criminal forfeiture as a part of the sentence was added in 1972 to Rule 32. Since then, the rule has been interpreted to mean that any forfeiture order is a part of the judgment of conviction and cannot be entered before sentencing. *See, e.g., United States v. Alexander*, 772 F. Supp. 440 (D. Minn. 1990).

Delaying forfeiture proceedings, however, can pose real problems, especially in light of the implementation of the Sentencing Reform Act in 1987 and the resulting delays between verdict and sentencing in complex cases. First, the government's statutory right to discover the location of property subject to forfeiture is triggered by entry of an order of forfeiture. *See* 18 U.S.C. § 1963(k) and 21 U.S.C. § 853(m). If that order is delayed

until sentencing, valuable time may be lost in locating assets which may have become unavailable or unusable. Second, third persons with an interest in the property subject to forfeiture must also wait to petition the court to begin ancillary proceedings until the forfeiture order has been entered. *See* 18 U.S.C. § 1963(l) and 21 U.S.C. § 853(m). And third, because the government cannot actually seize the property until an order of forfeiture is entered, it may be necessary for the court to enter restraining orders to maintain the status quo.

The amendment to Rule 32 is intended to address these concerns by specifically recognizing the authority of the court to enter a preliminary forfeiture order before sentencing. Entry of an order of forfeiture before sentencing rests within the discretion of the court, which may take into account anticipated delays in sentencing, the nature of the property, and the interests of the defendant, the government, and third persons.

The amendment permits the court to enter its order of forfeiture at any time before sentencing. Before entering the order of forfeiture, however, the court must provide notice to the defendant and a reasonable opportunity to be heard on the question of timing and form of any order of forfeiture.

The rule specifies that the order, which must ultimately be made a part of the sentence and included in the judgment, must contain authorization for the Attorney General to seize the property in question and to conduct appropriate discovery and to begin any necessary ancillary proceedings to protect third parties who have an interest in the property.

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

FROM: **Professor Dave Schlueter, Reporter**

RE: **Rule 24(a); Published for Public Comment**

DATE: **September 7, 1995**

Attached is Rule 24(a), re attorney-conducted voir dire, as it was approved by the Standing Committee in July 1995 for publication and comment.

The current version of the rule is very different from the language adopted by this committee at its April 1995 meeting. Although some members of the Standing Committee seemed to favor this committee's approach and structure to rule, others believed that both Civil Rule 47(a) and Criminal Rule 24(a) should match as much as possible. The Civil Rules Committee had considered this committee's language and had rejected it in favor of its own approach.

Following some discussions between the Reporter and a member of the Civil Rules Committee and this Reporter, language was drafted which attempted to capture the concerns of both committees. After making some additional minor changes, the Standing Committee approved the attached version for public comment.

For purposes of comparison, I am also attaching the versions submitted to the Standing Committee by the two Advisory Committees.

Hearings on the proposed change are scheduled for December and January.

Rule 24. Trial Jurors.*

(a) VOIR DIRE EXAMINATION. The court shall conduct the voir dire examination of prospective jurors . But the court shall also permit the defendant or the defendant's attorney and the attorney for the government to orally examine the prospective jurors to supplement the court's examination within reasonable limits of time, manner, and subject matter, as the court determines in its discretion. The court may terminate examination by a person who violates those limits or for other good cause. ~~The court may permit the defendant or the defendant's attorney and the attorney for the government to conduct the examination of prospective jurors or may itself conduct the examination. In the latter event the court shall permit the defendant or the defendant's attorney and the attorney for the government to supplement the examination by such further inquiry~~

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

~~as it deems proper or shall itself submit to the prospective jurors such additional questions by the parties or their attorneys as it deems proper.~~

* * * * *

COMMITTEE NOTE

The amendment is intended to insure that the parties are given an opportunity to participate in the critical stage of jury selection. While a recent survey from the Federal Judicial Center indicates that a majority of district courts permit participation by counsel, Shapard & Johnson, *Survey Concerning Voir Dire* (Federal Judicial Center 1994), the Committee recognizes that in many cases the right to participation is completely precluded under the present rule. Those opposing greater participation by counsel assert that providing an opportunity for such participation will extend the time for selecting a jury and that counsel may use the examination for improper means, e.g., attempting to influence or educate the jury regarding their client's view of the case.

Those supporting greater counsel participation assert that it is important for the parties to participate personally in the process because jurors may be intimidated by the trial court and that their answers to the judge may be less than candid. *See generally* D. Suggs & B. Sales, *Juror Self-Disclosure in the Voir Dire: A Social Science Analysis*, 56 Indiana L. Jour. 245, 256-257 (1981)(authors note that unintentional, nonverbal, communication from judge during voir dire may affect jurors' response); S. Jones, *Judge-Versus Attorney-Conducted Voir Dire*, 11 Law and Human Behavior 131, 143 (1987))(study showed the jurors attempted to report not what they truly felt but "what they believed the judge wanted to hear"). Second, in order to insure a fair opportunity to obtain information relevant to the exercise of peremptory challenges and challenges for

cause, it is important that at a minimum counsel be given the opportunity to conduct supplemental examination.

Although the concerns expressed by the opponents are not without merit, the Committee believed that on balance, the need for counsel participation outweighed the risk of potential abuse. The amendment recognizes that, particularly in criminal cases, there are good reasons for permitting supplemental inquiries by counsel, without regard to whether counsel or the courts can do a better job of picking an impartial jury. The amendment avoids that debate and at the same time recognizes that the defendant or defendant's counsel should have the right, even if limited, to question the potential jurors.

While the amendment recognizes the long-standing tradition in federal courts that the primary responsibility for conducting voir dire rests with the trial judge, it creates a presumptive right of counsel to participate in supplemental examinations. The right to supplemental questioning, however, is not absolute and may be conditioned on one of several factors.

First, the court may place reasonable limits on the time, manner, and subject matter of the examination. This condition probably reflects current practice in some courts. That is, at the present time, judges already permit counsel to pose supplemental questions, subject to such reasonable limitations in cases where attorney-conducted voir dire is permitted.

The second condition reflects the Committee's view that the court should retain the authority in particular cases to cut off absolutely any supplemental questioning. The amendment assumes that the supplemental examination has begun and that at some point, the defendant or trial counsel has engaged in conduct which violates the court's limits or demonstrates a purpose to use the voir dire process for some reason other than determining the ability of a potential juror to serve impartially. The amendment also assumes

that the court should have an articulable reason for absolutely barring supplemental questioning by the parties.

Rule 24. Trial Jurors.

(a) VOIR DIRE EXAMINATION. The court will conduct the preliminary voir dire examination of the trial jurors. Upon timely request, the court must permit the defendant or the defendant's attorney and the attorney for the government to conduct a supplemental examination of prospective jurors, subject to the following:

(1) The court may place reasonable limits on the time, manner, and subject matter of such supplemental examination; and

(2) The court may terminate supplemental examination if it finds that such examination may impair the jury's impartiality.

The court may permit the defendant or the defendant's attorney and the attorney for the government to conduct the examination of prospective jurors or may itself conduct the examination. In the latter event the court shall permit the defendant or the defendant's attorney and the attorney for the government to supplement the examination by such further inquiry as it deems proper or shall itself submit to the prospective jurors such additional questions by the parties or their attorneys as it deems proper.

* * * * *

COMMITTEE NOTE

The amendment is intended to insure that the parties are given an opportunity to participate in the critical stage of jury selection. While a recent survey from the Federal Judicial Center indicates that a majority of district courts permit participation by counsel, Shapard & Johnson, *Survey Concerning Voir Dire* (Federal Judicial Center 1994), the Committee recognizes that in many cases the right to participation is completely precluded under the present rule. Those opposing greater participation by counsel assert that providing an opportunity for such participation will extend the time for selecting a jury and that counsel may use the examination for improper means, e.g., attempting to influence or educate the jury regarding their client's view of the case.

Those supporting greater counsel participation assert that it is important for the parties to participate personally in the process because jurors may be intimidated by the trial court and that their answers to the judge may be less than candid. See generally D. Suggs & B. Sales, *Juror Self-Disclosure in the Voir Dire: A Social Science Analysis*, 56

Rule 47. Selecting ~~Selection of~~ Jurors

(a) ~~Examination of~~Examining Jurors. The court ~~may~~ must ~~permit the parties or their attorneys to~~ conduct the examination of prospective jurors ~~or may itself conduct the examination.~~ The court must permit the parties to examine the prospective jurors to supplement the court's examination within reasonable limits of time, manner, and subject matter determined by the court in its discretion. ~~In the latter event, the court shall permit the parties or their attorneys to supplement the examination by such further inquiry as it deems proper or shall itself submit to the prospective jurors such additional questions of the parties or their attorneys as it deems proper.~~

Committee Note

Rule 47(a) in its original and present form permits the court to exclude the parties from direct examination of prospective jurors. Although a recent survey shows that a majority of district judges permit party participation, the power to exclude is often exercised. See *Shapard & Johnson, Survey Concerning Voir Dire* (Federal Judicial Center 1994). Courts that exclude the parties from direct examination express two concerns. One is that direct participation by the parties extends the time required to select a jury. The second is that counsel frequently seek to use voir dire not as a means of securing an impartial jury but as the first stage of adversary strategy, attempting to establish rapport with prospective jurors and influence their views of the case.

The concerns that led many courts to undertake all direct examination of prospective jurors have earned deference by long tradition and widespread adherence. At the same time, the number of federal judges that permit party participation has grown considerably in recent years. The Federal Judicial Center survey shows that the total time devoted to jury selection is virtually the same regardless of the choice made in allocating responsibility between court and counsel. It also shows that judges who permit party participation have found little difficulty in controlling potential misuses of voir dire. This experience demonstrates that the problems that have been perceived in some state-court systems of party participation can be avoided by making clear the discretionary power of the district court to control the behavior of the party or counsel. The ability to enable party participation at low cost is of itself strong reason to permit party participation. The parties are thoroughly familiar with the case

Agenda Item II D#1

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

FROM: **Professor Dave Schlueter, Reporter**

RE: **Rule 11(e); Provision Barring Participation by Court in Plea Agreement Discussions**

DATE: **September 7, 1995**

Judge Jensen learned during the Ninth Circuit Conference that courts in the Southern District of California refer criminal cases to another judge for settlement conferences. *See United States v. Torres*, 999 F.2d 376 (9th Cir. 1993)(noting practice). Assuming that a court wishes to use that procedure, Rule 11(e) may prohibit such, depending on how one reads the rule, i.e., does the current rule prohibit any judge from taking part, or only the presiding or sentencing judge?

As the Advisory Committee Note to Rule 11(e)(1)(attached) makes clear, the language prohibiting participation by the court reflects the prevailing rule that for several reasons the court should not be a party to the plea bargaining. The caselaw generally follows that position. *See, e.g., United States v. Garfield*, 987 F.2d 1424 (9th Cir. 1993)(rule prohibiting all forms of judicial participation in plea bargaining is absolute, and without regard to motives of judge, is plain error). The Ninth Circuit, however, in *Torres, supra.* concluded that the sentencing judge had not participated in violation of Rule 11. The parties, said the court, "had already hammered out their agreement with the assistance of [another judge]." The *Torres* decision is attached.

This item is on the agenda for the Committee's October meeting.

Secure Guilty Pleas, 112 U.Pa.L.Rev. 865, 904 (1964). Discussions without benefit of counsel increase the likelihood that such discussions may be unfair. Some courts have indicated that plea discussions in the absence of defendant's attorney may be constitutionally prohibited. See Anderson v. North Carolina, 221 F.Supp. 930, 935 (W.D.N.C.1963); Shape v. Sigler, 230 F.Supp. 601, 606 (D.Neb.1964).

Subdivision (e)(1) is intended to make clear that there are four possible concessions that may be made in a plea agreement. First, the charge may be reduced to a lesser or related offense. Second, the attorney for the government may promise to move for dismissal of other charges. Third, the attorney for the government may agree to recommend or not oppose the imposition of a particular sentence. Fourth, the attorneys for the government and the defense may agree that a given sentence is an appropriate disposition of the case. This is made explicit in subdivision (e)(2) where reference is made to an agreement made "in the expectation that a specific sentence will be imposed." See Note, Guilty Plea Bargaining: Compromises By Prosecutors To Secure Guilty Pleas, 112 U.Pa.L.Rev. 865, 898 (1964).

Subdivision (e)(1) prohibits the court from participating in plea discussions. This is the position of the ABA Standards Relating to Pleas of Guilty § 3.3(a) (Approved Draft, 1968).

It has been stated that it is common practice for a judge to participate in plea discussions. See D. Newman, Conviction: The Determination of Guilt or Innocence Without Trial 32–52, 78–104 (1966), Note, Guilty Plea Bargaining: Compromises By Prosecutors To Secure Guilty Pleas, 112 U.Pa.L.Rev. 865, 891, 905 (1964).

There are valid reasons for a judge to avoid involvement in plea discussions. It might lead the defendant to believe that he would not receive a fair trial, were there a trial before the same judge. The risk of not going along with the disposition apparently desired by the judge might induce the defendant to plead guilty, even if innocent. Such involvement makes it difficult for a judge to objectively assess the voluntariness of the plea. See ABA Standards Relating to Pleas of Guilty § 3.3(a), Commentary at 72–74 (Approved Draft, 1968); Note, Guilty Plea Bargaining: Compromises By Prosecutors To Secure Guilty Pleas, 112 U.Pa.L.Rev. 865, 891–892 (1964); Comment, Official Inducements to Plead Guilty: Suggested Morals for a Marketplace, 32 U.Chi.L.Rev. 167, 180–183 (1964); Informal Opinion No. 779 ABA Professional Ethics Committee ("A judge should not be a party to advance arrangements for the determination of sentence, whether as a result of a guilty plea or a finding of guilt based on proof."), 51 A.B.A.J. 444 (1965). As has been recently pointed out:

The unequal positions of the judge and the accused, one with the power to commit to prison and the other deeply concerned to avoid prison, at once raise a question of fundamental fairness. When a judge becomes a participant in plea bargaining he brings to bear the full force and majesty of his office. His awesome power to impose a substantially longer or even maximum sentence in excess of that proposed is present whether referred to or not. A defendant needs no reminder that if he rejects the proposal, stands upon his right to trial and is convicted, he faces a significantly longer sentence. United States ex rel. Elksnis v. Gilligan, 256 F.Supp. 244, 254 (S.D.N.Y. 1966).

On the other hand, one commentator has taken the position that the judge may be involved in discussions either after the agreement is reached or to help elicit facts and an agreement. Enker, Perspectives on Plea Bargaining, in President's Commission on Law Enforcement and Administration of Justice, Task Force Report: The Courts 108, 117–118 (1967).

The amendment makes clear that the judge should not participate in plea discussions leading to a plea agreement. It is contemplated that the judge may participate in such discussions as may occur when the plea agreement is disclosed in open court. This is the position of the recently adopted Illinois Supreme Court Rule 402(d)(1) (1970), Ill.Rev.Stat.1973, ch. 110A, § 402(d)(1). As to what may constitute "participation," contrast People v. Earegood, 12 Mich.App. 256, 268–269, 162 N.W.2d 802, 809–810 (1968), with Kruse v. State, 47 Wis.2d 460, 177 N.W.2d 322 (1970).

Subdivision (e)(2) provides that the judge shall require the disclosure of any plea agreement in open court. In People v. West, 3 Cal.3d 595, 91 Cal.Rptr. 385, 477 P.2d 409 (1970), the court said:

[T]he basis of the bargain should be disclosed to the court and incorporated in the record. * * *

Without limiting that court to those we set forth, we note four possible methods of incorporation: (1) the bargain could be stated orally and recorded by the court reporter, whose notes then must be preserved or transcribed, (2) the bargain could be set forth by the clerk in the minutes of the court; (3) the parties could file a written stipulation stating the terms of the bargain; (4) finally, counsel or the court itself may find it useful to prepare and utilize forms for the recordation of plea bargains. 91 Cal.Rptr. 393, 394, 477 P.2d at 417, 418.

The District of Columbia Court of General Sessions is using a "Sentence-Recommendation Agreement" form.

Upon notice of the plea agreement, the court is given the option to accept or reject the agreement or defer its decision until receipt of the presentence report.

The judge may, and often should, defer his decision until he examines the presentence report. This is made possible by rule 32

sum of the damages listed in No. 5. The amount of damages the jury listed in No. 6 is far greater than the amount of the purported refund. Special Interrogatory No. 7, which asked the jury whether the rate reduction refunded damages, has meaning only if it is interpreted to ask whether it refunded *any* damages. Reading No. 7 as NPPD suggests, as asking whether the rate refund in the amount of $1,527,301 refunded *all* the damages Nucor suffered, which the jury had determined to be in the amount of $7,492,430, renders this interrogatory meaningless. Common sense dictates that a "refund" of $1,527,301 cannot fully compensate damages of $7,492,430.

III. CONCLUSION

We hold NPPD's motion under Rule 60(b) for partial satisfaction of the judgment was untimely, and that the district court had no jurisdiction to consider the motion. We vacate the district court's August 31, 1992, order amending the judgment.

UNITED STATES of America, Plaintiff–Appellee,

v.

Enrique TORRES, Defendant–Appellant.

No. 92–50549.

United States Court of Appeals, Ninth Circuit.

Submitted May 25, 1993 *.

Memorandum Filed June 1, 1993.

Order and Opinion Filed July 21, 1993.

Defendant was convicted in the United States District Court for the Southern District of California, John S. Rhoades, Sr., J., following his guilty plea to offense of importing marijuana into the United States. Appeal was taken. The Court of Appeals held that: (1) defendant's negotiated plea agreement validly waived right to appeal sentence, regardless of district court's subsequent denial of downward sentencing adjustment expected by defendant in light of his role as mere "mule" in bringing drugs across border, and (2) district judge did not participate in plea bargaining despite stating that agreement did not shock him.

Affirmed in part and dismissed in part.

1. Criminal Law ⇐1026.10(2.1)

Defendant's negotiated plea agreement validly waived right to appeal sentence, regardless of district court's subsequent denial of downward sentencing adjustment expected by defendant in light of his role as mere "mule" in bringing drugs across border; defendant claimed that expected adjustment was basis for plea agreement, but defendant had affirmed under oath his understanding that district court was not bound by plea agreement, and defendant's prior record had not been disclosed at time of plea negotiations.

2. Criminal Law ⇐1139

Whether district court judge improperly participated in plea negotiations is legal question which is reviewed de novo.

3. Criminal Law ⇐273.1(2)

District judge did not participate in plea bargaining despite stating that agreement did not shock him; agreement already had been reached during discussions before another judge, district judge in question clearly stated that he could not agree to follow plea agreement, and parties' presentation of agreement was mere matter of procedure before change of plea hearing. Fed.Rules Cr.Proc.Rules 11, 11(e)(1), 18 U.S.C.A.

* The panel unanimously finds this case suitable for disposition without oral argument Fed. R.App.P. 34(a); 9th Cir.R. 34–4.

Stephanie R. Thornton and Antonio F. Yoon, Law Graduate, Federal Defenders of San Diego, Inc., San Diego, CA, for defendant-appellant.

Roger W. Haines, Jr., Asst. U.S. Atty., San Diego, CA, for plaintiff-appellee.

Appeal from the United States District Court for the Southern District of California.

Before: HUG, WIGGINS, and THOMPSON, Circuit Judges.

ORDER

The memorandum disposition filed June 1, 1993 is redesignated a per curiam opinion.

OPINION

PER CURIAM:

Enrique Torres seeks to appeal his sentence of 33 months, imposed under the United States Sentencing Guidelines ("Guidelines"), following his guilty plea to importing 117 pounds of marijuana into the United States in violation of 21 U.S.C. §§ 952 and 960 and 18 U.S.C. § 2. Torres claims the district court's refusal to depart downward pursuant to *United States v. Valdez-Gonzalez*, 957 F.2d 643 (9th Cir.1992), rendered void his waiver of the right to appeal his sentence. Alternatively, he claims he should be allowed to withdraw his guilty plea because the district court committed plain error by participating in the plea negotiations. We have jurisdiction under 28 U.S.C. § 1291 and we affirm the conviction. We decline to exercise jurisdiction to review Torres's sentencing claims and we dismiss them.

A. Facts

Torres was arrested on February 5, 1992, less than a mile north of the Mexico-United States border with 117 pounds of marijuana in the back of his truck. The crime of importation, to which he pleaded guilty, exposed him to a maximum of 20 years imprisonment and a $1 million fine.

The government's initial investigation showed that Torres had a clean record. In fact, he had sustained four prior convictions under different aliases for illegal entry and related offenses.

Torres entered into a plea agreement under which the government promised to recommend a downward adjustment for acceptance of responsibility and a sentence at the low end of the applicable guideline range. The parties also agreed that Torres would argue for a downward departure pursuant to *Valdez-Gonzalez*, which the government would oppose only as a matter of policy.[1] The written agreement stipulated "there is no agreement as to defendant's criminal history category," and "[t]he defendant is aware that any estimate of the probable sentencing range that he may have received from his counsel or the government is a prediction, not a promise, and is *not binding* on the court." Torres, finally, "expressly waive[d] the right to appeal his sentence ... if [he was] sentenced pursuant to the Government's recommendation or to less time in custody."

In accordance with the criminal case settlement procedures of the Southern District of California, the parties discussed the terms of the proposed plea agreement with District Judge Earl Gilliam. Judge Gilliam approved of the agreement, and the parties conveyed Judge Gilliam's approval to District Judge John Rhoades, the sentencing judge. Both Judge Gilliam and Judge Rhoades were told that Torres had no criminal history. At the conclusion of the parties' meeting with Judge Rhoades, he said, "As you know, under Rule 11 I can't agree that I am going to follow what you say but it doesn't shock me." A week later, Torres pleaded guilty.

By the time Torres was sentenced, the probation office had discovered his criminal record, which changed his criminal history category from I to III. At sentencing, the government recommended and the court granted a two-level downward adjustment for acceptance of responsibility, but the court ruled as a matter of law that a *Valdez* depar-

1. In *Valdez-Gonzalez*, we agreed with the district court that the role in the drug trade played by "mules" may constitute a mitigating circumstance of a kind or to a degree not taken into account by the Sentencing Commission in formulating the Guidelines.

ture was inappropriate in light of Torres's criminal history. The court sentenced Torres according to the government's recommendation to the lowest possible term of imprisonment within the appropriate Guidelines range.

B. Waiver

[1] Although a defendant's waiver of his right to appeal is generally enforceable, *United States v. Navarro-Botello*, 912 F.2d 318, 321–22 (9th Cir.1990), *cert. denied*, —— U.S. ——, 112 S.Ct. 1488, 117 L.Ed.2d 629 (1992), we have considered a defendant's claims that he was sentenced in violation of a negotiated plea agreement. *United States v. Serrano*, 938 F.2d 1058, 1060 (9th Cir.1991). To determine whether a plea agreement was violated we look to "what the parties ... reasonably understood to be the term of the agreement." *United States v. Sutton*, 794 F.2d 1415, 1423 (9th Cir.1986) (citations omitted).

Torres argues that the district court's "refusal to consider" a *Valdez* departure frustrated "the premise upon which [his appeal] waiver was predicated," thus rendering the waiver void. We disagree. Torres got everything he bargained for. The government and the defense, the only parties bound by the plea agreement, performed as promised. Torres's attorney requested a downward departure under *Valdez* and the government did not strenuously oppose the motion. The district court considered the motion at some length before denying it.[2]

If Torres acceded to the plea agreement because he expected to get a *Valdez* departure, his expectation was wholly unreasonable. Torres was reminded at every turn that the district court was not bound by the agreement, and he affirmed under oath that he understood this. Because no one breached the agreement, we uphold Torres's waiver of his right to appeal. Accordingly, we decline to address Torres's other sentencing arguments.

C. Rule 11 Violation

[2] Whether a district court judge improperly participated in plea negotiations is a legal question which we review de novo. *United States v. Bruce*, 976 F.2d 552, 555 (9th Cir.1992). The government and the defendant may "engage in discussions with a view toward reaching [a plea] agreement ... [but] the court shall not participate in any such discussion." Fed.R.Crim.P. 11(e)(1). Torres argues that, by remarking, "as you know under Rule 11 I can't agree that I am going to follow what you say but it doesn't shock me," Judge Rhoades violated Rule 11. Torres claims that but for Judge Rhoades's illegally offering his "seal of approval" to the agreement, he "would not have proceeded with the guilty plea," and that therefore, he should be allowed to withdraw his plea. We disagree.

[3] Judge Rhoades did not participate in plea bargaining. The parties had already hammered out their agreement with the assistance of Judge Gilliam. Its presentation to Judge Rhoades was simply the next step, according to procedures in the Southern District, before the change of plea hearing. Moreover, Judge Rhoades's comment was not a "seal of approval" on the agreement. Far from violating Rule 11, his comment reflects his awareness of and care to observe its prohibitions. We discern no impropriety. Thus, we decline to allow Torres to withdraw his plea.

AFFIRMED in part and DISMISSED in part.

2. The district court said at the sentencing hearing, "I have reread the *Valdez* case. I'll concede that in most respects he may fit what is now called the profile for the *Valdez* case. He's poor. He lives in Mexico. He's got a job that doesn't pay much money. He's got a child that's sick, and he's got a family. But there is one big difference. In *Valdez*, ... and I reread it yesterday, Mr. Valdez had no criminal history. That's at page . 645. Valdez had no prior criminal record in either Mexico or the United States. And that's not the case here. So I would not be inclined to follow *Valdez*."

Agenda Item III D #2

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

FROM: **Professor Dave Schlueter, Reporter**

RE: **Rule 12; Proposal to Abolish Rule**

DATE: **September 7, 1995**

Attached is correspondence from Mr. Paul Sauers who urges the Committee to retire Rule 12. He apparently views the rule as being inconsistent with the Constitution.

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

August 30, 1995

Mr. Paul Sauers
3605 Carambola Circle
Coconut Creek, Florida 33066

Re: *Comment on Criminal Rule 12*

Dear Mr. Sauers:

Thank you for your letter commenting on Rule 12 of the Federal Rules of Criminal Procedure. A copy of your letter will be sent to the chair and reporter of the Judicial Conference Advisory Committee on Criminal Rules for their consideration. The next meeting of the Advisory Committee will be held on October 16-17, 1995.

We welcome your comments and appreciate your interest in the rulemaking process.

Sincerely,

John K. Rabiej

for Peter G. McCabe
Secretary

cc: Honorable Alicemarie H. Stotler
Honorable D. Lowell Jensen
Professor David A. Schlueter

Wade H. McCree, Jr. USA Judge
Michigan University Law School
Ann Arbor, MI 48109

RECEIVED 8/17/95

At: Joseph F. SPANIOL, Jr., Secretary
Committee on Rules of Practice/Procedure
Administrative Office, U.S. Courts
Washington, D.C. 20544

Re: CRIMINAL Rule 12 (Title 18)

Dear Judge McCree/Chairman of US Courts, etc.:

This relates to the heading-reference and companion matters.

Under the present rule 12 (Title 18) pursuant to the not of the ADVISORY Committee on criminal procedural rules of USA (inferior) courts of justice - sitting in American States (50 today) all challenges to their "jurisdiction" is ABOLISHED. Note to subdivision (a) at 1. of the rule.

Hmmm! What about (concurrent) jurisdiction matters?

In its place is substituted the plea of a MOTION to DISMISS primarily. But see America's supreme law or Constitution (Const. of USA), BILL of Rights, Amendment I "right to petition the government (co for redress of grievances." Does this way conform therewith? Reason?

IF the "MEANS" or Court rule can divert our laws, nothing is guaranteed AMERICANS ("We, the people of USA").

Committee on CRIMINAL Rules/Procedure (Attn: J.F. Spaniol, Jr., Dpty. Dir.)
Washington, D.C. 20544
8/14/95
Page 2

A similar change was introduced in CIVIL controversies (F.R.C.P.)(Title 28) with success. The success being principally avoiding dilatory or delaying tactics by one of the parties to suit, whether criminal or civil in nature and effect.

The rub is: that rule says nothing about the alleged VOLUNTARY and INVOLUNTARY trials comprehended by our SUPREME law or Constitution in [redacted] Amendment I, supra, etc.

Rule 12 makes NO distinction/difference between (voluntary) criminal cases, i.e. punishment of counterfeiting the securities and current coins of the USA or the United States (50 states) and defining and punishing piracies and felonies committed on the high seas, and, offenses against the law of nations, see Art. I, Sec. 8, Cls. 6 and 10 (Const. of/for USA Govt in D.C.), for examples... and (involuntary) CIVIL controversies under Article III (Judicial Powers of USA)(Const. of USA). USA "tax" matters belong to "civil" matters/powers, etc., category.

A (voluntary) dismissal of suit may be comprehended by that rule where the parties to suit do not dispute the true/operative facts of the particular action—whether criminal/civil in nature.

In short, the parties to the legal action may stipulate to the DISMISSAL of suit in toto—under that rule or procedural means. If so, what was the (real) purpose in initiating the legal action

first place?

A practitioner or the like may be inclined to misuse or misapply that rule to the clients advantage in legal actions, criminal or civil. The practitioner may delay suit for his "profit" sake. The reasons are boundless because the rule is unspecific as to voluntary/involuntary actions that may be brought in a USA Court under ~~Articles III~~ (Const. of U.S.A.)... under criminal practice and procedures (~~Title~~ 18).

Of course, rule 12(b)(Pretrial Motions) infers or implies that ANY defense, objection, or request which is capable of determination WITHOUT ~~the~~ trial of the ~~GENERAL~~ issues (of fact) may be raised (before) trial... by "motion." USA "tax" cases/controversies being of this sort under that unspecified rule of CRIMINAL practice/procedure.

I say to this, some sort of due process hearing or trial on merit is the only way to proceed in USA Courts of justice, reason, and law under ~~Art. III~~ (Const. of USA). If not such, a MOTION is (legally) INVALID because only a judicial determination CEMENTS, etc., A case/controversy... AND not a mere MOTION to DISMISS a suit in toto (involuntarily or voluntarily)x by the USA Govt in D.C. or otherwise.

The complaint or first pleading, see FRCP (Title 28) rule 7(a),

for definition of the word "pleadings," only asserts or avers this and that. A "trial" however establishes or confirms "this and that" as true and correct by supporting evidence or proofs... and not a mere motion.

Rule 12 (Title 18) is a far-cry from exactness or specific facts to apply any law thereto in the cardinal "due process of law" meaning or sense under Amendment 5 (Const. of USA).

Since it substitutes (the rule that is) a "motion to dismiss" all legal actions on JURISDICTION matters/concerns, even a concurrent-jurisdiction one, and no MOTION (in American jurisprudence) can be valid or legal absent established facts to sustain it, and that Rule 12 makes (no) distinction/difference between "voluntary" and involuntary actions in the criminal setting - the rule is clearly defective and legally invalid as it now stands.

Accordingly, Rule 12 (Title 18) must be retired, without more. See to it that this is done, without the requisite more, to harmonize with America's supreme law or Constitution "due process of law" guidelines and mandate, etc.

Sincerely,

/s/ Paul Sauers

PAUL SAUERS

Committee on Criminal Rules/Procedure (Attn: J.F. Spaniol, Jr., Dpty. Dir.)
Washington, D.C. 20544
8/14/95

3605 Carambola Circle
Coconut Creek, FL. 33066
(Law + Govt Student)

Dated: August 14, 1995.

Agenda Item ID # 3

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

FROM: **Professor David A. Schlueter, Reporter**

RE: **Rule 26.2; Consideration of Possible Amendments Re Definition of "Statement."**

DATE: **Sep. 8, 1995**

During its discussions at its last meeting regarding the pretrial production of witness statements in Rule 16, the Committee briefly addressed the question of whether the definition of "statement" in Rule 26.2(f) should be changed. It was determined that the matter should be discussed in more detail at a later meeting.

Henry Martin has drawn to my attention a fairly detailed, recent annotation in 125 ALR Federal (1995) on the subject. Due to its length, approximately 150 pages, I have only attached the introductory material which summarizes some of the problems the courts have faced in applying the definition in Rule 26.2(f). A second annotation in the same volume addresses the Jencks requirement that the produced statement relate to the witness' direct testimony.

Given the fact that this item, and a related proposal on extending the scope of Rule 26.2 to preliminary hearings, may require extended consideration and debate, it might be a worthy candidate for study by a subcommittee.

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94-CR -D

March 9, 1995

Mr. John K. Rabiej
Chief, Rules Committee Support Office
Administrative Office of the U.S. Courts
Washington, DC 20544

RE: Advisory Committee on Criminal Rules

Dear John:

I am enclosing a copy of a letter from an Assistant Federal Defender in Oregon regarding a proposed amendment to Rule 26.2. Although due to my short tenure on the Committee, I do not know whether this matter has been raised before, but it does seem to me to be a logical and reasonable extension of Rule 26.2. Therefore, I accept Mr. Levine's request and will ask the Committee to consider this amendment. If there is still time to add this to the agenda for the April meeting, and if that is the appropriate way to proceed, please do so.

Thank you for your cooperation in this matter. See you in a few weeks.

Sincerely yours,

Henry A. Martin

HAM:drh
Enclosure
enc/cc: The Honorable D. Lowell Jensen, Chair

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March 3, 1995

Mr. Henry A. Martin
Federal Public Defender
810 Broadway, Suite 200
Nashville, Tennessee 37203

Dear Henry:

In your capacity as member of the Advisory Committee on the Federal Rules of Criminal Procedure, I wish you to consider sponsoring an expansion of Rule 26.2 to preliminary hearings. As you know, the rule currently requires production of witness statements at motions to suppress [Rule 12(i)], at sentencing hearings [Rule 32(e)], at hearings to revoke or modify probation or supervised release [Rule 32.1(c)], at detention hearings [Rule 46(i)], and at habeas corpus evidentiary hearings [Rule 26.2(g)(4)].

In its commentary to the 1993 amendment, which expanded Rule 26.2, the Advisory Committee noted that the reasons that justified expansion of the rule to suppression hearings provided "compelling reasons" to expand the rule "to other adversary type hearings which ultimately depend on accurate and reliable information." The Committee noted further that there was "a continuing need for information affecting the credibility of witnesses who present testimony ...without regard to whether the witness is presenting testimony at a pretrial hearing, at a trial, or at a post-trial proceeding." Id. The need for reliable and accurate testimony at a preliminary hearing is equally important. See Coleman v. Alabama, 399 U.S. 1, 9-10, 90 S.Ct. 1999, 2003 (1970).

For the foregoing reasons, an extension of Rule 26.2 to cover preliminary hearings is appropriate. For your convenience, I enclose a draft of the proposed new rule.

Thank you for your cooperation.

Very truly yours,

Michael R. Levine
Assistant Federal Defender

MRL[mrl\henry.ltr\sms]
Enclosure

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May 8, 1995

Professor David A. Schlueter
Saint Mary's University School of Law
One Camino Santa Maria
San Antonio, TX 78284

RE: Advisory Rules Committee's Consideration of Rule 26.2 "Statement"

Dear David:

In light of Judge Jensen's comments that the Committee would soon take up consideration of the definition of "statement" in Rule 26.2 I noted with interest in a recent circular from Lawyers Cooperative Publishing Company that the next volume ALR Federal, Vol. 25, to be released in June, will contain two annotations on this point. These articles might be of some help to you in preparing this issue for the Committee's consideration.

Take care. I'll see you this fall, iif not somewhere before.

Sincerely yours,

Henry A. Martin

HAM:drh

PROPOSED RULE 26.2 (g)

(underlined language is proposed amendment)

(g) **Scope of the Rule.** This rule applies at a suppression hearing conducted under Rule 12, <u>at a preliminary hearing conducted under Rule 5.1</u>, at trial under this rule, and to the extent specified (etc.)

WHAT IS "STATEMENT" UNDER PROVISIONS OF JENCKS ACT (18 USCS § 3500) AND RULE 26.2 OF FEDERAL RULES OF CRIMINAL PROCEDURE PROVIDING FOR PRODUCTION OF STATEMENT OF WITNESS FOLLOWING WITNESS' DIRECT EXAMINATION

by
David B. Harrison, J.D.

Both the Jencks Act and Rule 26.2 of the Federal Rules of Criminal Procedure provide for the production of a witness' statement following the direct examination of the witness. However, both the Act and the Rule limit the disclosure requirement to writings or recordings that qualify as "statements" under the definitional language of those provisions. In United States v Gross (1992, CA 3 Pa) 961 F2d 1097, CCH Fed Secur L Rep ¶ 96609, 35 Fed Rules Evid Serv 557, 125 ALR Fed 649, a prosecution arising from the alleged participation of the accused in a scheme to defraud the shareholders of a corporation in which they were officers, the court upheld a trial court determination that prosecutors' notes of interviews with a particular government witness satisfied neither the Jencks Act provision defining a "statement" as a writing "adopted" by the witness, nor the provision defining a "statement" as a "substantially verbatim" recital of the witness' oral statement. Those cases determining what documents or recordings qualify as "statements" under the Jencks Act and Rule 26.2 are collected and analyzed in this annotation.

United States v Gross is fully reported at page 649, infra.

Dennis v United States (1965, CA10 Colo) 346 F2d 10, 51 CCH LC ¶ 19679—§ 25
Johnson v United States (1959, CA10 Kan) 269 F2d 72—§§ 12, 29[a]
Mims v United States (1964, CA10 Okla) 332 F2d 944—§ 29[a]
Travis v United States (1959, CA10 Colo) 269 F2d 928, 44 BNA LRRM 2709, 37 CCH LC ¶ 65719—§ 25
United States v Hall (1975, WD Okla) 424 F Supp 508—§ 14
United States v Jackson (1994, DC Kan) 850 F Supp 1481—§§ 6, 8
United States v Page (1987, CA10 Okla) 808 F2d 723, ALR Fed 4158—§ 25
United States v Pennett (1974, CA10 Kan) 496 F2d 293—§ 29[b]
United States v Shannahan (1979, CA10 Colo) 605 F2d 539—§ 21[b]
United States v Smaldone (1973, CA10 Colo) 484 F2d 311—§§ 6, 18, 22
United States v Swindler (1973, CA10 Kan) 476 F2d 167—§ 31[b]

ELEVENTH CIRCUIT

United States v Lovd (1984, CA11 Fla) 743 F2d 1555, 17 Fed Rules Evid Serv 182—§§ 3, 6, 11, 21[a], 26
United States v Mena (1989, CA11 Fla) 863 F2d 1522—§ 19[b]
United States v Soto (1983, CA11 Fla) 711 F2d 1558, 13 Fed Rules Evid Serv 1621—§ 19[b]
United States v Valera (1988, CA11 Fla) 845 F2d 923, 25 Fed Rules Evid Serv 1294—§ 25

DISTRICT OF COLUMBIA CIRCUIT

Borges v United States (1959) 106 US App DC 139, 270 F2d 332—§ 25
Brown v United States (1976, Dist Col App) 359 A2d 600—§ 18
Coleman v United States (1986, Dist Col App) 515 A2d 439—§§ 11, 25, 27
Dyas v United States (1977, Dist Col App) 376 A2d 827—§§ 11, 18, 25
Fields v United States (1977, Dist Col App) 368 A2d 537—§ 25
H., In re (1975, Dist Col App) 343 A2d 573—§§ 21[b], 25
March v United States (1976, Dist Col App) 362 A2d 691—§§ 2[b], 25
McGill v United States (1959) 106 US App DC 136, 270 F2d 329—§ 29[b]
Middleton v United States (1979, Dist Col App) 401 A2d 109—§ 28
Moore v United States (1976, Dist Col App) 363 A2d 288—§ 24
Moore v United States (1976, Dist Col App) 353 A2d 16—§ 11
Rease v United States (1979, Dist Col App) 403 A2d 322—§§ 11, 22, 25
Saunders v United States (1963) 114 US App DC 345, 316 F2d 346—§ 18
Strickland v United States (1978, Dist Col App) 389 A2d 1325—§ 11, 25
Tansimore v United States (1976, Dist Col App) 355 A2d 799—§ 19[b], 25
United States v Fowler (1979) 197 US App DC 208, 608 F2d 2, 4 Fed Rules Evid Serv 957—§ 22

United States v Gantt (1980) 199 US App DC 249, 617 F2d 831, 5 Fed Rules Evid Serv 553—§ 25
United States v Harrison (1975) 173 US App DC 260, 524 F2d 421—§ 24
United States v Hines (1971) 147 US App DC 249, 455 F2d 1317—§ 25
United States v Jackson (1982, Dist Col App) 450 A2d 419—§ 24
United States v North American Reporting, Inc. (1985) 245 US App DC 332, 761 F2d 735—§ 11
United States v North American Reporting, Inc. (1984) 238 US App DC 300, 740 F2d 50, 15 Fed Rules Evid Serv 2001—§§ 2[b], 18
United States v Scriber (1974) 163 US App DC 36, 499 F2d 1041—§ 24
Williams v United States (1964) 119 US App DC 177, 338 F2d 286, 5 ALR3d 746—§ 24, 25
Williams v United States (1963) 117 US App DC 206, 328 F2d 178—§ 24

SPECIALIZED COURTS

United States v Bosier (1982, ACMR) 12 MJ 1010—§§ 17, 19[b], 23[a]
United States v Durden (1982, AFCMR) 14 MJ 507—§ 19[b]
United States v Fountain (1976, NCMR) 2 MJ 1202—§§ 11, 12, 25
United States v Gomez (1983, ACMR) 15 MJ 954—§ 29[b]
United States v Jarrie (1978, CMA) 5 MJ 193—§ 21[a]
United States v Kilmon (1980, NCMR) 10 MJ 543—§ 19[a]
United States v Matfield (1978, ACMR) 4 MJ 843—§ 13
United States v McDaniel (1983, ACMR) 17 MJ 553—§ 12, 25
United States v Pena (1986, CMA) 22 MJ 281—§§ 19[a], 29[a]

ARTICLE

I. Preliminary Matters

§ 1. Introduction

[a] Scope

This annotation[1] collects and discusses the federal cases[2] determining what constitutes a "statement" under the provisions of the Jencks Act (18 USCS § 3500) or Rule 26.2 of the Federal Rules of Criminal Procedure requiring, subject to certain conditions set forth in the Act and Rule, that a witness' statement[3] be produced following

1. The present annotation supersedes § 15[c] of the annotation at 3 ALR Fed 29; §§ 11-13, and 16 of the annotation at 5 L Ed 2d 1014; and §§ 3-6 and §§ 8-15 of the annotation at 5 ALR3d 763.

2. The annotation includes cases emanating from the District of Columbia Court of Appeals and decided under the Jencks Act or Rule 26.2 of the Federal Rules of Criminal Procedure. Cases decided by military tribunals are included in the annotation on an illustrative basis only.

3. Both the Jencks Act and Rule 26.2 are limited in their application to statements of witnesses other than the defendant. The pretrial discovery of the defendant's statement

the direct examination of such witness.

Since the focus of the present annotation is upon whether the nature of a particular document or recording is such as to render it subject to production under the Act or Rule, no attempt is made herein to collect cases dealing with the requirements of the Act or Rule that a statement be in the "possession" of the person from whom production is sought,[4] or that the contents of the statement "relate to" the subject matter of the witness' direct testimony.[5]

Also excluded are those cases in which the court, although determining that a particular document or recording is or is not a statement under the Jencks Act or Rule 26.2, omits from its opinion any discussion of the nature of the document or recording, the circumstances under which it was made, or the principles applied by the court in making its determination.

The Jencks Act was amended in 1970 to delete a requirement, in 18 USCS § 3500(e)(2), that a recording or transcription otherwise within the purview of that clause be of an oral statement made "to an agent of the Government."[6] Accordingly, the annotation does not collect cases decided prior to the foregoing amendment in which the qualification of a particular document or recording as a "statement" was based upon the determination of whether the purported statement was one which could, or could not, be deemed to have been made to a government agent.

[b] Related annotations

Requirement of Jencks Act (18 USCS § 3500(b)) and Rule 26.2(a) of Federal Rules of Criminal Procedure that statement whose production is sought relate to subject of witness' direct testimony. 125 ALR Fed 675.

Statements of persons other than defendant as subject to discovery by defendant under Rule 16 of Federal Rules of Criminal Procedure. 115 ALR Fed 573.

Accused's right to depose prospective witnesses before trial in federal court under Rule 15(a) of Federal Rules of Criminal Procedure. 43 ALR Fed 865.

Accused's right to have federal grand jury make written record of its proceedings. 25 ALR Fed 723.

Accused's right to inspection of minutes of federal grand jury. 3 ALR Fed 29.

Proper procedure for determining whether alleged statement or report of government witness should be produced on accused's demand, under Jencks Act (18 USC § 3500). 1 ALR Fed 252.

Validity and construction of Jencks Act (18 USC § 3500) as to defendant's right to production of statements and reports of government witnesses. 5 L Ed 2d 1014.

Right of defendant in criminal case to inspection of statement of prosecution's witness for purposes of cross-examination or impeachment. 7 ALR3d 181.

Discovery and inspection of prosecution evidence under Federal Rule 16 of criminal procedure. 5 ALR3d 819.

Statements and reports of government witnesses producible in federal criminal case under Jencks Act (18 USC § 3500). 5 ALR3d 763.

is the focus of Rule 16 of the Federal Rules of Criminal Procedure. As to the effect of Rule 16 upon the pretrial discovery of a statement of a witness other than the defendant, where that statement alleged includes a statement by the defendant, see the annotation at 115 ALR Fed 573.

4. As to the requirement of "possession," see § 15 of the annotation at 5 L Ed 2d 1014. The related issues of whether a party is obligated by the Jencks Act or Rule 26.2 to write down or otherwise record a witness' oral statement, and whether, in the event such a writing or recording is made, the Act or Rule is violated by the loss or destruction of such writing or recording, are also considered to be beyond the scope of the present annotation, although cases discussing these issues are treated herein to the extent that they also discuss the question whether such writings or recordings would, if they had been in existence, qualify as Jencks Act or Rule 26.2 statements.

5. As to the requirement of such a relationship, see the annotation appearing at 125 ALR Fed 675.

6. Similarly, Rule 26.2 of the Federal Rules of Criminal Procedure contains no such requirement.

§ 2. Background, summary, and comment

[a] Generally

The United States Supreme Court's decision, in Jencks v United States,[7] that the defense in a federal criminal prosecution is entitled, under certain circumstances, to have produced for impeachment purposes the statements which have been made to government agents by government witnesses, gave rise to a concern on the part of Congress that an expansive reading of the Court's decision would compel the indiscriminate production of government agents' summaries of interviews, regardless of their character or completeness, and that disclosure of memorandums containing an investigative agent's interpretations and impressions might reveal the inner workings of the investigative process, thereby injuring the national interest while at the same time giving rise to a situation in which the defense would be allowed to use, for impeachment purposes, statements which could not fairly be said to be the witness' own.[8] These concerns led to the enactment of the Jencks Act,[9] which became the exclusive means of compelling, for cross-examination purposes, the production of statements of a government witness to an agent of the Government.[10]

7. Jencks v United States (1957) 353 US 657, 1 L Ed 2d 1103, 77 S Ct 1007, 75 Ohio L Abs 465, 40 BNA LRRM 2147, 32 CCH LC ¶ 70731.

8. See the discussion of the legislative history of the Jencks Act in Palermo v United States (1959) 360 US 343, 3 L Ed 2d 1287, 79 S Ct 1217, 59-2 USTC ¶ 9532, 3 AFTR 2d 1680, reh den 361 US 855, 4 L Ed 2d 94, 80 S Ct 41.

9. 18 USCS § 3500.

10. Palermo v United States (1959) 360 US 343, 3 L Ed 2d 1287, 79 S Ct 1217, 59-2 USTC ¶ 9532, 3 AFTR 2d 1680, reh den 361 US 855, 4 L Ed 2d 94, 80 S Ct 41.

The Jencks Act remained the exclusive means of such production until the adoption in 1980 of Rule 26.2 of the Federal Rules of Criminal Procedure, whose purpose was to place in the criminal rules the substance of the Act, in recognition of the belief that provisions which are purely procedural in nature should appear in the Federal Rules of Criminal Procedure rather than in Title 18.[11]

Both the Jencks Act and Rule 26.2 attempt, through provisions defining the term "statement,"[12] to limit controversies over what writings or recordings are subject to production. Three categories of statements are recognized by these definitional provisions. The first category consists of a written statement made by the witness and signed or otherwise adopted or approved by the witness.[13] The second category consists of stenographic, mechanical, electrical, or other recordings, or transcriptions thereof, that are substantially verbatim recitals of oral statements that were made by the witness and that were recorded contemporaneously with the making of such oral statements.[14] The third category consists of statements, however taken or recorded, or transcriptions thereof, made by the witness to a grand jury.[15] A 1970 amendment to the Jencks Act provision pertaining to the second category—substantially verbatim recitals of oral statements—deleted[16] from that provision a requirement that the oral statement must have been made by the witness "to an agent of the Government." Consistent with this change, Rule 26.2(f)(2) likewise contains no requirement that the statement be one which was made to a government agent.

Despite the clear attempt, in the promulgation of the foregoing definitions, to alleviate some of the concerns that arose from the Supreme Court's decision in the Jencks case, a large body of case law has arisen with respect to the issue of what constitutes a statement of the type that is subject to production under the Act or Rule. With respect to the first category of statement—namely, a written statement made by the witness and signed or otherwise adopted or approved by the witness—it is not surprising that

11. Advisory Committee on FRCrP 26.2. Notwithstanding the stated purpose of incorporating the Jencks Act in the Federal Rules of Criminal Procedure, Rule 26.2 includes some provisions changing the law as to production of witnesses' statements for impeachment purposes. A major change is the addition of a provision broadening the obligation to produce statements to include production by the defendant and the defendant's attorney. Other differences between the Act and the Rule are discussed in later sections of this annotation to the extent that they are relevant to the scope of the annotation.

12. § 3500(e); Rule 26.2(f).

13. § 3500(e)(1); Rule 26.2(f)(1).

14. § 3500(e)(2); Rule 26.2(f)(2).

15. § 3500(e)(3); Rule 26.2(f)(3).

16. § 3500(e)(2).

most of the case law has focused upon the question whether a particular unsigned writing was "adopted or approved" by the witness, within the purview of the definition. While this has generally required the courts to make case-by-case determinations, based upon the particular circumstances of each case, some general principles have been recognized by the courts with respect to this category of statement. Thus, consistent with the use of the disjunctive in the reference to a writing that is signed "or" otherwise adopted or approved, courts have recognized that a written statement need not have been signed by the witness to qualify as a statement under the provision, infra § 3. Moreover, in an implicit recognition of the distinction between the first category of statement, consisting of writings signed or otherwise adopted or approved by the witness,[17] and the second category, consisting of contemporaneously recorded, substantially verbatim recitals of oral statements,[18] it has been judicially recognized that a written statement need not be a verbatim recording of an oral statement to fall within the first category of Jencks Act or Rule 26.2 statement, infra § 4, and that the writing need not have been contemporaneous with the making of an oral statement, infra § 5.

As previously suggested, much of the litigation over what constitutes a statement under the first category defined by the Act and the Federal Rule centers upon the issue of what constitutes a witness' "adoption" or "approval" of a writing. Numerous courts have recognized, in this connection, that where a writing is one that the witness has not formally adopted by signing it, his adoption or approval will nevertheless be deemed to occur where the writing is read back to him and he verifies its accuracy, infra § 6. Several other courts have validated this form of adoption or approval, while at the same time making it clear that, as an alternative to reading the statement back to the witness, it is sufficient for the writing to be given back to the witness to read and verify himself, infra § 7.

With respect to the second category of statement—that consisting of contemporaneously recorded, substantially verbatim recitals of oral statements—it[19] has been recognized that a stenographic or other recording (or a transcript thereof) need not be signed or otherwise adopted or approved by the witness to qualify as a statement, infra § 8, and that, as reflected in the specific reference to a stenographic, mechanical, electrical, or "other" recording, a manual, nonstenographic recording may qualify under the definition, provided the other requirements of the provision are satisfied, infra § 9.

With regard to the much-litigated requirement of a "substantially verbatim recital," a few general principles have been asserted by the courts. Thus, it is often stated that the concept of a "substantially verbatim" recital of an oral state-

17. § 3500(e)(1); Rule 26.2(f)(1).

18. § 3500(e)(2); Rule 26.2(f)(2).

19. § 3500(e)(2); Rule 26.2(f)(2).

ment excludes purported witness statements that in actuality are nothing more than the impressions or interpretations of the witness' words by the person "recording" what the witness is saying, infra § 12. Moreover, a number of judicial decisions support the view that a statement will not be deemed to be "substantially verbatim" where it contains only occasional fragments of the witness' actual wording, infra § 11. However, that "substantially verbatim" does not mean "word-for-word" is a principle that has found support in the case law, infra § 10.

Some courts have recognized by implication that the definition of a "statement" as a contemporaneously recorded, substantially verbatim recital of an oral statement does not include the witness' testimony in prior judicial proceedings, infra § 13. However, as was previously indicated, Rule 26.2 and the Jencks Act now both specifically include grand jury testimony within a separate definition of "statement."[20] And while there has been little litigation concerning the latter provision, there has been some case law supporting the view that qualification of grand jury testimony as a "statement" under this provision is not dependent upon the showing of a "particularized need," as would otherwise be required in order to obtain grand jury testimony, infra § 14.

While much of the case law construing or applying the definition of "statement" has focused upon specific provisions of the statute or Rule, the courts have sometimes spoken generally of Jencks Act statements. Thus, a number of courts, without referring to particular definitional language, have endorsed the proposition that the concept of a "statement" does not include the government's entire investigative file on a particular case, infra § 15. Moreover, there is judicial support for the view that a statement, for purposes of the Jencks Act, includes only those communications reciting past occurrences, as opposed to communications (such as a recording of a conversation in which a witness is offered a bribe) that are contemporaneous with or part of the commission of the criminal offense that is the subject of the trial in which production of the communication is sought, infra § 17.

Another principle that has been recognized, apart from a discussion of particular language in the Jencks Act of Rule 26.2 definitions, is that a document that consists only of questions, and that lacks any declarative aspects, does not qualify as a "statement", infra § 16.

Finally, a number of courts, speaking generally about the Act or Rule, have endorsed the principle that the qualification of a writing or other document or recording as a "statement" is not subject to any attorney's work product exemption, infra § 18.

In applying the provision of the Jencks Act (or Rule 26.2) dealing with written statements that are signed, adopted, or approved by a witness, the situation with which the courts have been most frequently faced is that involving the notes or

20. § 3500(e)(3); Rule 26.2(f)(3).

reports of a law enforcement officer or a member of the criminal investigative staff of a particular government agency. Where an officer or investigator is called as a government witness, such notes or reports may constitute an important impeachment tool for the defense. Based upon the particular circumstances, such notes or reports were held to have been adopted or approved by the respective individual in some cases, infra § 19[a], while in other cases it was determined that the notes or reports failed to qualify as writings which the officer or investigator could be said to have adopted or approved, infra § 19[b]. Differing results have also been reached where the notes or report of a law enforcement officer or investigator were sought for use in the cross-examination of a different officer or agent from the one who actually made the notes or report. In some of these cases, the particular documents were held to have been "adopted or "approved" by the witness, and hence were deemed to be the latter's statement, infra § 20[a], while under the circumstances of other such cases the writings in question were considered not to have been adopted or approved, infra § 20[b].

Where the notes or report of a law enforcement officer or investigator consist of witness interview records, and the person interviewed becomes a witness at the trial, an attempt may be made to show that the notes or report were adopted or approved by the witness, so as to become subject to production following the witness' cross-examination. Under the circumstances of some of the cases in which writings were sought for this purpose, the courts found that the respective writings were in fact adopted or otherwise approved by the witness, infra § 21[a], while under other circumstances the contrary result was reached, infra § 21[b].

The provision of the Jencks Act and Rule 26.2 defining a "statement" as a writing signed or otherwise adopted or approved by a witness has also been applied to notes or reports made by prosecuting attorneys. However, under the circumstances of various cases in which this has occurred, the courts have determined that the particular notes or reports did not qualify as statements, infra § 22.

In addition to writings made by law enforcement officers and investigators, and by prosecuting attorneys, a number of the reported cases have involved miscellaneous other writings. Based upon the particular circumstances, some of these writings were held to have been adopted or approved by the witness, infra § 23[a], while others were held not to qualify as adopted or approved writings of the person whose statement they were alleged to be, infra § 23[b].

A large body of the case law falling within the scope of the present annotation involves the second category of statement, namely the contemporaneously recorded, substantially verbatim recital of a witness' oral statement.[21] Under a wide variety of circumstances facing the courts, particular documents or recordings have been held to

21. § 3500(e)(2); Rule 26.2(f)(2).

qualify as statements under this provision, infra § 24. However, under the circumstances of a large number of other cases, the courts have held that documents or recordings did not qualify as the witnesses' statements, usually because they were not considered to be "substantially verbatim" recitals of what the witnesses said, infra § 25. In some of the cases in which it was determined that the documents failed to qualify as "substantially verbatim" recitals, the courts reached this conclusion despite the fact that the documents in question contained occasional fragments of the witness' own words, infra § 26. And in some of the cases, it was held that the recording purporting to be a statement was made too long after the oral statement of the witness to be considered to have been made contemporaneously with the oral statement, as required by the definition, infra § 27.

Little litigation has occurred with respect to the specific provision of the Act and Rule including grand jury testimony within the purview of the term "statement."[22] However, there is a some case law recognizing that particular grand jury testimony qualified under the circumstances presented as a statement subject to production, infra § 28.

Not all of the courts that have construed the definition of the term "statement" have specified which provisions of the definition governed their decisions. Thus, in a number of the cases in which notes or reports of law enforcement or investigative personnel have been sought as statements, the courts have determined, without indicating the operative definitional language, that such documents failed to qualify as statements. This has occurred both with respect to notes or reports whose production was sought for the purpose of impeaching the testimony of the person who made them, infra § 29[b], and notes or reports sought for the purpose of impeaching someone other than the maker of the notes or reports, infra § 30, including a witness interviewed by the law enforcement officer or investigator, infra § 31[b]. However, in some instances the courts, without indicating the controlling provision of the Jencks Act of Rule 26.2 definitions, have held that a law enforcement officer's or investigator's notes or reports, sought for the purpose of impeaching the testimony of an interviewee, qualified as a statement, infra § 31[a], or that notes or papers, sought for the purposes of impeaching the person who produced the same, qualified as a statement, infra § 29[a].

Prosecuting attorneys' notes or reports have also been held not to be statements under the particular circumstances of cases in which the courts did not indicate which provisions of the definition of "statement" were being construed (§ 32, infra). A small group of additional decisions, involving materials other than notes or reports of prosecuting attorneys, law enforcement officers, or criminal investigators have resulted in determinations, made without reference to particular statutory language, that the materials did, infra § 33[a] or did not, infra § 33[b], qualify as statements.

22. § 3500(e)(3); Rule 26.2(f)(3).

[b] Practice pointers

Since the Jencks Act provides that the court may examine disputed material in camera to determine the Act's applicability,[23] it might be argued that where the challenged documents cannot be presented to the court for inspection because they have been lost or destroyed (such as where a police officer discards rough interview notes), the court is precluded from making a determination as to whether the materials in question satisfy the Act's definition of a statement. However, counsel should be aware that it has been held that where both the government witness who allegedly made the statement and the recorder of the statement are available to describe the witness' interview, and there exists extrinsic indicia of the reliability of their recollections, the court has an adequate factual basis upon which it may determine the applicability of the Jencks Act.[24]

Where counsel for the accused attempts to obtain disclosure under the Jencks Act of a government agents' report of interviews with individuals who later become witnesses for the government, and where counsel for the accused is thwarted in these efforts on the ground that the reports were not "substantially verbatim" recitals of the witness' oral statements to the agent, counsel may be able to obtain production of the reports as statements not of the witnesses interviewed but of the government agents who made the reports, where those agents are also called as witnesses. However, counsel should bear in mind that where the report is sought as a statement of the agent, production may be limited, if not totally precluded, by the requirement that the report "relate" to the witness' (namely the agent's) testimony. Material in the report that relates to the testimony of the individuals who were interviewed by the agents, but does not relate to the agent's testimony, may not be subject to production.[25]

Although some courts have taken the position that the defendant must meet the burden of specifying with reasonable particularity that a certain document exists, that there is a reason to believe that the document is a statutory "statement," and that the government failed to provide it in violation of the Jencks Act, counsel should be aware that this view has not been universally accepted. Thus, in United States v North American Reporting, Inc. (1984) 238 App DC 300, 740 F2d 50, 15 Fed Rules Evid Serv 2001, appeal after remand 245 App DC 332, 761 F2d 735 and cert den 474 US 905, 88 L Ed 2d 234, 106 S Ct 273, the court stated that this view, which it indicated was based on Justice Powell's concurring opinion in Goldberg v United States (1976) 425 US 94, 47 L Ed 2d 603, 96 S Ct 1338, runs counter to the principles established by the opinion of the Court in that case and also to earlier case law of the Court of Ap-

23. 18 USCS § 3500(c).

24. March v United States (1976, Dist Col App) 362 A2d 691.

25. United States v Medel (1979, CA5 Fla) 592 F2d 1305, 4 Fed Rules Evid Serv 458, reh den (CA5 Fla) 597 F2d 772.

Agenda Item ID #4

MEMO TO: Members, Criminal Rules Advisory Committee

FROM: Professor Dave Schlueter, Reporter

RE: Rule 31(d); Consideration of Amendment to Poll Jurors Individually

DATE: September 8, 1995

Attached is a letter from Judge Brooks in which he raises the issue of possibly amending Rule 31(d) to permit, or require, individual polling of members. As noted in the case attached to his letter, *United States v. Miller*, the Circuits are split on the issue.

As it currently reads, Rule 31(d) is silent on the method of polling. The question is whether the rule should be amended to (1) mention the possibility of individual polling in an individual case or (2) require individual polling in all cases.

For purposes of discussion at the Committee's meeting, I have attached a draft of the rule which would require individual polling and provides some stylizing of the existing language.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF PENNSYLVANIA
CHAMBERS OF
JUDGE D. BROOKS SMITH

REPLY TO ✓
PENN TRAFFIC BUILDING
319 WASHINGTON STREET
JOHNSTOWN, PENNSYLVANIA 15901
(814) 533-4514
FTS 723-9514

REPLY TO
UNITED STATES COURTHOUSE
GRANT & 7TH AVENUE
PITTSBURGH, PENNSYLVANIA 15219
(412) 644-4902
FTS 722-4902

July 21, 1995

Professor David Schlueter
Reporter, Committee on Criminal Rules
St. Mary's University School of Law
One Camino Santa Maria
San Antonio, Texas 78228

Dear David:

With this letter and its enclosure, I bring to your attention an issue of criminal procedure which recently found its way into a Third Circuit opinion, and which may be worthy of discussion by our committee.

Federal Rule of Criminal Procedure 31(d) reads:

> Poll of Jury. When a verdict is returned and before it is recorded the jury shall be polled at the request of any party or upon the court's own motion. If upon the poll there is not unanimous concurrence, the jury may be directed to retire for further deliberations or may be discharged.

In U.S. v. Miller, 95-1039 (7/5/95), the Third Circuit recently adopted a supervisory rule "requiring that jurors shall be polled individually rather than collectively." Apparently in several instances, a number of courts have found a collective poll to be permissible. For reasons which I believe are obvious, individual polling is the better alternative. As the Miller case notes, the ABA Standards Relating To Trial by Jury call individual polling "the most desirable" method.

I grant that this is neither a controversial subject nor one which is raised because of frequent problems experienced in the

taking of verdicts. It did seem, however, to be an appropriate procedural topic to raise, given both the split in the circuits which now exists and the committee's apparent desire to enhance the openness and candor of prospective jurors by mandating lawyer participation in the voir dire process.

I leave it to you and the chairman to decide if this matter warrants any agenda time.

Sincerely,

D. Brooks Smith
United States District Judge

DBS/tjw

cc: Honorable D. Lowell Jensen

Enclosure

Filed July 5, 1995

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 95-1039

UNITED STATES OF AMERICA,
Appellee

v.

CAROL A. MILLER a/k/a CAROL MILLER SALEMO,
Appellant

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA
(D.C. Crim. No. 93-cr-00406)

Argued April 20, 1995

Before: STAPLETON, HUTCHINSON, and WEIS,
Circuit Judges

Filed July 5, 1995

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OPINION OF THE COURT

WEIS, *Circuit Judge.*

In this criminal case, defendant contends that the trial court erred when it denied her request for an individual jury poll and instead conducted a collective inquiry. In the circumstances, we conclude that the trial court did not commit reversible error, but we adopt a prospective supervisory rule requiring that jurors shall be polled individually rather than collectively. We also affirm the trial court's rulings rejecting a duress defense and permitting the government to call a witness whom it had impeached in a previous trial.

Defendant Carol A. Miller was convicted on charges of bank fraud, 18 U.S.C. § 1344, and interstate transportation of a stolen vehicle, 18 U.S.C. §§ 2, 2312. She was sentenced to a prison term of twenty-seven months concurrent on both counts, followed by supervised release for three years, and ordered to pay restitution in the amount of $44,500.00.

In February 1991, defendant and her husband, George P. Salemo, engaged in a check-kiting scheme through which they defrauded the Meridian Bank in Allentown, Pennsylvania. Using proceeds from that operation, they purchased an automobile for $98,024.00.

On March 27, 1991, the husband was arrested in Florida. On that same day, defendant, who was also in Florida at the time, telephoned her home in Allentown, Pennsylvania and directed the housekeeper to take the

automobile from the garage and park it on a designated side street. On the following day, defendant returned to Allentown.

On March 29, 1991, at the behest of the Meridian Bank, the Court of Common Pleas of Philadelphia County served an order on defendant enjoining her and her husband from disposing of any of their assets. On the next day, the defendant's brother arrived in Allentown. He located the automobile and drove it to Arizona. On April 8, 1991, defendant flew to Arizona and, on the following day, sold the car for $89,000.00 in Las Vegas, Nevada.

Before trial, the district court granted the prosecution's motion *in limine* to bar defendant from presenting evidence of duress. After the jury returned guilty verdicts on each count charged in the indictment, defendant requested an individual poll of the jurors. The district judge refused to do so but inquired of the jurors collectively.

Defendant has appealed, raising four issues:

(1) The district court's denial of an individual poll of the jurors;

(2) Exclusion of the defendant's duress evidence;

(3) The government's use of a witness in this case that it had impeached in a former trial; and

(4) Failure of the district court to depart downward from the Guideline sentence.

I.

Following the charge of the court, the jury deliberated for about an hour and then returned to the courtroom to deliver its verdict. The record shows that the following occurred:

> "THE COURT: Members of the Jury, I understand you have reached a verdict and the way the verdict is to be taken will be as follows: First the Clerk of Court will ask the foreperson as to the results of the verdict form. Then, of course, you should listen intently while it's going on and then the other 11 persons will be

asked whether they agree as a group. You will be asked whether you agree with the verdict as announced by the foreperson.

"If you do, of course, you will say 'yes.' If you do not agree with the verdict, of course, you should say 'no.' So listen carefully. If you agree when you are asked collectively, you say 'yes.' If you do not agree, please let us know. Thank you.

"Would the Clerk take the verdict.

"THE CLERK: Would the foreperson please rise?

"Have the Members of the Jury reached a verdict by answering the jury verdict form?

"THE FOREPERSON: Yes.

"THE CLERK: How do you find the defendant as to Count 1, bank fraud?

"THE FOREPERSON: Guilty.

"THE CLERK: As to Count 2, interstate transportation of [a] stolen vehicle?

"THE FOREPERSON: Guilty.

"THE CLERK: Thank you.

"THE COURT: You may be seated.

"[DEFENSE COUNSEL]: Your Honor, I ask the jury be polled.

"THE COURT: I am going to do it collectively. I won't do it individually.

"[DEFENSE COUNSEL]: I ask for it individually.

"THE COURT: I deny it.

"THE CLERK: Members of the Jury, harken onto your verdict as the Court has recorded it in the issue joined this indictment, Number 94-406 and Carol A. Miller, also known as Carol A. Salemo, you find the defendant guilty in the manner and form as she stands indicted as to Count I, and so say you all?

"THE JURY: Yes.

"THE COURT: Does any[one] find her not guilty as to Count 1?

(No response).

"THE CLERK: As to Count 2, your verdict is 'guilty' and so say you all?

"THE JURY: Yes.

"THE COURT: Does anyone say 'not guilty' as to Count 2?

(No response)

"THE COURT: All right. Would you take the verdict form?"

Defendant contends that the denial of an individual poll violated Fed. R. Crim. P. 31 and due process as well. Fed. R. Crim. P. 31(d) does not specify any specific form but provides only that before a verdict is recorded, "the jury shall be polled at the request of any party or upon the court's own motion."

In *Humphries v. District of Columbia*, 174 U.S. 190, 194 (1899), the Supreme Court characterized polling as "an undoubted right" and explained that "[i]ts object is to ascertain for a certainty that each of the jurors approves of the verdict as returned; that no one has been coerced or induced to sign a verdict to which he does not fully assent." Judge Maris, writing for the Court in *Miranda v. United States*, 255 F.2d 9, 17 (1st Cir. 1958), described the right of the defendant to have the jury polled as being "of ancient origin and of basic importance," designed "to give each juror an opportunity, before the verdict is recorded, to declare in open court his assent to the verdict . . . ."

Although not of constitutional dimension, the right to a poll has its roots in the early common law. *United States v. Shepherd*, 576 F.2d 719, 724 (7th Cir. 1978). In 2 Sir Matthew Hale, *The History of the Pleas of the Crown* 299-300 (1st Am. ed. 1847), the text reads:

> "Now touching the giving up of their verdict, if the jury say they are agreed, the court may examine them by poll, and if in truth they are not agreed, they are fineable. 29 *Assiz.* 27. 40 *Assiz.* 10.

> "If the jurors by mistake or partiality give their verdict in court, yet they may rectify their verdict before it is recorded, or by advice of the court go together again and consider better of it, and alter what they have delivered. *Plow. Com.* 211. *b. Saunder's* case.
>
> "But if the verdict be recorded, they cannot retract nor alter it."

An additional advantage to polling is the likelihood that it will discourage post-trial efforts to challenge the verdict on allegations of coercion on the part of some of the jurors. *See Audette v. Isaksen Fishing Corp.*, 789 F.2d 956, 961 n.6 (1st Cir. 1986).

We have acknowledged the importance of the right to poll the jury, *see Government of Virgin Islands v. Hercules*, 875 F.2d 414, 418 (3d Cir. 1989), *United States v. Grosso*, 358 F.2d 154, 160 (3d Cir. 1966), *rev'd on other grounds*, 390 U.S. 62 (1968), but have not prescribed a specific method of doing so. In *Hercules*, we held that a district court erred in refusing to take a poll and by relying instead upon the fact that all of the jurors had signed the verdict slip as an indication of agreement. However, we acknowledged that the prevailing view is that the method chosen is within the discretion of the trial judge. *Hercules*, 875 F.2d at 418; *United States v. Almone*, 715 F.2d 822, 832-33 (3d Cir. 1983); *see also United States v. Sturman*, 49 F.3d 1275, 1282 (7th Cir. 1995); *Audette*, 789 F.2d at 959; *United States v. O'Bryant*, 775 F.2d 1528, 1535 (11th Cir. 1985); *United States v. Carter*, 772 F.2d 66, 67 (4th Cir. 1985); *United States v. Mangieri*, 694 F.2d 1270, 1282 (D.C. Cir. 1982); *accord* 3 Charles A. Wright, *Federal Practice & Procedure* § 517, at 33 (2d ed. 1982 & Supp. 1995); 8A James W. Moore, *Moore's Federal Practice* ¶ 31.07, at 31-67 (2d ed. 1995).

The general rule of discretion has been applied in a variety of circumstances. It has been cited when the question was whether the poll should be taken on each count of an indictment or as to each of several defendants; whether polling should continue after a juror expressed some misgivings about the verdict; and whether re-polling should be allowed. These variations differ, however, from the individual versus collective issue.

A number of courts have concluded that in the particular circumstances presented, a collective poll was permissible. *United States v. Hiland*, 909 F.2d 1114, 1139 n.42 (8th Cir. 1990); *Posey v. United States*, 416 F.2d 545, 554 (5th Cir. 1969); *Turner v. Kelly*, 262 F.2d 207, 211 (4th Cir. 1958); *see Carter*, 772 F.2d at 68 (showing of hands). Nevertheless, the preference of the appellate courts, and most district courts, has been for an individual jury poll.

In *Carter*, 772 F.2d at 68, the Court "strongly" suggested individual polling, stating: "We find that such a procedure best fulfills the purpose of a jury poll." In *Turner*, 262 F.2d at 211, the Court remarked, "[I]ndividual questioning would appear to be consonant with the etymological derivation of the term, and with the apparent trend of authority." *See also Audette*, 789 F.2d at 960; *Shepherd*, 576 F.2d at 722 n.1; *United States v. Sexton*, 456 F.2d 961, 967 (5th Cir. 1972) ("correct" procedure is to poll individual jurors).

A respected treatise likewise agrees that individual polling is preferable. In IV Charles E. Torcia, *Wharton's Criminal Procedure* § 586, at 152 (12th ed. 1976), the author says: "There is usually no prescribed mode of polling the jury. Any clear and concise form of inquiry is sufficient. The question put to *each* juror may be simply, 'Is this your verdict?' " (emphasis added and footnotes omitted).

In *Hercules*, 875 F.2d at 419 n.8, we noted that the ABA Standards Relating to Trial by Jury called for polling each juror individually, and we agreed "that this method is the most desirable." The ABA Standards for Criminal Justice § 15-4.5 provide that the "poll shall be conducted by the court or clerk of court asking each juror individually whether the verdict announced is his or her verdict." The commentary to that standard reads: "The jurors are to be questioned individually, which is what is generally understood to be contemplated by the right to have the jury polled." Although conceding that, in some jurisdictions, a collective inquiry is sufficient, the commentary warns that "[t]his procedure is not permitted under the standard, for it saves very little time while creating a risk that a juror who has been coerced to go along with the majority will not speak up."

Although our preferred method under *Hercules* has bee individual polling, we are bound by our precedent to review the procedure followed in the case before us as one that is within the discretion of the district court. As such, we loo to the record to determine whether the collective metho chosen by the trial judge here failed to provide a realistic opportunity for a potential dissenting juror to reveal his o her opposition before the verdict was recorded.

In this connection, it is significant that before the verdict was announced, the district judge told the jurors that the should listen attentively because they would soon be aske as a group whether they agreed with the verdict as announced by the foreperson. As noted earlier, afte responding collectively in the affirmative to the clerk' inquiry, "So say you all?," the jurors were then asked by the judge, "Does anyone say 'not guilty.'" No juro responded to that question.

When that proceeding is considered against the backdrop of a relatively simple case, a short period of deliberation b the jury, and no indication in the record that any of th jurors displayed reluctance or disagreement with the verdict, we cannot say that the district court abused it discretion. Accordingly, in this instance, we conclude tha the collective poll did not constitute reversible error.

However, we are concerned that in other circumstance collective polling may not have the desired effect and ma lead to unnecessary challenges to the finality of jury verdicts. Although we have previously expressed our strong preference for individual juror inquiries (the practice tha apparently is generally followed in the district courts), uniformity has not been achieved. Accordingly, we consider it necessary to adopt a supervisory rule for the distric courts within this circuit.

In the future, whenever a party timely requests that the jury be polled, the procedure shall be conducted by inquir of each juror individually, rather than collectively. Recognizing that circumstances in each case may vary widely, we leave to the discretion of the district courts — keeping in mind the purposes of the polling rule — whethe a separate inquiry should be conducted for each count of

an indictment or complaint, for each of a number of defendants, or for a variety of issues.

II.

Before the trial began, the district court conducted a hearing on the government's motion *in limine* to bar the defendant from producing evidence of alleged duress.[1] Defendant testified to a history of physical and psychological abuse by her husband, George Salemo. In addition, she asserted that he had threatened her, her brother, and her mother. Because Salemo had purported ties with organized crime, she believed that he had the ability to carry out his threats, even while incarcerated.

Defendant testified that she signed the checks and sold the car at Salemo's direction, as a result of his threats to injure her. She did not complain to the police, fearing it would be ineffectual because of Salemo's work for the Pennsylvania Crime Commission.

A witness who had previously served with the Crime Commission testified that prior to the check-kiting scheme, Salemo had been an informant for the Commission and had been released from prison in return for his cooperation. However, the arrest in Florida in 1991 was at the instigation of the Crime Commission.

The district court refused to allow the evidence of duress to be introduced. Ruling from the bench, the district judge found that because Salemo was in prison in another part of the country, there was no immediate threat of death or serious injury, no evidence of immediate retaliation tied to the sale of the car, nor a lack of reasonable opportunity to escape the threatened harm. Moreover, the court concluded that defendant produced no legally significant evidence that she lacked the opportunity to contact law enforcement officers.

---

1. A court may rule pretrial on a motion to preclude a defendant from presenting a duress defense where the government contends that the evidence in support of that position would be legally insufficient. *E.g., United States v. Sarno*, 24 F.3d 618, 621 (4th Cir. 1994); *United States v. Villegas*, 899 F.2d 1324, 1343 (2d Cir. 1990).

As the Supreme Court observed in *United States v. Bailey*, 444 U.S. 394, 409 (1980), at common law, duress excused criminal conduct when the actor was "under an unlawful threat of imminent death or serious bodily injury." The defense is not often successful. "[I]f there was a reasonable, legal alternative to violating the law, a chance both to refuse to do the criminal act and also to avoid the threatened harm, the defense[] will fail." *Id.* at 410 (internal quotation omitted).

In *United States v. One 107.9 Acre Parcel of Land Located in Warren Township, Bradford County, Pa.*, 898 F.2d 396, 399 (3d Cir. 1990), we determined that "[i]n a criminal law context, . . . duress contains three elements:

(1) an immediate threat of death or serious bodily injury;

(2) a well-grounded fear that the threat will be carried out; and,

(3) no reasonable opportunity to escape the threatened harm."

See also United States v. Santos, 932 F.2d 244, 249 (3d Cir. 1991). To the same effect, see *United States v. Paolello*, 951 F.2d 537, 541 (3d Cir. 1991), which added an additional factor — that a defendant should not recklessly place herself in a situation in which she would be forced to engage in criminal conduct.

Our review of the record persuades us that the factors of time and distance are fatal to the defendant's claim of duress. Her husband was in jail, many miles removed, when he threatened to kill her and her family. Shortly thereafter, defendant talked to an FBI agent and to a representative of the Crime Commission, but to neither did she disclose the threats.

There was ample opportunity for defendant to communicate her claims of duress to law enforcement officials. She thus failed in her obligation to notify the authorities rather than to violate a criminal law. The district court did not err in barring the defense of duress.

III.

Defendant further contends that the government acted improperly in calling Debra Moser, the defendant's housekeeper, to testify. Defendant argues that because the prosecution had impeached that witness in the earlier trial of George Salemo, it should not take an inconsistent position at her trial.

In 1992, Moser told Thomas Fry, an FBI agent, that she knew nothing about how the car was moved from the defendant's garage and out of the Allentown area. However, during Salemo's trial in October 1993, Moser, called as a witness by the defense, admitted that she had moved the car out of the garage and had hidden it. The government then impeached the witness with the statement she had given to agent Fry.

During the defendant's trial, Moser testified — this time on behalf of the government — to the same version of events that she had given in Salemo's case. She said that defendant had instructed her to move the car from the garage. Although at odds with the statement previously given to the FBI agent, the testimony of the witness at both trials was consistent.

Relying on *Mesarosh v. United States*, 352 U.S. 1 (1956), defendant contends that the government's use of Moser to support its case poisoned the trial. The circumstances presently before us, however, are a far cry from *Mesarosh* where the government conceded after the trial in that case that it had substantial doubts about the credibility of its principal witness, a paid informant. Here, by contrast, there is no allegation that Moser committed perjury. Her testimony under oath at the Salemo trial differed from the unsworn statement that she had given to the FBI agent, but it does not follow that the government could not believe that her in-court version was the truthful one.

Moreover, unlike *Mesarosh*, the government made its FBI statement available during the defendant's trial so that she was free to use it on cross-examination. As the Court of Appeals for the Eighth Circuit said in a somewhat similar situation, "Here, the poison of perjury by [the witness] ... was admitted at trial and the antidote of cross-examination

was available and used by the defendant." *United States v. Wiebold*, 507 F.2d 932, 935 (8th Cir. 1974).

In *United States v. Hozian*, 622 F.2d 439, 442 (9th Cir. 1980), the Court found no impropriety in the government's use of a witness whom it had sought to impeach in a previous trial. The Court pointed out that the defendant had ample opportunity to develop the matter on cross-examination. To the same effect, see *United States v. Tamez*, 941 F.2d 770, 776 (9th Cir. 1991); *United States v. Cervantes*, 542 F.2d 773, 776 (9th Cir. 1976).

We are persuaded that the district court did not err in permitting Moser to testify.

IV.

The defendant's final point is that the district court erred in refusing to depart downward after being advised of her claims of duress, ill health, and diminished capacity. The record demonstrates that the district court was aware of its power to depart downward, but in the exercise of discretion, chose not to do so. In such circumstances, we do not have appellate jurisdiction over this issue. *United States v. Denardi*, 892 F.2d 269, 272 (3d Cir. 1989).

Accordingly, the judgment of the district court will be affirmed.

A True Copy:
Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

Rule 31. Verdict

* * * * *

(d) POLL OF JURY. When a verdict is returned and before it is recorded the jury shall be polled individually at the request of any party or upon the court's own motion. If ~~upon~~ the poll reveals a lack of unanimity ~~there is not unanimous concurrence~~, the jury may be directed to retire for further deliberations or may be discharged.

* * * * *

Agenda Item II D #5

MEMO TO: Members, Criminal Rules Advisory Committee

FROM: Professor Dave Schlueter, Reporter

RE: Rule 35(b); Possible Amendment Addressing Issue of Pre-Sentencing Assistance by Defendant

DATE: September 11, 1995

Judge Ellis, a member of the Standing Committee has suggested in the attached materials that the Committee may wish to consider the issue of amending Rule 35(b). As noted in his letter, the courts which have considered the issue have concluded that under Rule 35(b) a motion to reduce may be filed only with regard to substantial assistance provided by the defendant subsequent to his sentencing.

Judge Ellis disagrees with that conclusion. As noted in his concurring opinion in *United States v. Speed*, 53 F.3d 643 (4th Cir. 1995), a defendant's "cooperation often does not easily separate out into distinct and independent acts of assistance." *Id.* at 647. And, "[a] rigid line of demarcation between presentencing and post-sentencing conduct also raises problems of fairness to a cooperating defendant." *Id.* He concludes his opinion by noting that if the courts continue to apply Rule 35(b) only to post-sentencing assistance, the rule should be changed. *Id.* at 649.

The current Rule 35(b) reads in pertinent part:

> (b) REDUCTION OF SENTENCE FOR CHANGED CIRCUMSTANCES. The court on motion of the Government made within one year after the imposition of the sentence, may reduce a sentence to reflect a defendant's *subsequent*, substantial assistance in the investigation or prosecution of another person who has committed an offense...(emphasis added)

As recognized by the court in *United States v. Martin*, 25 F.3d 211 (4th Cir. 1994)(attached), if the Government wishes to recognize a defendant's presentencing cooperation, that issue should be presented at the time of sentencing in accordance with appropriate sentencing guideline procedures, e.g., U.S.S.G. § 5K1.1.

As it stands, the plain language of the rule and the interpretative caselaw seem in accord. The question before the Committee is whethe rule should be amended to reflect the concerns raised by Judge Ellis.

If the Committee is inclined to amend Rule 35, it might be appropriate to also address the question raised at the last meeting about amending Rule 35(c) to clarify what is meant by "imposition of sentence" vis a vis when the time begins to run for correcting technical, arithmetical errors, etc. made during sentencing. As you may recall, the Committee decided to defer that issue until the rules as a whole were stylized, i.e. global amendments.

United States District Court
EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA, VIRGINIA 22314

CHAMBERS OF
T. S. ELLIS, III
UNITED STATES DISTRICT JUDGE

Telephone (703) 557-7817
Facsimile (703) 557-2830

July 31, 1995

Honorable D. Lowell Jensen
United States District Judge
Chairman, Advisory Committee on
Criminal Rules
P. O. Box 36060
450 Golden Gate Avenue
San Francisco, California 94102

Dear Judge Jensen:

Some courts construe Rule 35, Fed. R. Crim. P. to mean that cooperation rendered before sentencing cannot be considered or aggregated with post-sentencing cooperation for purposes of ascertaining whether a defendant's cooperation has been "substantial". This may create serious practical problems in administering the Rule. In this connection, I enclose the panel's opinion and my concurring opinion in *United States v. Speed,* 53 F.3d. 643 (4th Cir. 1995).

Perhaps this is a matter your committee may wish to consider.

Sincerely,

T. S. Ellis, III
United States District Judge

TSE:rws

cc:
Professor David A. Schlueter
Reporter
Advisory Committee on Criminal Rules
St. Mary's University of
San Antonio
School of Law
One Camino Santa Maria
San Antonio, Texas 78284

Honorable Alicemarie Stotler
United States District Judge
751 West Santa Ana Blvd.
Santa Ana, California 92701

impose a statutorily-authorized sentence of twenty-four months.

AFFIRMED.

UNITED STATES of America, Plaintiff–Appellee,

v.

Joseph Ben SPEED, Jr., Defendant–Appellant.

No. 94–5221.

United States Court of Appeals, Fourth Circuit.

Argued Feb. 3, 1995.

Decided May 15, 1995.

Defendant was convicted in the United States District Court for the Eastern District of North Carolina, at Raleigh, James C. Fox, Chief Judge, of conspiracy to possess with intent to distribute cocaine. Defendant appealed his sentence. The Court of Appeals, Williams, Circuit Judge, held that defendant was not entitled to sentencing continuance pending determination by government whether it would call defendant as witness in future criminal cases, and as to whether it would thus move for downward departure under Sentencing Guidelines based on defendant's assistance in those cases.

Affirmed in part and dismissed in part.

Ellis, District Judge, sitting by designation, issued opinion concurring in part and concurring in result.

1. Criminal Law ⇐1151

District court's decision to grant or deny motion for continuance is reviewed for abuse of discretion.

2. Criminal Law ⇐1134(3)

In reviewing district court's denial of motion for continuance in criminal proceeding, Court of Appeals is cognizant of possible Sixth Amendment implications concerning defense counsel's ability to provide effective assistance. U.S.C.A. Const.Amend. 6.

3. Criminal Law ⇐977(3)

Defendant was not entitled to sentencing continuance pending determination by government whether to call him as witness in future criminal cases, and as to whether it would thus move for downward departure under Sentencing Guidelines due to defendant's substantial assistance; defendant gave no estimate of length of his requested continuance or when any possible trials at which he would testify for government would take place, and plea agreement explicitly stated that government had no duty to file motion for downward departure based upon substantial assistance, whether at sentencing or at any other point. U.S.S.G. § 5K1.1 et seq., 18 U.S.C.A.

4. Criminal Law ⇐996(1.1)

Downward sentencing departure granted pursuant to rule pertaining to sentencing reduction for changed circumstances can only apply to substantial assistance that takes place after sentencing. Fed.Rules Cr.Proc. Rule 35(b), 18 U.S.C.A.

5. Criminal Law ⇐996(1.1)

Mechanism provided by rule that authorizes sentence reduction based on changed circumstances was not unacceptably cumbersome with respect to defendant whose potential downward departure for substantial assistance would turn on his possible future testimony; despite his claim that it would force defense attorney to continually monitor defendant's progress toward rendering substantial assistance, it was not too onerous a task for counsel to occasionally check whether government had called defendant as witness, and defendant would have great incentive to keep counsel apprised of his status. Fed.Rules Cr.Proc.Rule 35(b), 18 U.S.C.A.

6. Criminal Law ⇐1134(3)

Absent evidence that government breached plea agreement under which it

promised to apprise district court as to full extent of defendant's cooperation, Court of Appeals would not review defendant's sentence, which was within Sentencing Guidelines range. 18 U.S.C.A. § 3742(a)(1); U.S.S.G. § 1B1.1 et seq., 18 U.S.C.A.

ARGUED: Jack Benjamin Crawley, Jr., Raleigh, NC, for appellant. John Eric Evenson, II, Asst. U.S. Atty., Raleigh, NC, for appellee. **ON BRIEF:** Janice McKenzie Cole, U.S. Atty., Raleigh, NC, for appellee.

Before WILKINS and WILLIAMS, Circuit Judges, and ELLIS, United States District Judge for the Eastern District of Virginia, sitting by designation.

Affirmed in part and dismissed in part by published opinion. Judge WILLIAMS wrote the majority opinion, in which Judge WILKINS joined. Judge ELLIS wrote a separate opinion concurring in part and concurring in the result.

OPINION

WILLIAMS, Circuit Judge:

Joseph Ben Speed, Jr., appeals the sentence imposed by the district court following his conviction for conspiracy to possess with intent to distribute cocaine in violation of 21 U.S.C.A. § 846 (West Supp.1994). Specifically, Speed maintains that the district court committed reversible error in denying his motion to continue sentencing pending a determination by the Government whether, due to Speed's substantial assistance, it would move for a downward departure under the Sentencing Guidelines, pursuant to U.S.S.G.[1] § 5K1.1. Furthermore, in a related argument, Speed maintains that the district court sentenced him in violation of the law because it did not fully take into consideration Speed's assistance to the Government. For the reasons that follow, we affirm the district court's denial of Speed's motion for continuance of sentencing and dismiss the appeal to the extent that Speed argues the district court imposed his sentence in violation of the law.

1. United States Sentencing Commission, *Guidelines Manual* (Nov.1993).

I.

On September 21, 1993, a grand jury in the Eastern District of North Carolina returned an indictment against Speed, Patrick Sidney, Larry Hobgood, and Colonel Hunt, charging the four with conspiracy to possess with intent to distribute cocaine in violation of 21 U.S.C. §§ 841(a)(1), 846. On November 22, 1993, Speed pled guilty to the conspiracy charge pursuant to a negotiated plea agreement.

On March 8, 1994, the district court held a sentencing hearing for Speed. At that hearing, the district court considered a motion from Speed to continue the sentencing until the Government determined whether it would file a motion for downward departure for substantial assistance, pursuant to U.S.S.G. § 5K1.1, based on information Speed provided to help the Government in other criminal investigations. After taking argument, the district court denied the motion for a continuance and sentenced Speed to 115 months imprisonment, the high end of the applicable Sentencing Guideline range. Speed appeals from the sentence he received pursuant to a provision in his plea agreement that provided a right of appeal if the sentence imposed was greater than 63 months.

II.

A.

[1, 2] Speed's primary argument on appeal is that the district court committed reversible error in denying his motion for a continuance of the sentencing hearing. A district court's decision to grant or deny a motion for continuance is reviewed for an abuse of discretion. *United States v. Attar*, 38 F.3d 727, 735 (4th Cir.1994) (citing *Morris v. Slappy*, 461 U.S. 1, 11, 103 S.Ct. 1610, 1616, 75 L.Ed.2d 610 (1983)). Because a district court has broad discretion in scheduling the sentencing proceeding, "[a]bsent a showing both that the denial was arbitrary and that it substantially impaired the defendant's opportunity to secure a fair sentence, we will not vacate a sentence because a con-

tinuance was denied." *United States v. Booth*, 996 F.2d 1395, 1397–98 (2d Cir.1993) (quoting *United States v. Prescott*, 920 F.2d 139, 146–47 (2d Cir.1990)). In reviewing the district court's denial of a motion for continuance in a criminal proceeding, we remain cognizant of possible Sixth Amendment implications concerning the ability of counsel for the defendant to provide effective assistance. *United States v. LaRouche*, 896 F.2d 815, 822–25 (4th Cir.) (Sixth Amendment analysis of denial of continuance requires looking at whether abuse of discretion took place and possible prejudice to defendant), *cert. denied*, 496 U.S. 927, 110 S.Ct. 2621, 110 L.Ed.2d 642 (1990).

[3] In support of his motion for a continuance, Speed argues that the district court should have delayed his sentencing because the Government interviewed him concerning his knowledge of other criminal matters and, at the time of sentencing, had not yet decided whether to call him as a witness in future criminal cases. According to Speed, the likelihood that the Government would file a motion for downward departure would increase dramatically if it decided to call him as a witness at other trials. By continuing the sentencing for an unspecified amount of time, the district court would provide the Government and Speed with the proper opportunity to gauge the level of Speed's assistance.

Although in some circumstances delaying a defendant's sentencing might be advantageous to all parties and would not unacceptably consume scarce judicial resources, we can find no indication in the record that this is one of those times. In his motion and at oral argument before the district court, Speed gave no estimate of the length of his requested continuance or when any possible trials at which he would testify for the Government would take place. In addition, we note that the plea agreement explicitly stated that the Government had no duty to file a motion for downward departure based upon Speed's substantial assistance, whether at sentencing or at any other point. Without more, Speed has failed to provide a basis upon which we can find an abuse of discretion on the part of the district court. *See Booth*, 996 F.2d at 1397.

[4] Speed also argues that the district court was incorrect in noting that a motion for reduction of sentence for substantial assistance, filed under Fed.R.Crim.P. 35(b),[2] subsequent to sentencing would sufficiently protect his interest. Because a downward departure granted pursuant to Fed. R.Crim.P. 35(b) can only apply to substantial assistance that takes place *after* sentencing, Speed correctly maintains that his actions before sentencing could not be taken into account as substantial assistance. *United States v. Martin*, 25 F.3d 211, 215–16 (4th Cir.1994) ("Fed.R.Crim.P. 35(b) grants the sentencing judge the authority to reduce a defendant's sentence *only* for substantial assistance rendered *subsequent* to sentencing") (emphases in original); *United States v. Francois*, 889 F.2d 1341, 1345 (4th Cir.1989), *cert. denied*, 494 U.S. 1085, 110 S.Ct. 1822, 108 L.Ed.2d 951 (1990).[3] Thus, Speed ar-

2. Rule 35(b) states, in relevant part:

> *(b) Reduction of Sentence for Changed Circumstances.* The court, on motion of the Government made within one year after the imposition of the sentence, may reduce a sentence to reflect a defendant's subsequent, substantial assistance in the investigation or prosecution of another person who has committed an offense, in accordance with the guidelines and policy statements issued by the Sentencing Commission pursuant to section 994 of title 28, United States Code. The court may consider a government motion to reduce a sentence made one year or more after imposition of the sentence where the defendant's substantial assistance involves information or evidence not known by the defendant until one year or more after imposition of sentence. The court's authority to reduce a sentence under this subsection includes the authority to reduce such sentence to a level below that established by statute as a minimum sentence.

3. Judge Ellis raises some noteworthy concerns in his concurrence as to our holding that pre-sentencing assistance may not be taken into account in a Rule 35(b) motion. While we might find Judge Ellis's reasoning more persuasive if we were writing on a clean slate, we feel bound by our precedent as established in *Martin* and *Francois*. Unless or until that precedent is altered by *en banc* review or by revision of Rule 35(b), as Judge Ellis suggests at the end of his concurrence, we must follow that precedent.

Additionally, we note our disinclination to agree with Judge Ellis's reliance on *United States*

gues that he would be unacceptably prejudiced by the denial of the continuance because a Rule 35(b) motion could not adequately account for his pre-sentencing assistance in this case. We disagree. If the Government's decision to move for a downward departure would turn primarily on Speed's future testimony at other criminal proceedings, as are all the indications in the record, then the district court did not abuse its discretion in reasoning that a Rule 35(b) motion for downward departure would be an appropriate method by which to account for Speed's possible future assistance to the Government.

[5] Speed also complains that the Rule 35(b) mechanism is unacceptably cumbersome because it forces defense attorneys, especially those appointed by the district court, to monitor continually the defendant's progress towards rendering substantial assistance. Aside from the fact that we are not in the position to change the meaning of clear procedural rules such as Rule 35(b) to correct their potentially cumbersome nature, Speed's argument has no merit in its application to this case. It is clear from the facts before us that the Government's decision to file a downward departure for substantial assistance would turn on Speed's possible future testimony. Therefore, it is not too onerous a task in a continuing attorney-client relationship for counsel occasionally to check whether the Government has called Speed as a witness. Furthermore, there is little question that Speed will have great incentive to keep his counsel apprised of his status.

Speed also argues that the denial of the motion for continuance was prejudicial because the Government had promised in the plea agreement that it would inform the district court of the extent to which Speed had assisted the Government up to the time of sentencing. The difficulty faced by Speed on this point, however, is that he has never maintained, either before the district court or on appeal, that the Government breached the plea agreement with him. *See, generally, United States v. Conner*, 930 F.2d 1073, 1076–77 (4th Cir.), *cert. denied*, 502 U.S. 958, 112 S.Ct. 420, 116 L.Ed.2d 440 (1991). We decline Speed's invitation to guess about the possible breach of a plea agreement when Speed is unwilling to argue that a breach has actually occurred. *See United States v. Robertson*, 40 F.3d 1046, 1048 (9th Cir.1994) ("A claim of breach of the plea agreement ... is the sort of claim which a defendant ordinarily will recognize immediately and should be required to raise when the alleged breach can still be repaired.").

Accordingly, without any compelling reason for delaying the proceedings, the district court did not abuse its discretion in denying the motion for a continuance.

B.

[6] Speed makes an additional argument that turns in large part upon the argument we have rejected concerning the motion for a continuance: that the district court sentenced him in violation of the law because, but for the district court's failure to grant the motion for continuance, it would not have exercised its discretion to sentence him at the high end of the Sentencing Guidelines based upon the offense committed and his criminal history.[4] Speed points out, once again, that in his plea agreement the Govern-

v. Drown, 942 F.2d 55 (1st Cir.1991), for the proposition that "the First Circuit has explicitly recognized that a court may consider the full extent of a defendant's assistance in ruling on a Rule 35(b) motion." A review of *Drown* reveals that the First Circuit was confronted with the same issue as this Court in *Martin*: whether the government may predicate its decision to defer a U.S.S.G. § 5K1.1 motion on the fact that it will make a Rule 35(b) motion after sentencing? Both courts answered this question in the negative. However, to the extent that the *Drown* court took the position in a footnote that a sentencing court could take pre-sentencing assistance into account on a Rule 35(b) motion, the holding is not a model of clarity. *Drown*, 942 F.2d at 59 n. 7. The footnote not only lacks any citation to cases or Rule 35(b) to support its position, but also appears to have been *dictum*. Accordingly, after considering the footnote in *Drown*, we remain constrained by our precedent.

4. The district court calculated a total offense level of 23 and a criminal history category of VI. Accordingly, the guideline range applicable to Speed at sentencing was 92 to 115 months. *See* United States Sentencing Commission, *Guidelines Manual*, Ch. 5 Pt. A (Nov.1993). The district court sentenced Speed to 115 months imprisonment.

ment promised to apprise the district court as to the full extent of Speed's cooperation at sentencing. According to Speed, the sentence imposed by the district court violated the law because the Government did not summarize the full extent of aid offered by Speed up until that point.

Speed's argument concerning the failure to grant the motion for a continuance fairs no better when repackaged as a violation of the law by the district court under 18 U.S.C. § 3742(a)(1). When an adjudged sentence falls within a properly calculated guideline range, appellate review is not permitted. *United States v. Porter*, 909 F.2d 789, 794 (4th Cir.1990). At sentencing, the district court reasoned that Speed's lengthy criminal record warranted a sentence at the high end of the applicable guidelines range. Absent evidence that the Government breached the plea agreement, this Court will not review a sentence imposed within the correct guideline range. We therefore affirm this portion of Speed's appeal. 18 U.S.C. § 3742(f)(3).

III.

For the reasons stated, we affirm the opinion of the district court.

AFFIRMED IN PART AND DISMISSED IN PART.

ELLIS, District Judge, concurring in part and concurring in the result:

While I concur completely with the result reached and the essential reasoning of Judge Williams' thorough and insightful opinion, I write separately only to note one small portion of the opinion with which I disagree. Specifically, I do not agree with that portion of the majority opinion stating that Speed's "actions before sentencing could not be taken into account as substantial assistance" in ruling on a motion pursuant to Rule 35(b), Fed.R.Crim.P. Although Fourth Circuit precedent can be read to support, if not mandate, this view, *see United States v. Martin*, 25 F.3d 211, 215–16 (4th Cir.1994), *and United States v. Francois*, 889 F.2d 1341, 1345 (4th Cir.1989), I believe this is not a practical, fair, or compelled interpretation of the Rule.

As a practical matter, a defendant's cooperation often does not easily separate out into distinct and independent acts of assistance. Typically, cooperation is best viewed not as isolated instances of conduct divided along a time line, but rather as an overall, continuous course of conduct in which each instance builds upon the previous instances of cooperation. Accurate assessment of a defendant's cooperation requires examining the complete course of conduct. Given this, it generally makes no sense, for example, to consider a defendant's post-sentencing testimony against a co-conspirator in a vacuum, ignoring the nature and extent of information provided earlier that led to the co-conspirator's arrest.

A rigid line of demarcation between pre-sentencing and post-sentencing conduct also raises problems of fairness to a cooperating defendant. Because courts must consider the "significance and usefulness" [1] of a defendant's assistance in determining the appropriate sentence reduction, excluding pre-sentence cooperation from a court's consideration under Rule 35(b) is unjust and places unwarranted significance on the arbitrary date of sentencing. It also may create inappropriate incentives. For example, a defendant eager for a sentence reduction may well withhold all of his information until after sentencing in order to ensure that he enjoys the full benefit of his cooperation. Alternatively, sentencing judges may be encouraged to grant lengthy continuance motions in order not to prejudice a defendant whose assistance prior to sentencing has not yet risen to the "substantial" level.[2] Lengthy delays in sentencing may lead to a regrettable and unwelcome appearance of judicial participation in coercing additional information

1. *See* U.S.S.G. § 5K1.1(a)(1); *see also* Fed. R.Crim.P. 35(b) (directing courts to reduce a sentence "in accordance with the guidelines and policy statements issued by the Sentencing Commission pursuant to [28 U.S.C. § 994]").

2. I am personally aware of several such instances, including one in which the sentencing date has been postponed for almost three years.

from a defendant.[3] Yet, without such continuances, a defendant could find himself in the hapless position of having provided less than substantial assistance both before and after sentencing, despite an overall record of cooperation that crosses the "substantial assistance" threshold.

Nor is the rigid temporal division of cooperation in the majority opinion compelled by the Rule's language. Although Rule 35(b), Fed.R.Crim.P., states that the court "may reduce a sentence to reflect a defendant's *subsequent*, substantial assistance," (emphasis added), nothing in the Rule precludes courts from also taking into account prior assistance that, when added to subsequent assistance, amounts to "substantial assistance". In short, while some amount of post-sentencing assistance is required to trigger the possibility of a Rule 35(b) reduction, once triggered, the sentencing judge should be free to consider the full range and extent of a defendant's cooperation, including the cooperation rendered prior to sentencing.

Similarly, I am not convinced that the Fourth Circuit precedent cited in the majority opinion controls this narrow issue. *Francois* is certainly not controlling, for that case involved a defendant's challenge to the constitutionality of Rule 35(b) on the ground that the government maintained too much discretion over whether to bring the motion. 889 F.2d at 1345. In rejecting this claim, the Fourth Circuit panel simply noted in *dicta* that "Rule 35(b) provides for *'subsequent*, substantial assistance,' which is assistance that has occurred within one year after the imposition of sentence." *Id.* (emphasis in original). This broad observation, without more, does not compel the view expressed in the majority opinion to the effect that district courts, in ruling on Rule 35(b) motions, may not consider assistance rendered prior to sentencing.

Although *Martin* is more troublesome, it too is distinguishable. In *Martin*, the government brought a motion under Rule 35(b) in an attempt to reward a defendant whose assistance before sentencing had been substantial, but who was unable to provide *any* additional assistance after sentencing. 25 F.3d at 215. On these facts, the panel concluded that Rule 35(b) "grants the sentencing judge the authority to reduce a defendant's sentence *only* for substantial assistance rendered *subsequent* to sentencing." *Id.* (emphasis in original). This conclusion is understandable in light of the factual issue presented there. As noted, I agree that a threshold requirement of Rule 35(b) is that there be at least *some* post-sentencing assistance, a condition absent in *Martin*.[4] But neither *Martin* nor *Francois* is controlling on the precise issue here, namely, whether a district court confronted with a Rule 35(b) motion that is supported by some post-sentencing assistance is precluded from also considering in its ruling cooperation that occurred prior to sentencing.

It is also worth noting in this regard that the First Circuit has explicitly recognized that a court may consider the full extent of a defendant's assistance in ruling on a Rule

3. For instance, juries may understandably view with skepticism testimony from a cooperating defendant in a co-defendant's trial when they learn that the testifying defendant's sentencing awaits the completion of his testimony.

4. Furthermore, I agree with the conclusion in *Martin* that the government may not defer its decision whether to bring a § 5K1.1 motion on behalf of a defendant whose assistance as of sentencing has been substantial. 25 F.3d at 216. In that event, it is plainly a violation of due process to delay a decision on a substantial decision motion until after sentencing. *Id.* (Although the *Martin* panel went on to find that the government had modified the plea agreement to *require* it to bring a substantial assistance motion, *id.* at 217, that finding was not a prerequisite to the court's conclusion that a due process violation had occurred. *Id.* at 216). Provisions in plea agreements that require a defendant's assistance to be both substantial *and complete* before the government will bring such a motion therefore may run afoul of *Martin* in those instances where a defendant's cooperation, though not yet complete, has already crossed the Rule's "substantial" threshold. Of course, some unfairness may result even there in that the extent of the court's departure at the § 5K1.1 stage would not reflect the defendant's future cooperation.

Here, however, I speak only of those instances where a defendant's pre-sentencing assistance, though significant, is not yet "substantial." In those circumstances, it seems altogether unjust and somewhat arbitrary to omit the pre-sentencing assistance from a court's consideration during subsequent Rule 35(b) proceedings.

35(b) motion. *United States v. Drown*, 942 F.2d 55 (1st Cir.1991). Confronted with the question whether, at sentencing, the government may postpone its decision to bring a substantial assistance motion until the defendant's cooperation is complete, the court in *Drown* acknowledged that U.S.S.G. § 5K1.1 and Rule 35(b) contain distinct "temporal boundaries." *Id.* at 59 (stating that § 5K1.1 "was designed to recognize, and in an appropriate case to reward, assistance rendered *prior* to sentencing," while Rule 35(b) "was designed to recognize and reward *subsequent* cooperation") (emphasis in original). Therefore, the First Circuit in *Drown* concluded, as did this circuit in *Martin*, that the government may not make "a unilateral decision ... to reserve judgment on a defendant's presentence assistance in order to secure his post-sentence assistance." *Id.* Having reached this conclusion, however, the court in *Drown* nevertheless was careful to add in a footnote, "[t]his is not to say that, on a Rule 35(b) motion for sentence reduction, the court may not assay the totality of a defendant's cooperation." *Id.* at 59 n. 7. Thus, while cognizant and respectful of the distinct functions and timing of the two substantial assistance provisions, the First Circuit panel made clear its view, albeit in *dicta*, that the temporal division is not so rigid as to preclude a district court from considering the entire record of a defendant's assistance on a Rule 35(b) motion. This sound conclusion, as noted earlier, is wholly consistent with the Rule's purpose and not in conflict with its language.

In the event that the Fourth Circuit squarely addresses this issue in the future and holds that the Rule's language precludes district courts from considering pre-sentencing assistance in ruling on Rule 35(b) motions, then the Rule's language should be changed to alter this result.

UNITED STATES of America, Plaintiff–Appellee,

v.

Brian Ashley MARTIN, Defendant–Appellant.

UNITED STATES of America, Plaintiff–Appellee,

v.

Brian Ashley MARTIN, Defendant–Appellant.

UNITED STATES of America, Plaintiff–Appellant,

v.

Brian Ashley MARTIN, Defendant–Appellee.

Nos. 93–6477, 93–6583 and 93–6702.

United States Court of Appeals, Fourth Circuit.

Argued April 14, 1994.

Decided May 25, 1994.

After defendant was convicted, pursuant to his guilty plea, of distributing five grams or more of crack cocaine, conspiring to forcibly assault Drug Enforcement Administration (DEA) agent, and carrying firearm during and in relation to crime of violence, government filed motion for reduction of defendant's sentence based upon defendant's coop-

eration with government prior to sentencing. The United States District Court of the Eastern District of Virginia, Richard B. Kellam, Senior District Judge, denied motion. Defendant appealed and government cross-appealed. The Court of Appeals, Hamilton, Circuit Judge, held that: (1) government could not defer its decision to make substantial assistance motion on ground that it would make motion for reduction of sentence after sentencing, and (2) failure to make substantial assistance motion breached modified plea agreement and entitled defendant to specific performance.

Vacated and remanded for resentencing.

1. Constitutional Law ⇐270(2)
Criminal Law ⇐1306

If at time of sentencing, government deems defendant's assistance substantial, government cannot defer its decision to make substantial assistance motion under Sentencing Guidelines on ground that it will move for reduction of sentence after sentencing; if government defers making substantial assistance motion on premise that it will move for reduction of sentence after sentencing, sentence that follows deprives defendant of due process, and is therefore "in violation of law." U.S.S.G. § 5K1.1, 18 U.S.C.A.App.; Fed. Rules Cr.Proc.Rule 35(b), 18 U.S.C.A.; 18 U.S.C.A. § 3742(a)(1); U.S.C.A. Const. Amend. 5.

2. Criminal Law ⇐273.1(2)

Although plea agreements between government and defendant are unique and call for special due process considerations, judicial interpretation of plea agreements is largely governed by law of contracts. U.S.C.A. Const.Amend. 5.

3. Constitutional Law ⇐265.5

If government breaches express or implied terms of plea agreement, violation of due process occurs. U.S.C.A. Const.Amend. 5.

4. Criminal Law ⇐273.1(2, 5)

Party asserting breach of plea agreement has burden of proving its breach. U.S.C.A. Const.Amend. 5.

5. Criminal Law ⇐1139

Because case involving alleged breach of plea agreement concerned principles of contract interpretation, judicial review was de novo.

6. Constitutional Law ⇐265.5
Criminal Law ⇐273.1(2)

Government's commitment to make substantial assistance motion to reward defendant for his presentence substantial assistance was tantamount to and equivalent of modification of plea agreement, and government's failure to comply with plea agreement as modified resulted in deprivation of defendant's due process rights and entitled him to specific performance of government's promise to reward him for his presentence substantial assistance; defendant could not be penalized for government's failure, albeit inadvertent, to timely make substantial assistance motion at sentencing hearing. U.S.S.G. § 5K1.1, 18 U.S.C.A.App.; U.S.C.A. Const.Amend. 5.

ARGUED: Michael F. Imprevento, Sacks, Sacks & Imprevento, Norfolk, VA, for appellant. William Graham Otis, Asst. U.S. Atty., Sr. Litigation Counsel, Office of the U.S. Atty., Alexandria, VA, for appellee. **ON BRIEF:** Andrew M. Sacks, Sacks, Sacks & Imprevento, Norfolk, VA, for appellant. Helen F. Fahey, U.S. Atty., Vincent L. Gambale, Asst. U.S. Atty., Office of the U.S. Atty., Alexandria, VA, for appellee.

Before POWELL, Associate Justice (Retired), United States Supreme Court, sitting by designation, and WILKINSON and HAMILTON, Circuit Judges.

Vacated and remanded for resentencing by published opinion. Judge HAMILTON wrote the opinion, in which Justice POWELL and Judge WILKINSON joined.

OPINION

HAMILTON, Circuit Judge:

On April 10, 1992, Brian Ashley Martin was sentenced to 169 months' imprisonment. On March 31, 1993, citing Fed.R.Crim.P.

35(b), the government moved for a reduction of Martin's sentence based upon Martin's cooperation with the government *prior to sentencing*. The district court denied the motion, concluding that it lacked authority, under Fed.R.Crim.P. 35(b), to grant the motion for substantial assistance rendered to the government *prior* to Martin's sentencing on April 10, 1992. The government moved for reconsideration and the district court denied that motion, again concluding that it lacked authority to alter Martin's sentence. Martin appeals and the government cross-appeals the district court's refusal to consider the government's motion for a reduction of sentence and the district court's denial of the government's motion for reconsideration. For the reasons stated herein, Martin's sentence is vacated and the case is remanded for resentencing.

I

In late August 1991, a special agent of the Drug Enforcement Administration (DEA) purchased 55.35 grams of cocaine base (crack) from Martin in exchange for $2,300. In late September 1991, Martin approached an automobile occupied by the special agent and another undercover officer for the purpose of selling them additional quantities of crack. During this transaction two of Martin's associates, Gerald Davenport and Ronnie Newton, approached the automobile, with Davenport pointing a firearm at the special agent and the undercover officer. The special agent and the undercover officer proceeded to leave the scene. Shortly thereafter, Martin was arrested.

On October 15, 1991, a federal grand jury sitting in the Eastern District of Virginia returned a four-count indictment charging Martin with one count of distributing five grams or more of crack, 21 U.S.C. §§ 841(a)(1) and (b)(1)(B) (count one); one count of conspiracy to forcibly assault a DEA agent, 18 U.S.C. §§ 111 and 371 (count two); one count of forcibly assaulting a DEA agent, and aiding and abetting the same, 18 U.S.C. §§ 111, 1114, and 2 (count three); and one count of carrying a firearm during and in relation to a crime of violence, and aiding and abetting the same, 18 U.S.C. §§ 924(c)(1) and 2 (count four).

On December 4, 1991, Martin and the government entered into a plea agreement which was filed in the district court two days later. Pursuant to the agreement, Martin agreed, among other things, to: (1) plead guilty to counts one, two, and four of the indictment; (2) truthfully disclose all information with respect to the activities of himself and others concerning narcotics activities; and (3) truthfully testify before a grand jury and at any trial or court proceeding with respect to any matter about which he was requested to give testimony. In the plea agreement, the government agreed, among other things, to: (1) not make a recommendation of sentence; (2) dismiss the remaining charge in the indictment; (3) make an application on behalf of Martin for admission into the Witness Security Program; and (4) advise the district court at the time of sentencing of Martin's cooperation. The plea agreement also provided that the decision whether to file a "substantial assistance" motion under U.S.S.G. § 5K1.1 or Fed.R.Crim.P. 35(b) "rests in the government's sole discretion." (J.A. 16).

After Martin entered into the plea agreement, he cooperated extensively with the government. Martin testified before a federal grand jury which led to the indictments of Davenport and Newton. Davenport pleaded guilty in part because Martin was willing and available to testify against him at a trial. Martin also testified at Newton's trial. The government has indicated that Martin's testimony was "instrumental in the conviction of Newton on all charges." (J.A. 32).

A Presentence Report (PSR) was prepared by the probation office. Notably, the PSR contains the following statement:

Substantial Assistance

3. Assistant U.S. Attorney Charles D. Griffith has advised that he does intend to make a substantial assistance motion pursuant to 18 U.S.C. 3553(e). However, because the defendant is in the process of corroborating (sic) with the Government, the motion will not be made at the time of sentencing but will be made within the year.

(J.A. 135). In addition, in its "Position of United States with Respect to Sentencing Factors," the government made the following statement:

> With respect to all unresolved matters set forth in the presentence report, and with respect to the calculations, and basis therefore, of the guideline range, the United States is in agreement with the probation department.

(J.A. 19).

At sentencing, the government candidly acknowledged that Martin's assistance was substantial, having led to the prosecution of two others. The Assistant United States Attorney added, however, that, pursuant to his office's policy, he intended to defer making a substantial assistance motion until Martin had the opportunity to provide more information. Because the government did not expect Martin to testify in any pending cases, the district court questioned whether a second sentencing hearing was really necessary. However, the district court did not take issue with the government's position that, given the circumstances, it had the discretion to make a substantial assistance motion within the next year. Counsel for Martin proffered to the district court that it was in his client's best interest to allow the government to defer making its substantial assistance motion, allowing Martin additional time to cooperate, ultimately resulting in a lower sentence for his client. We recite the following exchange between the prosecutor, defense counsel, and the district court:

> PROSECUTOR: Your Honor, I simply would tell the Court the defendant has been cooperative. As Mr. Imprevento [defense counsel] indicated, he did testify at the trial against Ronnie Ray Newton, and I also believe that the fact that he was available to cooperate led to the conviction of Gerald Davenport, who also ultimately ended up cooperating and assisting in that trial against Mr. Newton. I think it is fair to say that I will at some time within the next year be coming back before you to make a motion on his behalf.
>
> Our office has a policy. We only make one such motion, and although *I believe his cooperation up to now with respect to the robbery attempt would entitle him to such a motion, he is still cooperating, and we want to give him the full benefit of all the cooperation he can provide before I come back to the Court to make such a motion.*
>
> So that is something that I've told his attorney, and *we've decided to delay that until a later time* when we know a little bit more about the full development and extent of his cooperation, but he has been and I expect him to be continuing to cooperate. I have no problem with you sentencing him to the low end of the guidelines on the drug conviction.
>
> Of course, there is the five-year mandatory consecutive sentence with respect to the firearm conviction.
>
> THE COURT: Are there any other pending cases about which you expect him to testify?
>
> PROSECUTOR: There are no pending cases.
>
> THE COURT: The reason I'm making an inquiry is because it seems to me if he's already extended his cooperation and applied [sic] with the provisions of his plea bargaining agreement, there's no reason to delay the idea of coming back at some subsequent time because there's no reason to use the facilities of the Court or take the time of counsel to have to do so.
>
> PROSECUTOR: Your Honor, the reason why our office chooses to do it this way is, and I don't know that Mr. Martin would fall in this category, but oftentimes, once the motion is made, the incentive to continue to provide cooperation disappears. He has other information that we would like to pursue with him, and the law does permit us to come back within one year.
>
> THE COURT: I'm not questioning the authority to do it. I'm trying to talk about why can't we deal with it all at one time and get it over with. I understand their reasons. I understand the reasons on each side, of course.
>
> PROSECUTOR: We don't know what other cooperation or results there will be in

the future. We do know this one thing, and if I came forward now, that would be all I could come forward to the Court on. If there's more, then certainly Mr. Martin benefits from that, so it's his choice for me to delay this hearing, this motion, as well.

THE COURT: All right.

DEFENSE COUNSEL: I would agree with that, Your Honor. I do feel that there are substantial matters that may cause the Court at a later time to substantially reduce the sentence, and I think at this stage, it would be advantageous to say wait. We'll try not to burden the Court's resources and just have a brief hearing at a time appropriate in the future.

(J.A. 41–44) (emphasis added). The district court then sentenced Martin to 169 months' imprisonment.

After sentencing, through no fault of his own, Martin's continued willingness to cooperate was fruitless in that he was not able to provide any additional information or assistance to the government. On March 31, 1993, the government made a motion for reduction of sentence pursuant to Fed.R.Crim.P. 35(b). The factual predicate for the government's motion was the substantial cooperation Martin had provided with respect to the prosecution of Davenport and Newton, all of which occurred *prior* to the time of Martin's sentencing on April 10, 1992.

The district court held that it was without authority to grant the government's motion because the government's motion for reduction of sentence rested on substantial assistance Martin provided to the government *prior* to his sentencing. In reaching this conclusion, the district court reviewed various provisions that allow for a reduction of a sentence and found all of them to be inapplicable. Notably: (1) construing U.S.S.G. § 5K1.1, the district court reasoned that it did not apply because the provision speaks only to a departure at the time of sentencing; (2) applying 18 U.S.C. § 3582(c)(2), the district court rejected its application because that provision only addresses the situation in which the Sentencing Commission subsequently lowers a particular sentencing range;[1] and (3) applying Fed.R.Crim.P. 35(b), the district court rejected any reliance on that provision because it relates solely to a reduction of a sentence "to 'reflect a defendant's subsequent, substantial assistance in the investigation or prosecution of another person.'" (J.A. 61) (quoting Fed.R.Crim.P. 35(b)).

The government moved for reconsideration, but the district court denied that motion as well. The district court reiterated its position that it was without authority to grant a substantial assistance motion given the circumstances, but noted that if it had the authority, it "would not hesitate to act." (J.A. 117). Martin appeals and the government cross-appeals the district court's refusal to grant the government's motion for reduction of sentence and the district court's subsequent denial of the government's motion for reconsideration.

II

This is an unusual case, insofar as the government and Martin are asking for the same relief. Both parties urge this court to vacate Martin's sentence and remand the case to the district court for resentencing.

In making their respective arguments, the parties concede that United States Sentencing Commission, *Guidelines Manual*, § 5K1.1[2] grants the sentencing judge the authority to grant a downward departure

1. 18 U.S.C. § 3582(c)(2) provides:

> [I]n the case of a defendant who has been sentenced to a term of imprisonment based on a sentencing range that has subsequently been lowered by the Sentencing Commission pursuant to 28 U.S.C. § 944(o), upon motion of the defendant or the Director of the Bureau of Prisons, or on its own motion, the court may reduce the term of imprisonment, after considering the factors set forth in section 3553(a) to the extent that they are applicable, if such a reduction is consistent with applicable policy statements issued by the Sentencing Commission.

2. U.S.S.G. § 5K1.1 provides:

> Upon motion of the government stating that the defendant has provided substantial assistance in the investigation or prosecution of another person who has committed an offense, the court may depart from the guidelines.

only for substantial assistance provided to the government *prior* to, or at the time of, sentencing. *See United States v. Drown*, 942 F.2d 55, 59 (1st Cir.1991) ("The language, structure, context, and operation of [U.S.S.G. § 5K1.1] leaves little doubt that the guideline provision, section 5K1.1, was designed to recognize, and in an appropriate case to reward, assistance rendered *prior* to sentencing.").

The parties also concede that Fed. R.Crim.P. 35(b) [3] grants the sentencing judge the authority to reduce a defendant's sentence *only* for substantial assistance rendered *subsequent* to sentencing. *See Id.* ("Rule 35(b) ... was designed to recognize and reward *subsequent* cooperation."). The interplay of these two provisions was ably summarized by the Eleventh Circuit:

> [U.S.S.G. § 5K1.1 and Fed.R.Crim.P. 35(b)] are substantially different with respect to timing. Section 5K1.1 is a sentencing tool; at the time of the original sentencing, the court may sentence the defendant below the guideline range on a motion from the government.... Rule 35(b) operates *after* sentence has been imposed. It allows the court to *resentence* the defendant to reflect substantial assistance rendered after imposition of the initial sentence.

United States v. Howard, 902 F.2d 894, 896 (11th Cir.1990).

[1] In light of the language and structure of these provisions, it has been held that the government may not predicate its decision to defer a U.S.S.G. § 5K1.1 motion on the fact that it will make a Fed.R.Crim.P. 35(b) substantial assistance motion after sentencing. *See Drown*, 942 F.2d at 59. The *Drown* court explained: "[W]here section 5K1.1 is in play, the prospect of Rule 35(b) relief in the future cannot be allowed to alter or influence the decisions of the prosecution, or the deliberations of the court, at sentencing." *Id.* To hold otherwise would "improperly merge[ ] the temporal boundaries established in section 5K1.1 and Fed.R.Crim.P. 35(b)." *Id.; cf. Howard*, 902 F.2d at 897 (district court must rule on U.S.S.G. § 5K1.1 motion before imposing sentence). Accordingly, if at the time of sentencing, the government deems the defendant's assistance substantial, the government cannot defer its decision to make a U.S.S.G.§ 5K1.1 motion on the ground that it will make a Fed.R.Crim.P. 35(b) motion after sentencing. Instead, the government at that time must determine—yes or no—whether it will make a U.S.S.G. § 5K1.1 motion. If the government defers making a U.S.S.G. § 5K1.1 motion on the premise that it will make a Fed.R.Crim.P. 35(b) motion after sentencing, the sentence that follows deprives a defendant of due process, and is therefore "in violation of law." *Drown*, 942 F.2d at 58, 59; 18 U.S.C. § 3742(a)(1).

In the present case, it is undisputed that the government's motivation behind its decision to defer making a U.S.S.G. § 5K1.1 motion was that it would make a Fed.R.Crim.P. 35(b) substantial assistance motion within one year after Martin's sentencing. This the government was not at liberty to do. Under the circumstances, as stated above, the government was required at sentencing to make a determination whether it was going to make a U.S.S.G. § 5K1.1 motion. Its decision to defer on the ground that it would make a Fed.R.Crim.P. 35(b) motion after sentencing resulted in a deprivation of due process. *Drown*, 942 F.2d at 58, 59. Accordingly, Martin's sentence was imposed "in violation of law." *Id.*, 18 U.S.C. § 3742(a)(1).

Ordinarily, we would remand this case for further proceedings under *Drown* to afford "the government the opportunity to consider afresh the substantiality of the defendant's assistance at the time of sentencing" and determine whether to exercise its discretion to make a U.S.S.G. § 5K1.1 motion. *Drown*, 942 F.2d at 60. However, as discussed in Part III, *infra*, a remand for resentencing is required.

III

[2–5] Although plea agreements between the government and a defendant are unique and call for special due process considerations, the judicial interpretation of plea

3. Rule 35(b) provides in pertinent part:
> The court, on motion of the Government made within one year after imposition of sentence, may reduce a sentence to reflect a defendant's subsequent, substantial assistance in the investigation or prosecution of another person who has committed an offense.

agreements is largely governed by the law of contracts. *See, e.g., United States v. Conner,* 930 F.2d 1073, 1076 (4th Cir.), *cert. denied,* — U.S. —, 112 S.Ct. 420, 116 L.Ed.2d 440 (1991). If the government breaches express or implied terms of a plea agreement, a violation of due process occurs. *Mabry v. Johnson,* 467 U.S. 504, 509, 104 S.Ct. 2543, 2547, 81 L.Ed.2d 437 (1984); *Santobello v. New York,* 404 U.S. 257, 262–63, 92 S.Ct. 495, 498–99, 30 L.Ed.2d 427 (1971). Applying general contract principles, we have held that the party asserting a breach of a plea agreement has the burden of proving its breach. *United States v. Dixon,* 998 F.2d 228, 230 (4th Cir.1993); *Conner,* 930 F.2d at 1076. Our review of "what the parties said or did are reviewed under the 'clearly erroneous' standard while principles of contract interpretation applied to the facts are reviewed de novo." *L.K. Comstock & Co. v. United Engineers & Constructors,* 880 F.2d 219, 221 (9th Cir.1989). Because this case concerns principles of contract interpretation, our review is *de novo.*

[6] In this case, the plea agreement required the government, in exchange for Martin's cooperation and assistance, to, among other things, inform the district court of Martin's assistance. In addition, in the plea agreement, the government retained discretion in determining whether to make a U.S.S.G. § 5K1.1 motion or Fed.R.Crim.P. 35(b) motion. Although the government did not include in the plea agreement a commitment to make a U.S.S.G. § 5K1.1 motion for downward departure at sentencing based on Martin's substantial assistance, the government in its "Position of United States with Respect to Sentencing Factors," (J.A. 19), indicated that it agreed with the PSR's statement that a motion for substantial assistance would be made within the year. At sentencing, the government candidly acknowledged that Martin's assistance, *at the time of sentencing,* was substantial, having led to the prosecution of two others, and that it intended to make a substantial assistance motion "within the next year." (J.A. 41). The government's commitment to make a substantial assistance motion to reward Martin for his *presentence* substantial assistance was tantamount to and the equivalent of a modification of the plea agreement, albeit an oral one. The modified agreement required the government to make a *timely* substantial assistance motion in exchange for, among other things, Martin's *presentence* substantial assistance and agreement to make himself available to provide post-sentence cooperation.[4]

Because a U.S.S.G. § 5K1.1 motion at sentencing was the only vehicle under the law to reward Martin's *presentence* substantial assistance, once the government committed itself to reward Martin for his *presentence* substantial assistance in the modified plea agreement, it was bound to make a U.S.S.G. § 5K1.1 motion at sentencing. *Cf. Conner,* 930 F.2d at 1075 ("[O]nce the government uses its § 5K1.1 discretion as a bargaining chip in the plea negotiation process, that discretion is circumscribed by the terms of the agreement."). In other words, having *committed* itself to reward Martin for his *presentence* substantial assistance, Martin cannot be penalized for the government's failure, albeit inadvertent, to timely make a U.S.S.G. § 5K1.1 motion at the sentencing hearing on April 10, 1992. The government's failure to comply with the plea agreement as modified resulted in a deprivation of Martin's due process rights. Accordingly, Martin is entitled to specific performance of the government's promise to reward him for his *presentence* substantial assistance. *Dixon,* 998 F.2d at 231 (noting that a defendant is entitled "to specific performance of the government's promise to move for a substantial assistance departure").

IV

For the reasons stated herein, Martin's sentence is vacated and the case is remanded for resentencing.

4. All of our Rule 11 concerns are obviated by the parties' obvious willingness to modify orally the plea agreement and the district court's acceptance of the arrangement. In addition, the special circumstance of a mutually agreed upon modification made in open court in no way undermines our commitment to the general rule that integrated written plea agreements are not open to oral supplementation. See *United States v. Fentress,* 792 F.2d 461, 463–65 (4th Cir.1986).

VACATED AND REMANDED FOR RE-SENTENCING.

Agenda Item ID # 6

MEMO TO: Members, Criminal Rules Advisory Committee

FROM: Professor Dave Schlueter, Reporter

RE: Report on Uniform Numbering System Regarding Criminal Rules

DATE: September 11, 1995

Since 1986, the Standing Committee has undertaken a compilation of various local rules. Pursuant to what has become known as the "Local Rules Project," the Standing Committee has compiled local rules dealing with civil and appellate rules of procedure. Most recently, the consultants to the Local Rules Project requested and received copies of local rules governing criminal cases. They completed their report this summer and provided copies to the Standing Committee, which in turn has requested further consideration by the Criminal Rules Committee.

As noted in the attached report, some of the local rules appear to be inconsistent with the national rules and still others may be worthy of consideration in the national rules. To that end, I requested Professor Mary Squires to provide copies of those local rules which appear to fall into that latter category. Copies of the listed local rules are attached.

Please note that the Report focuses on a uniform system of numbering for local rules. It would be helpful for the Committee to offer any suggestions to the Standing Committee on the proposed numbering. As you may recall, for the last several years, the Committee has dealt with amendments to the Rules of Procedure (i.e. Criminal Rule 57), which as of December 1, 1995, will specifically address the issue of uniform numbering.

Given the open-ended nature of these proposals, I have not attempted at this point to draft any amending language to the various Criminal Rules. If the Committee believes that any of the attached rules lend themselves to incorporation into the uniform rules, I will draft appropriate language to be considered at the next meeting.

The following is a list of local rules identified in the Report which Professor Squires believes may be of interest to the Committee for inclusion in the national rules:

District	Local Rule #	Fed. R. Crim. P. #
M.D. Ala	30	12
D. Ariz	4.17	30

W.D. Ark.	Order	30
C.D. Cal.	11.1	4
	Order	30
E.D. Cal.	SO 30(?)	30
S.D. Ga.	212.7	12
	230.1	30
D. Haw.	310	4
	330	30
N.D. Ind.	110.1	30
E.D. La.	2.11	16
M.D. La.	2.11	16
W.D. La.	2.11	16
D. Mont.	320-1	47
	320-2	
E.D. N.Y.	3	16
N.D. N.Y.	5.1	4
S.D. N.Y.	3	16
E.D. N. Car.	49.00	30
D. N.Dak.	8(G)	30
D. N.Mar.(?)	330-1	4
E.D. Pa.	9	16
D. P.R.	409	16
	412	30
N.D. Tex	5.1	47
	8.2(c)	30
S. D. Tex.	Order 91-26	4

D. Utah	114	30
D. Vt.	2	16
E.D. Wash.	51	30
W.D. Wash.	5	4
	30	30
S.D. W.Va.	2.01	30

BOSTON COLLEGE

885 CENTRE STREET, NEWTON CENTRE, MA 02159-1163

LAW SCHOOL
Telephone: (617) 552-8851
Fax: (617) 552-2615
Internet: SQUIERSM@hermes.bc.edu

Memorandum

TO: Dave Schlueter

FROM: Mary P. Squiers

RE: Local Criminal Rules

DATE: September 8, 1995

Attached are the rules you requested for submission to the Advisory Committee. I have amended your list a bit because I think there may have been some discrepancies in it. They are as follows.

1. D.Ariz. Rule 4.17. This is a criminal rule that relates to a particular civil rule (2.16) which I also appended.

2. E.D.Cal. SO 30. Frankly, I could not locate any "SO 30" but I did find two separate orders which discussed jury instructions and I assumed those were the rules to which I was referring in the document.

3. D.Mont. Rule 330-2. There was no Rule 330-2. There was, however, a Rule 320-2 which I attached.

4. S.D.Wash. Rule 2.01. There is no Southern District of Washington. The applicable rule is in the Southern District of West Virginia.

If you have any questions, please feel free to contact me.

Hope this does fine to talk to with you soon. — Mary

Local Rule 30

DEFENSE OF ENTRAPMENT IN CRIMINAL CASES

Criminal defendants who intend to rely on entrapment as a defense shall, within the time allowed for pleading, file a written pleading notifying the United States of the particular circumstances to be relied upon to substantiate the plea of entrapment. Failure to so present any such defense shall constitute a waiver thereof, but the Court, for good cause, may grant relief from the waiver.

D. ARIZ

RULE 4 - CRIMINAL PROCEEDINGS

Rule 4.17

JURY INSTRUCTIONS

The provisions and requirements of Rule 2.16 of these Rules are applicable to and will be followed in all criminal jury trials.

peremptory challenges simultaneously and in secret. The Court shall then designate as the jury the persons whose names appear first on the list.

CV Rule

Rule 2.16. Jury instructions

(a) Proposed instructions for the jury shall be presented to the Court at the opening of the trial unless otherwise directed by the Court; but the Court, in its discretion, may at any time prior to the opening of the argument, receive additional requests for instructions on matters arising during the trial. The requested instructions shall be properly entitled in the cause, distinctly state by which party presented, and shall be prepared in all capital letters of even type size. They shall be numbered consecutively and contain not more than one (1) instruction page. Each requested instruction shall be understandable, brief, impartial, free from argument, and shall embrace but one (1) subject, and the principle therein stated shall not be repeated in subsequent requests.

(b) A failure to conform to these requirements in the manner of proposing instructions will, in the discretion of the Court, be deemed sufficient ground for their refusal.

(c) All instructions requested of the Court shall be accompanied by citations of authorities supporting the proposition of law stated in such instructions.

(d) At the time of presenting the instructions to the Court, a copy shall be served upon the other parties.

(e) Objections to an instruction for the jury, or a refusal to give as a part of such jury instructions requested in writing, shall be made out of the presence of the jury and shall be noted by the Clerk in the minutes of the trial or by the reporter if one is in attendance.

Rule 2.17. Findings

In all actions in which findings are required, the prevailing party shall, unless the Court otherwise directs, prepare a draft of the findings and conclusions of law within five (5) days after the rendition of the decision of the Court if the decision was in the presence of counsel, and otherwise within five (5) days after notice of the decision. The draft of the findings and conclusions of law shall be filed with the Clerk and served upon the adverse party. The adverse party shall within five (5) days thereafter file with the Clerk, and serve upon his adversary, such proposed objections, amendments, or additions to the findings as he may desire. The findings shall thereafter be deemed submitted and shall be settled by the Court and shall then be signed and filed. No judgments shall be entered in actions in which findings of fact and conclusions of law are required until the findings and conclusions have been settled and filed. A failure to file proposed findings of fact and conclusions of law and to take the necessary steps to procure the settlement thereof may be grounds for dismissal of the action for want of prosecution or for granting judgment against either party.

Rule 2.18. Judgments

(a) Judgments will be entered in accordance with Rule 58, Federal Rules of

W.D. Ark. Ode

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF ARKANSAS

CRIMINAL TRIAL SCHEDULING ORDER

In all jury cases, two copies of proposed instructions shall be submitted to the court, with copies to other counsel, no later than fourteen (14) days prior to the scheduled trial date. Citations of authority for any instruction requested shall be made either on the instruction or by separate statement. In non-jury cases, proposed findings of fact and conclusions of law shall be submitted to the court, with copies to other counsel, no later than fourteen (14) days prior to the scheduled trial date.

In the event of a decision to enter a plea of guilty, the court shall be advised by notifying Ms. Gail Ramsey at 783-1466. However, a case will not be removed from the trial docket until a date and time has been set for the defendant to enter a plea of guilty.

HONORABLE JIMM LARRY HENDREN
UNITED STATES DISTRICT JUDGE

10.5 PROBATION - ARREST OF VIOLATOR - DUTY OF MARSHAL - As soon as practicable after taking into custody any person charged with a violation of probation, the Marshal shall give written notice to the United States Attorney, the Probation Officer and the Clerk of the date of such arrest and the place of confinement of the alleged probation violator.

10.6 PROBATION VIOLATION HEARING - The Clerk shall set the violation of probation for hearing as soon as practicable after the notice of arrest of the alleged violator.

10.7 PROBATION VIOLATION - NOTICE TO ATTORNEY FOR DEFENDANT - The Clerk shall promptly inform any attorney of record for an alleged probation violator of the arrest of the violator and the place of confinement. If no attorney of record appears or the attorney of record cannot be found, the notice shall be given to the Federal Public Defender.

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.

10.8.1 PROBATION RECORDS - DISCLOSURE TO DEFENDANT AND COUNSEL - (REPEALED PURSUANT TO GENERAL ORDER 325, MAY 2, 1991)

10.8.2 PROBATION RECORDS DISCLOSURE TO PAROLE COMMISSION OR BUREAU OF PRISONS - (REPEALED PURSUANT TO GENERAL ORDER 325, MAY 2, 1991)

RULE 11. ARREST OF FEDERAL DEFENDANTS

11.1 NOTICE OF ARREST - It shall be the duty of the Marshal to require all agencies arresting persons for an offense against the laws of the United States, and all jailors who incarcerate any person as a Federal prisoner, to give the Marshal notice of such arrest or incarceration forthwith.

11.2 NOTICE OF ARREST - DUTY OF MARSHAL - The Marshal shall, upon receiving notice or knowledge of the arrest or incarceration of any Federal prisoner, give written notice forthwith to the United States Attorney and the Clerk of the date and fact of such arrest or incarceration and the place of confinement of the person arrested.

11.3 PERSONS IN CUSTODY - BIWEEKLY LIST - The report of persons in custody required by F.R. Crim. P. 46(h) shall be delivered promptly to the Criminal Duty Judge. The Criminal Duty Judge shall make whatever orders may be necessary to prevent unnecessary detention.

RULE 12. STAYS IN CRIMINAL CASES - After mandate or judgment on appeal is filed in criminal cases, no stay of commitment shall be allowed except as required in the interest of justice.

C.D. Cal rules

4. Usual "trial days" are Tuesdays through Fridays, 9:00 a.m. to 5:00 p.m. Lunch recess is normally 12:00 noon to 1:30 p.m.

5. Before trial commences, the Court will give counsel an opportunity to discuss, in advance, housekeeping matters and anticipated problems of procedure or law. During the trial, if there are any housekeeping matters you wish to discuss, please inform my Courtroom Clerk of the types of matters for discussion.

6. TRANSCRIPTS: Counsel for the government shall obtain authorization from their agencies. A copy of said authorization shall be given to the court reporter when requesting transcripts.

7. JURY INSTRUCTIONS

Jury instructions are to be submitted not later than the Wednesday of the week prior to trial. Counsel need only submit proposed substantive jury instructions, the Court propounds its own general instructions and essentially follows the format set out in a blue soft bound pamphlet entitled "Ninth Circuit Pattern Jury Instructions" by Judge William Schwarzer, as revised. In those cases where a special verdict is desired, counsel shall submit a proposed verdict form with the jury instructions.

a) Form of Jury Instructions

The parties must submit joint jury instructions and a joint proposed verdict form (if a special verdict). In order to produce these joint instructions, the parties shall meet and confer sufficiently in advance of the required submission date.

The instructions should be submitted in the order in which the parties wish to have the instructions read. This order should reflect a single organized sequence agreed to by all of the parties.

The joint jury instructions shall be submitted in three sets as follows: 1) those instructions which are agreed to by all parties; 2) those instructions which are propounded by the Government to which the Defendant(s) object; and 3) those instructions which are propounded by the Defendant(s) to which the Government objects.

Instructions upon which agreement cannot be reached should reflect the basic disagreements among the parties as to the law.

Attribution and case citation for each instruction should be placed on pages following a proposed instruction. For disputed instructions, a party should note its objections to a proposed instruction and its reasons for putting forth its alternative on pages placed after <u>its own</u> alternative instruction.

INSTRUCTIONS SHALL BE BRIEF, CLEAR, CONCISE, WRITTEN IN PLAIN ENGLISH, FREE OF ARGUMENT, AND SHALL BE ORGANIZED IN LOGICAL FASHION AS TO AID JURY COMPREHENSION. Standard or form instructions, if used, must be revised to address the particular facts and issues of this case.

The following list contains some suggested source for jury instructions:

1). <u>Federal Jury Practice and Instructions</u>
(Devitt and Blackmar (3rd Edition))

2) Modern Federal Jury Instructions
(Mathew Bender 1985)

3) California Forms of Jury Instructions
(Mathew Bender 1985)

8. INSTRUCTIONS TO COUNSEL GOVERNING TRIALS IN THIS COURT

a) During trial counsel shall not refer to their clients by their first names.

b) Opening statements, examination of witnesses, and closing arguments should be made from the lectern only.

c) The Court views opening statements in a jury case as one of the most important parts of the case. Avoid discussing the law or arguing the case in opening statements.

d) Do not use objections for the purpose of making a speech, recapitulating testimony, or attempting to guide the witness. When objecting, state only that you are objecting and the legal ground of the objection, e.g., hearsay, irrelevant, etc. If you wish to argue an objection further, ask for permission to do so.

e) Speak up when making an objection. The acoustics in most courtrooms make it difficult for all to hear an objection when it is being made. Counsel must speak audibly and clearly when questioning witnesses or arguing to the court or jury. Counsel should instruct their witnesses to speak audibly and clearly.

f) Do not approach the clerk or the witness box without specific permission. Please go back to the lectern when the purpose of the approach is finished.

/ / /

g) Please rise when addressing the Court. In jury case, please rise when the jury enters or leaves the Courtroom.

h) Address all remarks to the Court. Do not address the clerk, the reporter, or opposing counsel. If you want to say something to opposing counsel, ask permission to talk to him or her off the record. All requests for the re-reading of questions or answers, or to have an exhibit placed in front of a witness, shall be addressed to the Court.

i) The Court shall be addressed as "Your Honor" at all times, not "Judge" as in state court practice.

j) Do not make an offer of stipulation unless you have conferred with cpposing counsel and have reason to believe the stipulation will be accepted. Any stipulation of fact will require the defendant's personal concurrence. A proposed stipulation should be explained to him or her in advance.

k) While Court is in session, do not leave the counsel table to confer with investigators, secretaries, or witnesses in the back of the Courtroom unless permission is granted in advance.

l) Counsel should not by facial expression, nodding, or other conduct exhibit any opinions, adverse or favorable, concerning any testimony which is being given by a witness. Counsel should admonish their own clients and witnesses similarly to avoid such conduct.

m) When a party has more than one lawyer, only one may conduct the direct or cross-examination of a given witness.

n) If a witness was on the stand at a recess or adjournment, have the witness back on the stand, ready to proceed when Court resumes.

o) Do not run out of witnesses. If you are out of witnesses and there is more than a brief delay, the Court may deem that you have rested.

p) The Court attempts to cooperate with doctors and other professional witnesses and will, except in extraordinary circumstances, accommodate them by permitting them to be put on out of sequence. Anticipate any such possibility and discuss it with opposing counsel. If there is objection, confer with the Court in advance.

q) Counsel are advised to be on time as the Court starts promptly. Morning and afternoon breaks are approximately 10 minutes in length.

DATED: _____

STEPHEN V. WILSON
UNITED STATES DISTRICT JUDGE

rev 7/91

E.D. Cal

FRESNO

FILED

^D

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,

Plaintiff,

v.

^C

Defendant^C.

_____/

Case No. CR-F-^C OWW

STANDING ORDER RE CRIMINAL CASES

TRIAL DATE: ^C
TIME: 10:00 AM
COURTROOM: Two

I. SUGGESTED VOIR DIRE EXAMINATION

All counsel will lodge with the Courtroom Deputy:

A. All suggested voir dire examination questions no later than 4:00 p.m., on the Thursday preceding the commencement of trial.

B. An original and two copies of the list of all potential witnesses, including those which counsel may reasonably be expected to call as rebuttal witnesses, **by 4:00 p.m. on the day prior to the commencement of the trial. (This list will be referred to in voir dire.)**

II. PROPOSED INSTRUCTIONS

A. Each counsel shall, no later than Thursday at 4:00 p.m. preceding the trial of the action, submit copies of their proposed jury instructions, **together with a computer disk** with the "clean" set of instructions thereon, as follows:

1. One set shall identify the proponent at

the top:

a. "Government's Proposed Instruction No. 1, et seq.," or

b. "Defendant Smith's Proposed Instruction No. 1, et seq." Each instruction shall contain a citation of the supporting authority and a legend: Given; Given As Modified; Refused; Withdrawn.

2. A duplicate set of jury instructions shall be submitted, each of which shall bear the heading: "Instruction No. ____" and a short title; i.e., "Credibility of Witness." which neither identifies the proponent nor the supporting authority. This "clean" set shall be used for submission to the jury. The computer disk should be formatted in Wordperfect 5.0 and can be either 5 1/4" or 3 1/2" size disk. All the instructions should be in one document, and each instruction should be typed out.

N.B.: The Court will not accept a list of numbers of instructions from Blackmar and Devitt or Caljic not actually including reproduced instructions.

III. INSTRUCTION CONFERENCE

Counsel are ordered to meet and confer, no later than the end of the first day of trial, to indicate to the Court, in writing, which jury instructions they agree upon and any instruction to which counsel has objection, in whole or in part. Objections should be typed, but in exceptional circumstances the Court will receive the same in legible handwritten form. In addition to identifying the objectionable instruction, counsel shall state in

concise terms the basis for their objection. These written objections will be reviewed by the Court before the Instruction Conference which will be held before the jury is instructed by the Court.

N.B.: The Court instructs before oral argument.

IV. ADDITIONAL INSTRUCTIONS

The Court will consider instructions filed after the date specified in Paragraph I, supra, only if they pertain to issues which arose during the trial and could not be reasonably foreseen in advance of trial.

V. UNUSUAL EVIDENTIARY PROBLEMS

Counsel are directed to identify any unusual problems relating to the admissibility of evidence (as opposed to suppression of evidence)[1] which may arise at the trial of the action. If counsel has reason to believe that such problems are present, counsel who propose to introduce such evidence are ordered to:

A. File a written offer of proof, together with a memorandum of supporting authority, no later than eight (8) days prior to trial.

B. Should opposing counsel have objection to the introduction of such evidence, a memorandum of points and authorities in opposition to such evidence shall be filed no later than five (5) days prior to trial.

C. During trial, it shall be the duty of counsel to notify the Court of evidentiary problems by 4:30 p.m. of the day

---

[1] All evidence, including defendants' statements, sought to be suppressed must be addressed by pre-trial motion pursuant to the provisions of Federal Rule of Criminal Procedure 12.

preceding the trial day on which the problem is expected to arise. Such matters shall be taken up at 8:30 a.m. on the trial day following such notification.

D. Counsel shall notify the court by 4:30 p.m. the day before any witness will be called who is expected to invoke the Fifth Amendment privilege against self-incrimination.

N.B.: This includes voir dire or other examination of witnesses to be conducted outside the presence of the jury.

VI. EXHIBITS

All exhibits will be premarked and an original and two copies of the exhibit list will be submitted to the Courtroom Deputy no later than 4:00 p.m. on the day prior to the first day of trial. Joint exhibits shall be marked in sequence with Roman numerals; Government exhibits shall be marked with Arabic numerals, defense exhibits shall be marked with letters, i.e., A; AA, etc.

VII. COURTROOM DECORUM

Please familiarize yourself with Exhibit "A" attached regarding courtroom procedures and decorum.

SO ORDERED.

OLIVER W. WANGER
UNITED STATES DISTRICT JUDGE

EXHIBIT "A"

COURTROOM DECORUM

The purpose of these guidelines is to state, for the guidance of counsel, certain basic principles concerning courtroom decorum. The requirements stated are minimal, not all-inclusive, and are intended to emphasize the supplement, not supplant or limit, the ethical obligations of counsel under the Code of Professional Responsibility or the time honored customs of experienced trial counsel.

When appearing in this Court, all counsel (including where the context applies, all persons at counsel table) shall abide by the following:

1. Stand at the lectern while examining any witness; except that counsel may approach the Clerk's desk or the witness for the purposes of handling or tendering exhibits.

2. Stand at or in the vicinity of the lectern while making opening statements or closing arguments, except to refer to exhibits.

3. Address all remarks to the Court, not to opposing counsel.

4. Avoid disparaging personal remarks or acrimony toward opposing counsel and remain wholly detached from any ill-feeling between the litigants or witnesses.

5. Do not address jurors by name nor approach the jury box.

6. Refer to all persons, including witnesses, other

counsel and the parties by their surnames and not by their first or given names.

7. Only one attorney for each party shall examine, or cross-examine each witness. The attorney stating objections, during direct examination, shall be the attorney recognized for cross-examination.

8. Only one attorney for each party shall present oral argument on motions, opening statements, or closing arguments, although separate motions, the opening statement, or closing argument may be divided among counsel if a party has more than one trial counsel.

9. Counsel should request permission before approaching the bench or a witness. Any documents counsel wish to have the Court examine should be handed to the Clerk.

10. Any paper exhibit not previously marked for identification should first be handed to the Clerk to be marked before it is tendered to a witness for examination; and any exhibit offered in evidence should, at the time of such offer, be handed to opposing counsel.

11. In making objections, counsel should state only the legal grounds for the objection and should withhold all further comment or argument unless elaboration is requested by the Court.

12. In examining a witness, counsel shall not repeat or echo the answer given by the witness.

13. Offers of, or requests for, a stipulation should be made privately, not within the hearing of the jury.

14. In opening statements and in arguments to the jury, counsel shall not express personal knowledge or opinion concerning any matter in issue.

15. Counsel shall admonish all persons at counsel table and parties present in the courtroom that gestures, facial expressions, audible comments, or the like as manifestations of approval or disapproval during the testimony of witnesses are prohibited.

E.D. Cal

FRESNO

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, Plaintiff, v. JOHN DOE Defendant.	No. CR-F-94-0000-REC STANDING ORDER RE CRIMINAL CASES (Revised 3/15/93)

I. Suggested Voir Dire Examination.

Counsel will lodge with the court:

A. All suggested voir dire examination questions no later than 4:00 p.m., Thursday preceding the commencement of the trial.

B. A list of all potential witnesses, including those which counsel may reasonably be expected to be called as rebuttal witnesses, by 9:00 a.m. on the first day of trial, prior to the commencement of the voir dire examination of the jury.

II. Proposed Instructions.

A. Each counsel shall, no later than Thursday at 4:00 p.m. preceding the trial of the action, submit original and one copy of their proposed instructions, which shall **typed and in pleading form**, and will identify the proponent at the top, thusly:

1. "Government's Proposed Instruction No. 1, et seq." or

2. "Defendant Smith's Proposed Instruction No. 1, et seq.," and will contain a citation of the supporting authority as well as a legend indicating the court's disposition of each proposed instruction.

III. Instruction Conference.

Counsel are ordered to meet and confer, no later than the end of the first day of trial, to indicate to the court, in writing, any instruction to which counsel has objection, in whole or in part. Such objections should be typed, but in exceptional circumstances the court will receive the same in legible handwritten form. In addition to identifying the objectionable instruction, counsel shall state in concise terms the basis for their objection. These written objections will be reviewed by the court at the Instruction Conference which will be held before the jury is instructed by the court.

IV. Additional Instructions.

The court will consider instructions filed after the date specified in Paragraph I, supra, only if they pertain to issues which arose during the trial and could not be reasonably foreseen in the advance of trial.

V. Unusual Evidentiary Problems.

Counsel are directed to identify any unusual problems relating to the admissibility of evidence (as opposed to the suppression of evidence) which may arise at the trial of the

action. If counsel has reason to believe that such problems are present, counsel who propose to introduce such evidence are ordered to:

A. File a written order of proof, together with a memorandum of supporting authority, no later than eight (8) days prior to trial.

B. Should opposing counsel have objection to the introduction of such evidence, a memorandum of points and authorities in opposition to such evidence shall be filed no later than five (5) days prior to trial.

C. If the court is not advised by counsel that the evidentiary matters have been resolved, hearing on such problems will be held at 11:00 a.m. on the court's law and motion day (Monday) prior to trial (or on a Tuesday if Monday is a holiday, or at such other time if counsel are notified to the contrary).

VI. Exhibits.

All exhibits will be premarked and an exhibit list will be submitted no later than 9:00 a.m. the first day of trial.

FAILURE TO COMPLY WITH THE ABOVE ORDER MAY RESULT IN THE IMPOSITION OF SANCTIONS.

DATED:

ROBERT E. COYLE
United States District Judge

requirements of this rule, the Court may exclude the testimony of any undisclosed witness offered by such party as to the defendant's defense of entrapment. This rule shall not limit the right of the defendant to testify in his own behalf.

212.6 Exceptions. For good cause shown, the Court may grant an exception to any of the requirements of this rule.

212.7 Inadmissibility of Withdrawn Defense. Evidence of an intention to rely upon a defense of entrapment, or the admission of any act upon which the prosecution may be based, if later withdrawn, or of any statement made in connection with a notice under this rule, is not admissible in any civil or criminal proceeding against the person who gave notice of the intention.

RULES 213 through 215. *See* Federal Rules of Criminal Procedure 13 through 15.

RULE 216. DISCOVERY

216.1 Pretrial Discovery and Inspection in Criminal Cases. Within five (5) days after arraignment, the United States Attorney and the defendant's attorney shall confer and, upon request, the government shall:

(a) Permit defendant's attorney to inspect and copy or photograph any relevant written or recorded statements or confessions made by the defendant, or copies thereof, within the possession, custody, or control of the government, the existence of which is known, or by the exercise of due diligence may become known to the attorney for the government.

(b) Permit defendant's attorney to inspect and copy or photograph any relevant results or reports of physical or mental examinations, and of scientific tests or experiments made in connection with the case, or copies thereof, within the possession or control of the government, the existence of which is known, or by the exercise of due diligence may become known to the attorney for the government.

(c) Permit defendant's attorney to inspect and copy or photograph any relevant recorded testimony of the defendant before a grand jury.

(d) Permit defendant's attorney to inspect and copy or photograph books, papers, documents, tangible objects, buildings, or places which are the property of the defendant and which are within the possession, custody, or control of the government.

(e) Permit defendant's attorney to inspect and copy or photograph the Federal Bureau of Investigation Identification Sheet indicating defendant's prior criminal record.

S.D.Ga., LR 230.1

(f) Permit defendant's attorney to inspect and copy or photograph any evidence favorable to the defendant.

(g) There shall be no duplication required of a party making discovery under this rule or under Rule 16 of the Federal Rules of Criminal Procedure. In the event the United States Attorney declines to furnish any such information described in this rule, he shall file such declination in writing specifying the types of disclosure that are declined and the grounds therefor. If defendant's attorney objects to such refusal, he shall move the Court for a hearing thereon. Any duty of disclosure and discovery set forth in the rule is a continuing one and the United States Attorney shall produce any additional information gained by the government.

Any disclosure granted by the government pursuant to this local rule of material within the purview of Rules 6(e), 16(a)(2) and 16(b) of the Federal Rules of Criminal Procedure, and 18 U.S.C. § 3500, shall be considered as relief sought by the defendant and granted by the Court. Defense counsel is prohibited from disseminating this information beyond that necessary to the preparation of his client's defense.

RULES 217 through 229. *See* Federal Rules of Criminal Procedure 17 through 29.

RULE 230. INSTRUCTIONS

230.1 Jury Instructions. In criminal cases, all requests to charge and proposed voir dire questions must be filed at least seven (7) days before jury selection.

RULE 231. *See* Federal Rule of Criminal Procedure 31.

RULE 232. SENTENCE AND JUDGMENT

232.1 Conditions of Probation and/or Supervised Release. All persons placed on probation or supervised release will abide by the following general conditions:

(1) You shall not leave the judicial district without permission of the Court or probation officer.
(2) You shall report to the probation officer as directed by the Court or probation officer, and shall submit a truthful and complete written report within the first five days of each month.
(3) You shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer.
(4) You shall support your dependents and meet other family responsibilities.
(5) You shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reason.

shall advise the opposing party of such objection. The parties shall confer with respect to any objections in advance of trial and attempt to resolve them.

(b) Any motions *in limine* shall be filed not less than five (5) days prior to the date of trial, unless leave of court is obtained shortening the time for filing.

235-11. **Jury Instructions.**

All proposed jury instructions are required to be filed and served at least seven (7) calendar days before the trial begins, except for an isolated one or two whose need could not have been foreseen. Jury instructions are to be submitted in the following format:

(a) The parties are required to jointly submit one set of agreed upon instructions. To this end the parties are required to serve their proposed instructions upon each other no later than eighteen (18) calendar days prior to trial. The parties should then meet, confer and submit one complete set agreed upon instructions.

(b) If the parties cannot agree upon one complete set of instructions, they are required to submit one set of those instructions that have been agreed upon, and each party should submit a supplemental set of instructions which are not agreed upon.

(c) It is not enough for the parties to merely agree upon the general instructions, and then each submit their own set of substantive instructions. The parties are expected to meet, confer, and agree upon the substantive instructions for the case.

(d) These joint instructions and supplemental instructions must be filed seven (7) calendar days prior to trial. Each party should then file, five (5) days before trial, its objections to the non-agreed upon instructions proposed by the other party. Any and all objections shall be in writing and shall set forth the proposed instruction in its entirety. The objection should then specifically set forth the objectionable material in the proposed instruction. The objection shall contain citation to authority explaining why the instruction is improper and a concise statement of argument concerning the instruction. Where applicable the objecting

party shall submit an alternative instruction covering the subject or principle of law.

(e) The parties are required to submit the proposed joint set of instructions and proposed supplemental instructions in the following format:

(i) there must be two copies of each instruction;

(ii) the first copy should indicate the number of the proposed instruction, and the authority supporting the instruction; and

(iii) the second copy should contain *only* the proposed instruction — there should be no other marks or writings on the second copy except for a heading reading "Instruction No. _____" with the number left blank.

(f) On the day of trial the parties may submit a concise argument supporting the appropriateness of each parties' proposed instructions which the other party objected to.

(g) All instructions should be short, concise, understandable, and *neutral* statements of law. Argumentative or formula instructions are improper, will not be given, and should not be submitted.

(h) Parties should note in jointly agreeing upon instructions that the Court has designated a set of standard instructions, and otherwise generally prefers 9th Circuit Model Jury Instructions over Devitt and Blackmar.

(i) Parties should also note that any modifications of instructions from statutory authority, BAJI, or Devitt and Blackmar (or any other form instructions) must specifically state the modification made to the original form instruction and the authority supporting the modification.

(j) Failure to comply with any of the above instructions may subject the noncomplying party and/or its attorneys to sanctions in accordance with L.R. 100-3.

(a) **Surety Bonds.** Surety bonds for the appearance of a person charged with a criminal offense shall require the execution of a bail bond or equivalent security as provided in L.R. 290-2.

(b) **Property Bonds.** For real property to qualify as adequate security:

1. The real property, whether located within the State of Hawaii or a Sister State, Territory or Commonwealth, must have an equity value, after deducting the outstanding balance of any existing lien or encumbrance, in an amount not less than the principal amount of the bail set.

2. The title owner of the property shall furnish a mortgage on the property in favor of the Clerk of the Court and shall deliver to the court such mortgage note as security for the bond.

3. Prior to release of the person charged, the mortgage shall be recorded in the State of Hawaii Bureau of Conveyances or filed with Registrar of the State Land Court. In the event that the property is located in a Sister State, Territory or Commonwealth, the mortgage or deed of trust shall be recorded in the designated office required by the law of such State, Territory or Commonwealth, and evidence thereof shall be furnished to the court.

4. The value of the property must be established by evidence satisfactory to the court.

RULE 310

ARRESTS

310. Arrest by Federal Agencies and Others.

It shall be the duty of all federal agencies and others who arrest any person as a federal prisoner in this district to give prompt notice without unnecessary delay to the appropriate pretrial services officer.

When an arrested person is not represented by counsel and requests to be represented by a court-appointed attorney as an indigent,

the federal arresting agency shall inform the magistrate judge of the request without unnecessary delay.

RULE 312

APPOINTMENT, APPEARANCE AND WITHDRAWAL OF COUNSEL

312. Right to and Appointment of Counsel.

If a defendant appearing without counsel in a criminal proceeding desires to obtain his or her own counsel, a reasonable continuance for arraignment, not to exceed one week at any one time, shall be granted for that purpose. If the defendant requests appointment of counsel by the court, or fails for an unreasonable time to appear with his or her own counsel, the assigned district judge or magistrate judge shall, subject to the applicable financial eligibility requirements, appoint counsel, unless the defendant elects to proceed without counsel and signs and files the court-approved form of waiver of right to counsel. In an appropriate case, the district judge or magistrate judge may nevertheless designate counsel to advise and assist a defendant who elects to proceed without counsel to the extent the defendant might thereafter desire. Appointment of counsel shall be made in accordance with the plan of this court adopted pursuant to the Criminal Justice Act of 1964 on file with the clerk.

RULE 313

APPEARANCE AND WITHDRAWAL OF RETAINED COUNSEL

313. Appearance and Withdrawal of Retained Counsel.

An attorney who has been retained and has appeared in a criminal case may thereafter withdraw only upon notice to the defendant and all parties and upon an order of court finding that good cause exists and granting leave to withdraw. Until such leave is granted, the retained attorney shall continue to represent the defendant until the case is dismissed, the defendant is acquitted, or, if convicted, the time for making post-trial motions and for filing notice of appeal, as specified in Rule 4(b)

(e) **Other Motions Prior to Plea.** Nothing in this rule prohibits the filing and hearing of appropriate motions prior to plea.

325-3. **Local Civil and Magistrate Judge Rules Applicable to Motions.**

The local rules pertaining to civil motions are applicable to motions in criminal cases, specifically L.R. 220-5 (Length of Briefs and Memoranda), L.R. 220-7 (Filing and Lodging of Extra Copies) and L.R. 220-9 (Related and Counter Motions).

RULE 330

JURY INSTRUCTIONS

330. **Jury Instructions.**

See the text of Chapter II, Civil Rules, L.R. 235-11 which text and rule is incorporated herein in its entirety.

RULE 340

PRETRIAL CONFERENCE

340-1. **Pretrial Agenda.**

The trial district judge shall conduct at least one pretrial conference. Where practicable, such conference shall be held no later than seven (7) calendar days prior to trial. Other pretrial conferences may be conducted by the trial district judge at the request of any of the parties or on the court's own motion. The agenda at the pretrial conference shall consist of any or all of the following items, so far as practicable:

(a) Date of production of statements or reports of witnesses under the Jencks Act, 18 U.S.C. § 3500;

(b) Date of production of grand jury testimony of witnesses intended to be called at the trial;

of performing its function, no person shall remain in an area in which persons who are appearing before the grand jury can be monitored or observed. This rule shall not apply to grand jurors; witnesses; government attorneys, agents, and employees; court personnel concerned with grand jury proceedings; private attorneys whose clients have been called to appear as a witness at a session of the grand jury then in progress or about to commence; and others specifically authorized to be present.

L.R. 109.1

Requests for Discovery; Other Motions

(a) A request for discovery or inspection pursuant to Fed. R. Crim. P. 16 shall be made at the arraignment or within 10 days thereafter.

(b) At the arraignment or as soon thereafter as practicable, the Court shall enter an appropriate order fixing the dates for the filing of and responses to, any other pretrial motions.

L.R. 110.1

Instructions in Criminal Cases

In all criminal cases to be tried to a jury, all requests for instructions shall be filed with the clerk, in triplicate, with citations to authority, not later than three (3) business days before trial, or at such earlier time as the court may direct. Parties shall utilize the Seventh Circuit Pattern Jury Instructions whenever possible, and shall submit a request for those instructions by number only. Parties are also encouraged to submit an additional copy of the non-pattern instructions on a disk compatible with the WordPerfect word processing program. Exceptions to this requirement will be made only when the matters on which instruction is sought could not reasonably have been anticipated in advance of trial.

2.10E & W Opposition to Summary Judgment

Each copy of the papers opposing a motion for summary judgment shall include a separate, short and concise statement of the material facts as to which there exists a genuine issue to be tried. All material facts set forth in the statement required to be served by the moving party will be deemed admitted, for purposes of the motion, unless controverted as required by this rule.

2.10M Opposition to Summary Judgment

Each copy of the papers opposing a motion for summary judgment shall include a separate, short and concise statement of the material facts as to which there exists a genuine issue to be tried. All material facts set forth in the statement required to be served by the moving party will be deemed admitted, for the purposes of the motion, unless specifically denied.

2.11W Discovery Motions

No motion relative to discovery shall be accepted for filing unless accompanied by a certificate of counsel for the moving party, stating that counsel have conferred in person or by telephone for purposes of amicably resolving the issues and stating why they are unable to agree or stating that opposing counsel has refused to so confer after reasonable notice. Counsel for the moving party shall arrange the conference. A proposed order shall accompany each motion filed under this paragraph. If the court finds that opposing counsel has willfully refused to meet and

confer, or, having met, willfully refused or failed to confer in good faith, the court may impose such sanctions as it deems proper.

2.11E & M Discovery Motions

No motion relative to discovery shall be accepted for filing unless accompanied by a certificate of counsel for the moving party, stating that counsel have conferred in person or by telephone for purposes of amicably resolving the issues and stating why they are unable to agree or stating that opposing counsel has refused to so confer after reasonable notice. Counsel for the moving party shall arrange the conference. Any motion filed under this paragraph shall be noticed for hearing. If the court finds that opposing counsel has willfully refused to meet and confer, or, having met, willfully refused or failed to confer in good faith, the court may impose such sanctions as it deems proper.

2.12 Objections to Interrogatories or Requests for Admission

Objections to interrogatories and to requests for admission, and objections to the answers to them, shall set forth in full, immediately preceding each answer or objection, the interrogatory, request or answer to which objection is being made.

2.13 Vacant

2.14 Oral Testimony on Hearing of Motion

Oral testimony shall not be offered at the hearing on a motion without prior authorization from the court, and counsel shall not

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CRIMINAL RULES

RULE 320

MOTIONS—NOTICE AND OBJECTIONS

320–1 MOTIONS

Upon serving and filing a motion, or within 5 days thereafter, the moving party shall serve and file a brief. The adverse party shall have 10 days thereafter within which to serve and file an answer brief. A reply brief may be served and filed within 10 days thereafter. Upon the filing of briefs, the motion shall be deemed made and submitted and taken under advisement by the Court, unless the Court orders oral argument on the motion. The Court may, in its discretion, order oral argument on its own motion, or upon an application contained in the brief of either party.

Failure to file briefs within the prescribed time may subject any motion to summary ruling. Failure to file a brief by the moving party shall be deemed an admission that, in the opinion of counsel, the motion is without merit, and, failure to file a brief by the adverse party shall be deemed an admission that, in the opinion of counsel, the motion is well taken.

320–2 NOTICE TO OPPOSING COUNSEL, AND OBJECTIONS

Within the text of each motion submitted to the Court for its consideration counsel shall note that opposing counsel has been contacted concerning the motion, and whether opposing counsel objects to the motion. All objections provided for in connection with discovery proceedings in the Federal Rules of Criminal Procedure shall be noticed for hearing at the next date convenient for counsel for all parties and the Court of the Division in which the action is pending, and shall be heard at that time unless otherwise set by the Court.

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LOCAL RULES

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CRIMINAL RULES

Rule 1. Notice of Appearance

Attorneys representing defendants named in an information or indictment shall file a notice of appearance in the clerk's office and serve a copy on the United States attorney; or, in cases wherein a complaint has been filed with the United States magistrate judge a notice of appearance shall be filed with the magistrate judge and a copy served on the United States Attorney.

Within twenty (20) days after an attorney first files and serves a notice of appearance in a criminal case following the date of amendment of this Rule, said attorney shall submit to the Clerk of the District Court a certificate of the court for at least one of the states in which the attorney is a member of the bar, which has been issued within thirty (30) days and states that the attorney is a member in good standing of the bar of that state court. If the Clerk is satisfied that the submitted certificate shows the attorney to be a member in good standing of the bar of a state designated in Rule 2 of the General Rules for these districts, said attorney may file and serve all subsequent notices of appearance without submitting any further certification to the Clerk.

Rule 2. Attendance of Defendants

A defendant in a criminal prosecution admitted to bail shall attend before the court at all times required by the Rules of Criminal Procedure for the United States district courts, and at any time upon notice from the United States attorney.

Rule 3. Motions

(a) Except as otherwise provided by statute, rule or order of the court, motions in criminal proceedings and motions for remission of forfeiture of bail shall be made upon five (5) days' notice.

(b) Notice of motion and any supporting affidavits must be filed with the clerk at least two (2) days before the return day. No note of issue is required.

(c) Motions for correction or reduction of sentence under Rule 35, Federal Rules of Criminal Procedure, or to suspend execution of sentence under 18 U.S.C. § 3651,or in arrest of judgment under Rule 34, Federal Rules of Criminal Procedure, shall be referred to the trial judge. If the trial judge served by designation and assignment under 28 U.S.C. §§ 291-296, and is absent from the district, such motions may be referred to said judge for consideration and disposition.

(d) Upon any motion, objections or exceptions addressed to a bill of particulars or answers or to discovery and inspection, the moving party shall:

(1) File a copy simultaneously with the filing of the moving papers in all instances in which the demand for a bill of particulars or the answers or the demand for discovery and inspection have not been filed previously; and

(2) Specify and quote verbatim in the moving papers each requested particular or answer and each item as to which discovery and inspection is sought to which objection or exception is taken and immediately following each specification shall set forth the basis of the exception or objection.

No motion described in this subparagraph shall be heard unless counsel for the moving party files with the court simultaneously with the filing of the moving papers an affidavit certifying that said counsel has conferred with counsel for the opposing party in an effort in good faith to resolve by agreement the issue

raised by the motion without the intervention of the court and has been unable to reach such an agreement. Such affidavit shall specify the time when, the place where and the duration of the said conference. If part of the issues raised by motion have been resolved by agreement, the affidavit shall specify the issues so resolved and the issues remaining unresolved.

Rule 4. Bail Pending Appeal

Application for bail pending appeal shall be made orally upon the clerk's or stenographer's minutes to the trial judge, upon notice. The action taken and the reasons for such action shall be recorded. The judge may direct that the application be made upon notice and written petition setting forth briefly the question to be reviewed by the appellate court.

Rule 5. Approval of Bail Bonds

In cases wherein the amount of bail has been fixed by the judge, the clerk may approve the bond of a corporate surety holding a certificate from the Secretary of Treasury, and may approve the bond of an individual furnishing such bail in cash or government bonds. A party herein may avail itself of Civil Rule 8(c).

Bail bonds of individual sureties shall be approved by one of the officers specified in 18 U.S.C. § 3041.

Rule 6. Sentence;Sentencing Guidelines; Notification of Rights on Appeal

(a) The Role of Counsel

(1) Defense Counsel Defense Counsel shall:

(i) Prior to entry of plea of commencement of plea agreement discussions, if any, assure himself or herself that the defendant understands the nature and consequences of the plea, sentencing proceedings, and any sentencing alternatives.

(ii) On prompt request, be entitled to be present to protect defendant's rights whenever the defendant is interviewed by probation officers regarding a presentence report to the court.

(iii) Timely familiarize himself or herself with the contents of the presentence report, including the valuative summary, and any special medical and psychiatric reports pertaining to the client, and shall freely make sentence recommendations to the judge.

(2) The United States Attorney

At the defendant's request, the prosecutor shall inform the judge, on the record or in writing, of any cooperation rendered by the defendant to the government; this writing may be submitted by the agency to which cooperation was furnished. The prosecutor shall make specific sentence recommendations to the judge when requested.

(b) The Role of the Probation Officer

In addition to the normal functions in connection with the preparation of the presentence report, the probation officer shall:

(1) Attend presentence and sentencing hearings when requested by the judge;

SECTION X: LOCAL RULES OF CRIMINAL PROCEDURE

1.1 Scope of the Rules.

These are the Local Rules of Practice for Criminal Cases in the United States District Court for the Northern District of New York. They shall be cited as "L.R.Cr.P.____."

2.1 THROUGH 4.1

[Reserved]

5.1 Notice of Arrest.

(a) Notice of Arrest of Parole, Special Parole, Mandatory Release or Military Parole Violators.

As soon as practicable after taking into custody any person charged with a violation of parole, special parole, mandatory release or military parole, the United States marshal shall give written notice to the chief probation officer of the date of the arrest and the place of confinement of the alleged violator.

(b) Notice of Arrest of Probation or Supervised Release Violators.

As soon as practicable after taking into custody any person charged with a violation of probation or supervised release, the United States marshal shall give written notice to the chief probation officer, the United States attorney, and the United States magistrate judge assigned to the case.

(c) Notice of Arrest by Federal Agencies and Others.

It shall be the duty of the United States marshal to require all federal agencies and others who arrest or hold any person as a federal prisoner in this district, and all jailers who incarcerate any such person in any jail or place of confinement in this district, to give the United States marshal notice of the arrest or incarceration promptly.

As soon as practicable after receiving notice or other knowledge of any such arrest or incarceration anywhere within the district, the marshal shall give written notice to the United States magistrate judge at the office closest to the place of confinement and to the United States attorney and the pretrial services officer of the date of arrest and the prisoner's place of confinement.

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EASTERN DISTRICT OF NORTH CAROLINA

Rule 49.00

ATTORNEY PREPARATIONS FOR CRIMINAL TRIAL

(a) Unless the parties have previously entered into and executed a written plea agreement, counsel for each party shall file with the Clerk and the assigned judge, on or before the Thursday preceding the first day of the session at which the criminal action is set for trial:

(1) *voir dire* questions as required by Local Rule 6.02;

(2) requests for jury instructions.

(b) Before jury selection begins, all parties shall file with the court a list of all witnesses each party, in good faith, reasonably anticipates will be called in its evidence-in-chief.

Rule 50.00

PROCEDURES IMPLEMENTING SENTENCING GUIDELINES

50.01: Scheduling of Sentencing. Sentencing proceedings shall be scheduled by the court at the time of adjudication of guilt not earlier than ninety (90) days following the adjudication of guilt.

50.02: Time for Completion of Presentence Report. Within forty (40) days after the adjudication of guilt, the probation officer shall complete and disclose the presentence investigation report to the defendant, counsel for defendant, and counsel for the government.

50.03: Time for Filing Objections to Presentence Report. Within fifteen (15) days thereafter, counsel shall communicate, in writing, to the probation officer objections to any material information, sentencing classifications, guideline ranges, and policy statements contained in or omitted from the report. A copy shall be served on opposing counsel.

50.04: Procedure for Resolving Objections to Presentence Report. After receiving objections from counsel the probation officer shall conduct such further investigation as may be necessary. Counsel shall jointly confer with the probation officer to discuss and attempt to resolve contested issues, meeting personally if the probation officer deems it necessary. Thereafter, the probation officer shall make such revisions to the presentence investigation report as the probation officer deems appropriate. Unresolved contested issues, including the position of counsel for the parties and the opinion of the probation officer, shall be contained in an addendum to the presentence investigation report.

50.05: Time for Filing Revised Presentence Report. The revised presentence investigation report and addendum shall be delivered to the judge, the defendant, and counsel within fifteen (15) days after the objection period provided to counsel in Section 50.03 expires.

50.06: Expedited Procedures where Defendant Detained. If it appears that a defendant may be detained pending trial and sentencing for a period of time exceeding the sentence likely to be imposed under the guidelines, the court upon motion of counsel for defendant at the time of adjudication of guilt may direct the probation office to expedite the presentence investigation.

50.07: Court Acceptance of Presentence Report. The revised presentence investigation report may be accepted by the court as accurate except as to matters set forth in the addendum which shall be resolved as provided in Section 6A1.3 of the *Sentencing Guidelines and Policy Statements* (October 1987).

50.08: Service of Presentence Report. The presentence investigation report shall be deemed to have been disclosed when a copy is physically delivered or three days after a copy is mailed. Such dates shall be certified on the report by the probation officer.

50.09: Procedure at Sentencing. Before final judgment is entered in a case, the court shall disclose to the defendant, defense counsel and the attorney for the government, the court's tentative findings of fact and interpretation of applicable guidelines and shall afford the parties an opportunity to object to said

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(G) REQUESTS FOR INSTRUCTIONS TO JURY

At least five days prior to the commencement of all jury trials, requests for instructions to the jury shall be presented to the Court and served upon each adverse party, but the Court may receive additional requests relating to questions arising during the trial at any time prior to the argument. All requests for instructions shall be plainly marked with the number of the case, shall designate the party submitting the same, and each requested instruction shall be numbered and written on a separate page, together with a citation of authorities supporting the proposition of law stated in the instruction.

is dismissed; (2) the defendant is acquitted, or; (3) if convicted, the time has expired for making post-trial motions and for filing a notice of appeal as specified in Federal Rule of Appellate Procedure 4(b) and until counsel has satisfied the requirements of Federal Rule of Appellate Procedure, 3(d).

Rule 330

ARRESTS

330-1. Arrest by Federal Agencies or Others.

It shall be the duty of all Federal and Commonwealth agencies who arrest any person as a federal prisoner in the Northern Mariana Islands to promptly notify the U.S. Marshal of any arrest or incarceration.

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(BOTH SIDES)

Rule 9 Pretrial Discovery and Inspection.

(a) **Pretrial Conference.** Within five days after the arraignment, or within such other period as the Court may set, counsel for the Government and for the defendant shall confer; and at such conference ("counsel's conference"), upon request of the defendant, the Government shall comply, or if compliance is then impossible, agree to comply as soon as possible with the requirements of Fed.R.Crim.P. 16(a)(1)(A-D).

(b) **Disclosure of Evidence by the Defendant.** If at the counsel's conference the defendant requests disclosure under subparagraph (a)(1)(C) or (D) of Fed.R.Crim.P. 16, upon compliance with such request by the Government, the defendant, upon request of the Government, shall comply with Fed.R.Crim.P. 16(b)(1)(A) and (B).

(c) **Regulation of Discovery.**

(1) If, in the judgment of the attorney for either party, the requested discovery is beyond the scope of Rule 16 or if the attorney has reasonable grounds to believe that a protective order should be entered regarding such a discovery request, disclosure may be declined. A declination of any requested disclosure shall be in writing, directed to opposing counsel, and shall specify the types of disclosure that are declined and the reasons therefor.

(2) If the defendant or the Government desires to contest such declination or seeks additional discovery not specified in these rules, its attorney shall promptly confer with opposing counsel with a view to satisfying these requests in a cooperative atmosphere without recourse to the Court.

(3) In the event that the conference prescribed by subparagraph (c)(2) does not resolve the dispute concerning discovery of items not

Attorneys who appear unprepared for an expedited hearing, after having made request therefor, will be subject to appropriate sanctions.

RULE 408

PRELIMINARY CONFERENCE OF ATTORNEYS

All motions filed in criminal actions shall include a certification by the attorney for the moving party that the requirements of Rule 311 of these Rules as applicable to criminal actions, have been complied with, and shall recite the date, time and place of the preliminary conference of attorneys, and the names of all parties participating therein, or, if no such conference has been held, the reason for such failure to confer.

RULE 409

DISCOVERY

Requests for discovery in criminal actions shall be presented informally to the United States Attorney or his assistant assigned to the case within five (5) days following the arraignment, and the government may voluntarily disclose within said term all material discoverable pursuant to Rule 16 of the Federal Rules of Criminal Procedure. In the event the attorney for defendant files any motion requesting discovery and inspection, or relating thereto, the motion papers shall include a statement of said attorney setting forth in detail the statements, documents, tangible objects, reports or other matters of which the government has made voluntary disclosure. The motion shall also include the certification required by Rule 408 of these Rules.

RULE 410

STATUS CONFERENCES

The Court or a Magistrate Judge may, at any time during the pendency of a criminal action, schedule a status conference to determine the status of the case, to resolve any issues in order to expedite the trial or other disposition of the case, or to consider any other aspect of the case.

RULE 411

PRETRIAL CONFERENCE

A pretrial conference may be scheduled in all criminal actions unless otherwise ordered by the Court. The attorneys who will conduct the trial on behalf of all parties are expected to attend and to be prepared to discuss any of the following matters:

(1) Any motions which have been filed by any party that have not been ruled upon by the Court.

(2) Any matter known to counsel that may cause a delay or continuance of the trial.

(3) The probable length of trial.

(4) The number of witnesses and their availability for the trial.

(5) Stipulations of facts as to which there is no dispute or of testimony of an absent witness.

(6) Identification and marking of documents and exhibits whose admissibility is not in [at] issue.

(7) The exclusion from admissible statements of materials which may be prejudicial to a codefendant, if there is one.

(8) Requirements of severance or possible conflicts of counsel in case of multiple defendants or charges.

(9) Any special arrangements for the conduct of the trial, including seating arrangements, security measures, necessity for sequestration of the jury, witnesses outside courthouse environs subject to call, and any other matter which may facilitate or expedite the trial.

(10) Waiver of jury trial.

(11) Proposed *voir dire* examination.

(12) Number and use of peremptory challenges.

(13) Procedures on objections where there are multiple defendants.

(14) Order of presentation of evidence and argument, where there are multiple defendants.

(15) Order of cross-examination where there are multiple defendants.

(16) The amount of time allowed for summation.

(17) Requests for jury instructions.

(18) The exact date and time the trial will begin.

(19) The parties shall comply with Local Rule 324 as far as applicable to criminal cases.

RULE 412

REQUESTS FOR JURY INSTRUCTIONS AND *VOIR DIRE*

(1) Each party shall file with the Clerk of the Court, not later than three (3) days preceding the date of trial, a notice of request for jury instructions, the need for which can be anticipated prior to trial. Such notice shall include in separate numbered pages a proposed form of the requested instruction, with the citation of the authorities or precedents relied on. The instruction shall also identify the party requesting the same. Such notice shall be filed in all cases in which the defense of entrapment or insanity is raised, or in which the defense elects to request a special instruction as to the silence of the defendant. Failure to give notice of a special request shall in no case be permitted to affect the rights of the defendant, but such failure may result in the imposition of sanctions on the attorney for the defendant for failure to comply with this rule, particularly in those cases in which such failure causes delay at the trial of the action.

(2) Not later than three (3) days before trial, the parties shall file request for *voir dire*.

RULE 413

TRIAL SETTINGS

Unless trial has already been scheduled, a date for commencement of the trial of each action shall be set at the pretrial conference. The attorney who is to conduct the trial for each party shall attend and shall bring to the pretrial conference his personal professional appointment calendar or record, in order that any possible conflicts may be avoided. A trial setting will be vacated only for good cause shown.

RULE 414

CHANGES OF PLEA

Attorneys for defendants are expected to inform the Court as promptly as possible that a defendant will request a change of plea. It is expected that, except for extraordinary circumstances, notification will be given to the Court not less than three (3) business days prior to commencement of

the trial, in order to avoid the unnecessary expenses of convening a jury panel.

RULE 417

UNITED STATES ATTORNEY AT MAGISTRATE JUDGES' TRIALS AND HEARINGS

All appearances on behalf of the government in matters related to misdemeanors and petty offenses shall be made by duly authorized members of the Bar of this Court.

RULE 418

PROCEDURES UNDER THE SENTENCING REFORM ACT OF 1984

(1) Sentencing procedures and plea agreements are now governed by Chapter 6 of the United States Sentencing Commission Guidelines Manual, Sections 6A1(1)-6B1(4), as amended.

In order to meaningfully exercise its sentencing authority pursuant to 18 U.S.C. § 3553, the Court shall order the preparation of a Presentence Investigation Report. This will be done at the time that criminal responsibility has been established by a plea of guilty or *nolo contendere*, or after the entry of a verdict or other finding of guilt. The Clerk shall, by the following business day, transmit to the United States Probation Officer, in writing, the Court's order and the date set for the imposition of sentence. The sentencing date shall be set by the Court taking into consideration the prevalent work load conditions of the United States Probation Officer for this District. The sentencing hearing may be set as late as ninety (90) days from the date of acceptance of responsibility of guilty verdict, as the case may be.

(2) In the case where the parties have reached a plea agreement as a condition to a defendant's acceptance of criminal responsibility, the same shall be presented in writing to the Court at the time that the defendant appears before the Court to plead guilty or to accept responsibility. The same shall be signed by the defendant, counsel for the defendant, and by the members of the United States Attorney's Office designated by the United States Attorney to sign said document.

(A) In all cases where a Presentence Investigation Report is ordered by the Court, within ten (10) days from the entry of said order, counsel for

V. Motion Practice

Rule 5.1: Motion Practice Requirements, Generally

Unless otherwise directed by the Presiding Judge, motion practice in civil and criminal cases is controlled by the Uniform Requirements on Motion Practice, (a copy of which is included as Appendix I) and by the following:

(a) Conference Required. Before filing a motion, counsel for a moving party shall confer with the counsel of all parties affected by the requested relief to determine whether or not the contemplated motion will be opposed. Such a conference is required for all motions except motions to dismiss the entire action or indictment, motions for judgment on the pleadings, motions for summary judgment, and motions for new trial.

(b) Unopposed Motions. All unopposed motions shall be accompanied by agreed proposed orders, signed by the parties or their attorneys. No order shall recite untrue facts.

(c) Contested Motions. All opposed motions shall include either (i) a certificate which states that a conference was held and which indicates the date of the conference, the attorneys who conferred, and *the reasons why agreement could not be reached;* or (ii) a certificate explaining why it was not possible for the required conference to be held. A motion filed under (c)(ii) shall be presumed to be opposed.

(d) Briefs, Proposed Orders. Each contested motion shall be accompanied by a proposed order and by a brief setting forth the movant's contentions of fact and law, unless a brief or proposed order is not required by the Uniform Requirements on Motion Practice. (See Appendix I.)

(e) Time for Response. In a civil action, any response to a motion shall be filed within 20 days from the date the motion was filed. In a criminal action, any response shall be filed within 10 days from the date the motion was filed. Motions shall be deemed ready for disposition at the end of these periods, unless the Presiding Judge grants an extension of time for the filing of a response. (Amended January, 1984 by Misc. Order No. 37.)

(f) Permission for Reply. Unless the Presiding Judge otherwise directs, a party who has filed a motion in a civil action may file a reply brief within 15 days from the date the response to the motion was filed. In a criminal action, a movant who desires to file a reply brief shall promptly request leave to do so, in such manner as the Presiding Judge directs. If leave is granted, the Presiding Judge will specify the deadline for filing the reply brief. (Amended February 27, 1992 by Special Order No. 2-6.)

(g) Oral Argument. Oral argument on motions will not be held unless directed by the Presiding Judge.

Rule 5.2: Particular Civil Motions

(a) Motions for Summary Judgment. A motion for summary judgment shall list in numerical order (i) the undisputed facts upon which the motion relies and (ii) the issues of law. The response to a motion for summary judgment shall list in numerical order (i) the disputed facts upon which the response relies and (ii) the issues of law. No motion for summary judgment may be filed within 45 days of the trial date scheduled in the particular case.

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VIII. Trial Procedure

Rule 8.1: Exhibits, Depositions, Exhibit and Witness Lists

(a) Exchanging Exhibits and Designating Depositions. All exhibits (except impeachment documents) are to be marked with either gummed labels or tags obtained from the Clerk or the Court Reporter, and are to be exchanged with opposing counsel at least 3 days before the scheduled date for trial. When practicable, a copy of marked exhibits shall be furnished to the Court. All portions of depositions to be offered at trial shall be designated at least 3 days before the scheduled trial date.

(b) Lists of Exhibits and Witnesses. At least 3 days before trial, each counsel shall file and deliver to opposing counsel, the Court, and the Court Reporter, a list of all exhibits and witnesses, except those offered solely for impeachment.

(c) Designation of Expert Witnesses. Unless otherwise directed by the Presiding Judge, each party shall file a written designation of its expert witnesses at least 90 days before trial. (Amended December, 1987 by Special Order No. 2-2.)

Rule 8.2: Jury Trials

(a) Civil Trials. In all civil jury cases, except as may be expressly required by law, and at the discretion of the Presiding Judge, the jury may consist of at least 6 members and no more than 12 members. Peremptory challenges shall be allowed for jurors as provided in 28 U.S.C. Section 1870. (Amended effective August 7, 1992 by Special Order No. 2-7.)

(b) Criminal Trials. In all criminal jury cases, the jury shall consist of 12 members. Peremptory challenges shall be allowed for jurors and alternate jurors as provided in Rule 24, Federal Rules of Criminal Procedure.

(c) Requested Instructions and Issues. At least 3 days before trial, each counsel shall file and deliver to the Court and to opposing counsel the requested jury charge, including instructions and special issues. The requested instructions may cite the authorities relied upon.

(d) Conduct of Voir Dire Examination and Peremptory Challenges; Submission to Jury. The conduct of jury selection, the exercise of peremptory challenges, and the form of the jury instructions shall remain in the discretion of the Presiding Judge.

(e) Contact with Jurors. Neither a party or attorney in a case (or a representative of either) shall, before or after trial, contact any juror, prospective juror, or the relatives, friends, or associates of a juror, except upon explicit leave of the Presiding Judge.

Rule 8.3: Non-Jury Trials: Proposed Findings and Conclusions

At least 3 days before trial, counsel shall file and deliver to the Court and to opposing counsel proposed findings of fact and conclusions of law. Counsel shall submit such amendments to proposed findings and conclusions as the Court may direct.

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IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

IN THE MATTER OF
GUIDELINES FOR COORDINATION
OF CRIMINAL PROCEDURES

ORDER NO. 91-26

ORDER

Since December, 1983, criminal procedures in the Houston Division involving this Court, the U. S. Attorney, the Pretrial Services Agency and the Federal Law Enforcement Agencies have been coordinated by guidelines issued by the U. S. Magistrate Judges. The existing guidelines have been revised, and "Guidelines for Coordination of Criminal Procedures", in the form attached to this Order, are **ADOPTED** by the Court.

One of the objectives of the guidelines has been to establish procedures to insure that a person, when arrested, is taken without unnecessary delay before the nearest available federal magistrate judge, as provided by Rule 5(a), Federal Rules of Criminal Procedure. The Pretrial Services Agency coordinates the appearance of the defendant before the magistrate judge and obtains and verifies information pertaining to pretrial release for reporting to the Court at the initial hearing.

It is ORDERED that an arresting agency, or a receiving agency if the defendant surrenders, shall give prompt notice to the Pretrial Services Agency, as provided in the Guidelines for Coordination of Criminal Procedures, of the arrest or surrender of the defendant, his location, and his availability for interview and initial appearance in court.

DONE at Houston, Texas, this 25th day of November, 1991.

JAMES DEANDA, CHIEF JUDGE
UNITED STATES DISTRICT COURT

GUIDELINES FOR COORDINATION OF CRIMINAL PROCEDURES
U. S. MAGISTRATE JUDGES, U. S. ATTORNEY, PRETRIAL
SERVICES AGENCY & FEDERAL AGENCIES
SOUTHERN DISTRICT OF TEXAS, HOUSTON DIVISION

I. PROCEDURE

Regular court hearings on criminal matters are docketed before the duty magistrate judge at 10 a.m. and 2 p.m. each day. Special hearings at other times may be scheduled by the duty magistrate judge upon advance request. Each magistrate judge has a calendar criminal duty month, alternating each fourth month. Agencies will present matters to the duty magistrate judge or in his absence to the designated substitute magistrate judge.

A. Documents

1. Since the U. S. Attorney is responsible for prosecuting federal offenses, every criminal proceeding must have his prior authorization. His "approval" herein includes authorization, review, revision and final approval of the complaint, warrant or any other form of pleading to be presented by an agent. The authorizing AUSA will initial the pleading to indicate approval. The judicial branch, including magistrates judges and court staff, is not permitted to draft, prepare, revise or type criminal pleadings. Each agency should maintain a supply of current printed criminal forms.

2. Advance planning must be made to present papers at the U. S. Courthouse (515 Rusk) during normal business hours; processing must be performed there. When an agency presents papers outside the Courthouse, there must be appropriate quantities for execution and distribution. The magistrate judge will retain the documents and deliver them to the Case Manager for docketing and distribution.

3. If possible, advance notice should be given to the duty magistrate judge and Case Manager when matters are anticipated after normal business hours or outside the Courthouse. Estimated time of presentation should be established, with follow-up notifications of any changes.

B. Arrest Without Warrant

1. During regular business hours - refer to C. and E. below.

2. After regular business hours

a. Agent prepares complaint for approval by Assistant United States Attorney.

b. Following immediately upon completion of the administrative procedures incident to arrest, the arresting agent will turn arrestee over to United States Marshal for custody.

c. Agent contacts duty magistrate judge or state magistrate if applicable for presentation of complaint and determination of probable cause during daytime hours.

d. Magistrate judge will indicate on complaint time and date accepted by him or her, as well as an express statement whether or not probable cause is found.

e. Arrestee will be brought before the duty magistrate judge for initial appearance at the 10 a.m. setting on the first business day after arrest. Refer to E.(3) below.

C. Complaint

1. Preparation by agency and approval by U. S. Attorney, Criminal Division.

2. Submit all documents to Case Manager of duty magistrate judge for processing:

a. Assign docket number and prepare docket sheet.

b. Review forms for approval, content and sufficiency of copies.

c. If Case Manager of duty magistrate judge not available, processing by another deputy clerk.

3. Case Manager will accompany agent to magistrate judge for verification, execution and sealing.

4. Case Manager will retain original complaint and warrant and copies for distribution; other copies returned to agent.

D. Indictment or Information

1. U. S. Attorney prepares order for issuance of bench warrant or summons, with suggested conditions of release; execution by duty magistrate judge.

2. Original order to Criminal Clerk for issuance of warrant or summons; copy to Pretrial Services Agency (PSA), with copy of indictment or information.

3. U. S. Marshal serves summons or executes warrant.

4. Criminal Clerk refers case file to Case Manager of duty magistrate judge.

E. Arrest and Initial Appearance of Defendant

Initial appearance of defendant before the duty magistrate judge should be made at either of the regular hearings scheduled daily at 10 a.m. and 2 p.m.

1. The arresting or receiving agency will give prompt notice to the Pretrial Services Agency (PSA) of the detention and location of the defendant, and will have the defendant available for interview by PSA in sufficient time before next regular hearing before the magistrate judge. The agency is responsible for detention and presentation of defendant until transferred to custody of U. S. Marshal at or prior to the initial appearance.

   a. PSA will interview defendant and confer with U. S. Attorney and agency to collect and verify information to be considered for pretrial release. Where charges originate outside this division, PSA will consult with Pretrial Services Agency in the charging district to determine setting or recommendation of detention or conditions of release.

b. If defendant requests counsel and is indigent, PSA will provide financial affidavit for execution by defendant and will notify Federal Public Defender of request for representation.

c. PSA will notify Case Manager of duty magistrate judge to schedule appearance of defendant. If arrested on warrant, Case Manager must prepare papers for initial appearance; if arrest without warrant, complaint must be executed and filed (see C above), and papers must be prepared.

d. PSA will advise the duty magistrate judge verbally, by written report, or personally at the initial appearance, of information regarding defendant and PSA's recommendation for conditions of release.

e. Where defendant surrenders voluntarily or in response to summons, PSA will proceed as outline in Subsections (a)-(d) above.

2. Untimely presentation or notification

a. Agency and PSA processing are encouraged to be planned so defendant will appear at a scheduled docket.

b. Without advance notice and agreement, U. S. Marshal (USM) is not available to take custody of defendant from the arresting agent after the last trip of prisoners to jail facility, usually departing from the Courthouse at 4:00 p.m.

3. Late afternoon, weekend and holiday arrests.

a. For late afternoon arrests, near or after U. S. Marshal's deadline, arresting agent should transport defendant to jail facility and return him for the next docket appearance. If defendant is to be released, advise Case Manager, USM and PSA in advance for special appearance before magistrate judge.

b. A defendant arrested after 4:00 p.m. on the last working day before a weekend or a holiday will be taken by the arresting agent directly to the jail facility. The arresting agency will give prompt notice to the Pretrial Services Agency (PSA) of the arrest and location of the defendant. Similar notice will be given for a defendant who surrenders. PSA will initiate and coordinate internal procedures to schedule the initial appearance of the defendant before the duty magistrate judge.

c. On warrantless arrests, the agent will prepare the complaint for presentation to magistrate judge in accordance with I.B. above.

F. Search Warrant or Seizure Warrant

1. Approval by U. S. Attorney; request and order if affidavit and warrant to be sealed.

2. Process and execution - same as C, 2-4 above; original warrant returned to agent.

3. Advance notification if telephonic search warrant is anticipated.

4. Within the period prescribed therein, the original warrant, whether executed or not, will be delivered by the agent to the Case Manager for completion of return before the magistrate judge.

G. Electronic Surveillance or Tracking Device Warrant

1. Approval by U. S. Attorney; request and order if affidavit and warrant to be sealed.

2. Process and execution - same procedures as C, 2-4 above; original warrant returned to agent.

3. Renewal or extension - same procedures as C, 2-4 above.

4. Normally no return is required.

H. Pen Register, Trap and Trace, Telephone Toll Records or Bank Records Orders

1. Approval by U. S. Attorney; request and order if application and order to be sealed.

2. Process and execution - same procedures as C, 2-4 above; original order returned to agent.

3. Renewal or extension - same procedures as C, 2-4 above.

4. Normally no return is required.

I. OSHA Warrant

1. Preparation by OSHA.

2. Process and execution - same procedures as C, 2-4 above; original warrant returned to agent.

3. Normally no return is required.

J. IRS Warrant or Summons (Will Have Miscellaneous Docket Number)

1. Approval by U. S. Attorney, Civil Division.

2. Process and execution - same procedures as C, 2-4 above; original warrant or summons returned to agent.

3. Normally no return is required.

K. Writ of Habeas Corpus Ad Prosequendum/Testificandum

1. Preparation by U. S. Attorney

2. Submit application and writ to Case Manager.

3. Case Manager will present documents to magistrate judge for execution.

4. Case Manager will retain original application and copy of writ; original and true copy of writ delivered to U. S. Marshal.

II. EMERGENCY, CRITICAL AND NON-ROUTINE REQUIREMENTS

Emergency, critical or non-routine matters may develop which require special hearings. Normally these proceedings will be conducted in the same manner as regular docketed hearings and will require full court and support personnel. Advance planning must be made to arrange the presence of personnel.

III. U. S. DISTRICT JUDGES

The U. S. District Judges inherently have the powers to perform all the acts outlined above for magistrate judges, as well as exclusive powers, such as authorization of telephonic wire-taps. Inquiries regarding presentations to District Judges should be directed to the Clerk of the District Court.

IV. EFFECTIVE DATE

These guidelines have been modified and adopted by the United States District Court, Southern District of Texas, as the official operational policy for the Houston Division, effective November 21, 1991 (superseding the guidelines as revised June 1, 1988).

D. Utah

RULE 114
INSTRUCTIONS TO THE JURY

(a) **Written Proposed Jury Instructions.** In the case of a jury trial, two (2) originals and one (1) copy of proposed jury instructions shall be prepared, served, and filed with the court two (2) days before the morning of the first day of trial unless the court otherwise orders. The court in its discretion may receive additional written requests during the course of the trial. One (1) original and one (1) copy thereof of each proposed instruction shall be numbered, shall indicate the identity of the party presenting the same, and shall contain citations of authority. A second original of each proposed instruction shall be without number or citation. Individual instructions shall embrace one (1) subject only, and the principle of law embraced in any instruction shall not be repeated in subsequent instructions. Service copies of proposed instructions must be received by the adverse party or parties at least twenty-four (24) hours prior to the time the case is set for trial, unless the court otherwise orders.

(b) **Ruling on Requests.** Prior to the argument of counsel, the court, in accordance with Fed. R. Civ. P. 51 and Fed. R. Crim. P. 30, shall inform counsel of the court's proposed rulings in regard to requests for instructions. If any counsel believes that there has not been sufficient information from the court pursuant to Fed. R. Civ. P. 51 or Fed. R. Crim. P. 30, counsel should call the matter specifically to the attention of the court upon the record prior to final arguments before the jury.

(c) **Objections or Exceptions to Final Instructions.** The jury shall be instructed orally or in writing as the court in its discretion may determine. As provided in Fed. R. Civ. P. 51 or Fed. R. Crim. P. 30, objections to a charge or objections to a refusal to give instructions as requested in writing shall be made by stating such to the court before the jury has retired, but out of the hearing of the jury, specifying (i) the objectionable parts of the charge or the refused instructions; and (ii) the nature and the grounds of objection. Before the jury has left the box, but before formal exceptions to the charge are taken, counsel at the bench are invited to indicate to the court informally any corrections or explanations of the instructions that they believe were omitted due to the inadvertence of the court.

D. VT

Rule No. 2 Discovery

(a) Disclosure by the Government

(1) At arraignment, or within 7 days of a request by the defendant when such a request is necessary under paragraphs (2) through (9) of this Local Rule to obligate disclosure, or as soon thereafter as available, the Government shall furnish copies, or notify the defendant that he may inspect or listen to and record items which cannot be copied, of the following items in the possession, custody or control of the Government, the existence of which is known or by the exercise of due diligence may become known to the attorney for the Government.

(2) Statement of Defendant. Any relevant written or recorded statements made by the defendant; recorded testimony of the defendant before a grand jury which relates to the offenses charged; the substance of any oral statement made by the defendant of which the Government has knowledge or intends to offer in evidence at the trial whether made before or after arrest, in response to interrogation by any person then known to the defendant to be a Government agent.

(3) Where the defendant is a corporation, partnership, association or labor union, the Government shall furnish to the defendant copies of relevant recorded testimony of any witness before the grand jury who was,

(A) at the time of his testimony, so situated as an officer or employee as to have been able to bind legally the defendant in respect to conduct constituting the offense; or

(B) at the time of the offense, personally involved in the alleged conduct constituting the offense and so situated as an officer or employee as to have been able to bind legally the defendant in respect to that alleged conduct in which he was involved.

(4) Defendant's Prior Record. If requested by the defendant, which request shall be within 7 days of arraignment, the prior criminal record of the defendant when known to the Government.

(5) Documents and Tangible Objects. If requested by the defendant, which requests shall be within 7 days of arraignment, books, papers, documents, photographs, tangible objects, buildings or places, which

(A) are material to the preparation of the defense;

(B) are intended to be used by the Government as evidence at the trial; or

(C) were obtained from or belong to the defendant.

(6) Reports of Examinations and Tests. If requested by the defendant, which request must be within 7 days of arraignment, results or reports of physical or mental examinations and of scientific tests or experiments which are material to the preparation of the defense or are intended for use by the Government as evidence in chief at trial.

(7) Search and Arrest Warrant Documents and Things. if requested by the defendant, which request shall be within 7 days of arraignment, all warrants, applications with supporting affidavits, testimony under oath, returns and inventories for the arrest of defendant and for the search and/or seizure of the defendant's person, property, or items with respect to which the defendant may have standing to move to suppress.

(8) Electronic Surveillance Documents and Things.

(A) If requested by the defendant within 7 days of notification, all authorizations, applications, orders and returns obtained pursuant to Chapter 119 of Title 18, United States Code with respect to which the defendant may have standing to move to suppress.

(B) If requested by the defendant within 7 days of notification, and at reasonable cost to the defendant, all inventories logs, transcripts, and recordings obtained pursuant to Chapter 119 of Title 18 of the United States Code with respect to which the defendant may have standing to move to suppress.

(C) Notification that there has been electronic surveillance in the case pursuant to Chapter 119, Title 18, United States Code, with respect to which the defendant may have standing to move to suppress, shall be given by the Government at arraignment or as soon thereafter as possible.

(9) List of Witnesses. If required by the defendant, which request must be within 7 days of arraignment, a list of names and addresses of all Government witnesses whom the Government intends to call in presentation of its direct case. If the Government, within the 7 days it has to comply with the defendant's request, files an objection to the request, the list of names and addresses of all the Government witnesses shall be furnished in such time and to such extent as ordered by the court. Within 7 days of the date on which the Government has furnished said witness list to the defense, the defense shall furnish to the Government a list of the names and addresses of all defense witnesses whom the defense intends to call in presentation of its direct case. The United States Attorney shall also disclose any criminal convictions of which it has knowledge at any time and which may be used to impeach a witness pursuant to Rule 609, Federal Rules of Evidence.

(10) Exculpatory Evidence. All evidence which may be favorable to the accused on the issue of guilt or innocence within the scope of Brady v. Maryland, 373 U.S. 83 (1963).

(b) Disclosure by the Defendant

(1) Documents and Tangible Objects. If the defendant requests disclosure under paragraph (a)(5) of this Local Rule, within 7 days of defendant's request the Government may request that the defendant permit the Government to inspect and copy or photograph books, papers, documents, photographs, objects,

or copies or portions thereof, which are within the defendant's possession, custody, or control and which the defendant intends to introduce as evidence in its direct case at the trial. The defendant shall comply within 7 days of the Government's request or as soon thereafter as possible.

(2) Reports of Examinations and Tests. If the defendant requests disclosure under paragraph (a)(6) of this Local Rule within 7 days of defendant's request, the Government may request that the defendant permit it to inspect and copy or photograph any results or reports of physical or mental examinations and of scientific tests or experiments made in connection with the particular case, or copies thereof, within the defendant's possession or control, which the defendant intends to introduce as evidence in chief at the trial or which were prepared by a witness whom the defendant intends to call at the trial when the results or reports relate to his testimony. The defendant shall comply within 7 days of the Government's request.

(c) Alibi and Insanity Defense Notification

(1) Alibi Defense. The Government shall file its demand for notification of an alibi defense within 7 days of arraignment. Compliance and further disclosure thereafter shall be governed by the schedule provided in Rule 12.1 of the Federal Rules of Criminal Procedure.

(2) Insanity Defense. Notification of an insanity defense under Rule 12.2 of the Federal Rules of Criminal Procedure shall be within 14 days of arraignment, or at such later time as the court may direct.

(d) Motions for Discovery

(1) All motions for discovery shall include a written certification that, after a discovery conference between counsel and sincere efforts to resolve their differences, the parties are unable to reach an accord. Such certification shall include the date, time, and place of such conference, and the names of all parties participating therein.

(2) It shall be the continuing duty of counsel for all parties to reveal immediately to opposing counsel all newly-discovered information or other material within the scope of this Local Rule after initial discovery has been furnished.

(3) Upon sufficient showing, the court may, at any time upon motion properly filed, order that the discovery and inspection provided by this Local Rule be denied, restricted, or deferred, or make such other order as is appropriate.

(e) Bill of Particulars

(1) If requested by the defendant within 7 days of arraignment, the Government shall, within 7 days of such request, either supply a bill of particular or file specific objection to such request. In the event that such objection is filed, the bill of particulars shall be furnished as the court orders.

(2) Within 7 days of the defendant's receipt of the bill of particulars, the defendant may move to attack the sufficiency of the indictment as made more particular by the Government's bill of particulars.

LR 51

JURY INSTRUCTIONS

(a) **Giving Instructions Prior to Argument**

It is the general policy of this Court to give the instructions to the jury after the close of evidence and prior to argument. However, the court may give instructions at anytime.

(b) **Copy of Instructions for Jury Use**

A written set of the Court's instructions may be given to the jury when they retire to deliberate their verdict.

(c) **Submission of Proposed Instructions**

In jury cases, counsel for each party shall at least five (5) days prior to trial, excluding Saturdays, Sundays and holidays, or such other time as may be fixed by the Court, file the original plus two clearly legible copies of proposed instructions with the Clerk. Each set of proposed instructions is to bear a cover sheet styled in the name and number of the case and titled (PLTF/DEF) PROPOSED JURY INSTRUCTIONS. Each proposed instruction shall be typewritten or printed on a separate, plain, unnumbered 8½" by 11" paper and shall be headed "Instruction No. _____"The original of each instruction shall be unnumbered, bear no citation of authorities and shall not be identified as to the proposed party. All other copies of each instruction shall be numbered and contain supporting citations at the end of the instruction.

Proposed instructions upon questions of law developed by the evidence, which could not reasonably be anticipated, may be submitted at any time before closing argument. Except as otherwise provided above, the failure to submit proposed instructions in accord with this rule, or at such other time as the Court may set by Order in a given case, shall be deemed a waiver of the defaulting party's right to propose instructions.

W.D. Wash.

CRIMINAL RULES

CrR 1 THROUGH 4

RESERVED

CrR 5

NOTICE OF ARREST

(a) Notice of Arrest of Parole Violators

As soon as practicable after taking into custody any person charged with a violation of parole, the United States Marshal shall give written notice to the Chief Probation Officer of the date of arrest and the place of confinement of the alleged violator.

(b) Notice of Arrest of Probation Violators

As soon as practicable after taking into custody any person charged with a violation of probation, the United States Marshal shall given written notice to the Chief Probation Officer, the United States Attorney, and the United States magistrate judge in Tacoma or Seattle.

(c) Notice of Arrest by Federal Agencies and Others

It shall be the duty of the United States Marshal to require all federal agencies and others who arrest or hold any person as a federal prisoner in this district, and all jailers who incarcerate any such person in any jail or place of confinement in this district, to give the United States Marshal notice of such arrest or incarceration forthwith.

As soon as practicable after receiving notice or other knowledge of any such arrest or incarceration anywhere within the district, the marshal shall given written notice to the United States magistrate judge in Seattle or Tacoma and the United States Attorney of the date of the arrest and the prisoner's place of confinement.

(c) Expert Witnesses

Except as otherwise ordered by the court, a party shall not be permitted to call more than one expert witness on any subject.

(d) Attorney as Witness

If an attorney of any party be examined as a witness on behalf of a party he represents and give testimony on the merits, he shall not argue the merits of the cause, either to the court or jury, except by the consent of the opposite party and the permission of the court.

(e) Trial Brief

Each party shall file a trial brief discussing matters of substantive law involved in the trial and important or unusual evidentiary matters. Al briefs, except those dealing exclusively with questions of the admissibility of evidence, shall be served upon counsel for the adverse party, filed with the clerk, and a copy served upon the judge before whom the case is pending five days, exclusive of Saturdays, Sundays and holidays, prior to the trial date.

CrR 27 THROUGH 29

RESERVED

CrR 30

JURY INSTRUCTIONS

(a) Proposed Instructions Required

Each party shall file and serve proposed jury instructions.

(b) Format

Each proposed instruction shall be headed with the caption, "Instruction No. ____," permitting the court to fill in the instruction number as required. One set of copies of the proposed instructions

shall bear no other caption, and shall include no citations of authority. The original set and all other copies, however, shall comply with the following additional requirements. Each shall be numbered consecutively as "Plaintiff's (or Government's or Defendant's) proposed Instruction No. (fill in number);" and each shall reflect, at the foot of the page, any supporting authority for the instruction.

(c) Filing and Service

Unless otherwise ordered, proposed jury instructions shall be filed and served two days, exclusive of Saturdays, Sundays and holidays, before the trial date. Each party shall file the original and three copies (one without citations) with the clerk, and serve one copy upon each other party.

(d) Reading Instructions Prior to Argument

With approval of counsel for all parties, the court may read instructions to the jury after the close of evidence and prior to argument.

(e) Copy of Instructions for Jury Use

A written set of the court's instructions shall be given to the jury when they retire to deliberate their verdict.

CrR 31

VERDICT

(a) Through (e) Reserved

(f) Receiving the Verdict

Upon receiving the verdict of the jury, one attorney for each side and the defendant or defendants, shall be present.

magistrate judge, the government shall give notice of the arraignment and plea to counsel who appeared for defendant before the magistrate judge.

When the United States Attorney has knowledge that a defendant is without counsel, that fact shall be promptly brought to the attention of the appropriate judicial officer so that consideration may be given to early provision of counsel.

(b) The United States Attorney shall serve on defendant's counsel or on an unrepresented defendant a notice of a motion to dismiss a complaint pending before a judicial officer.

(c) No other or further notice of arraignment and plea or motion to dismiss need be given by the clerk except on order of the court.

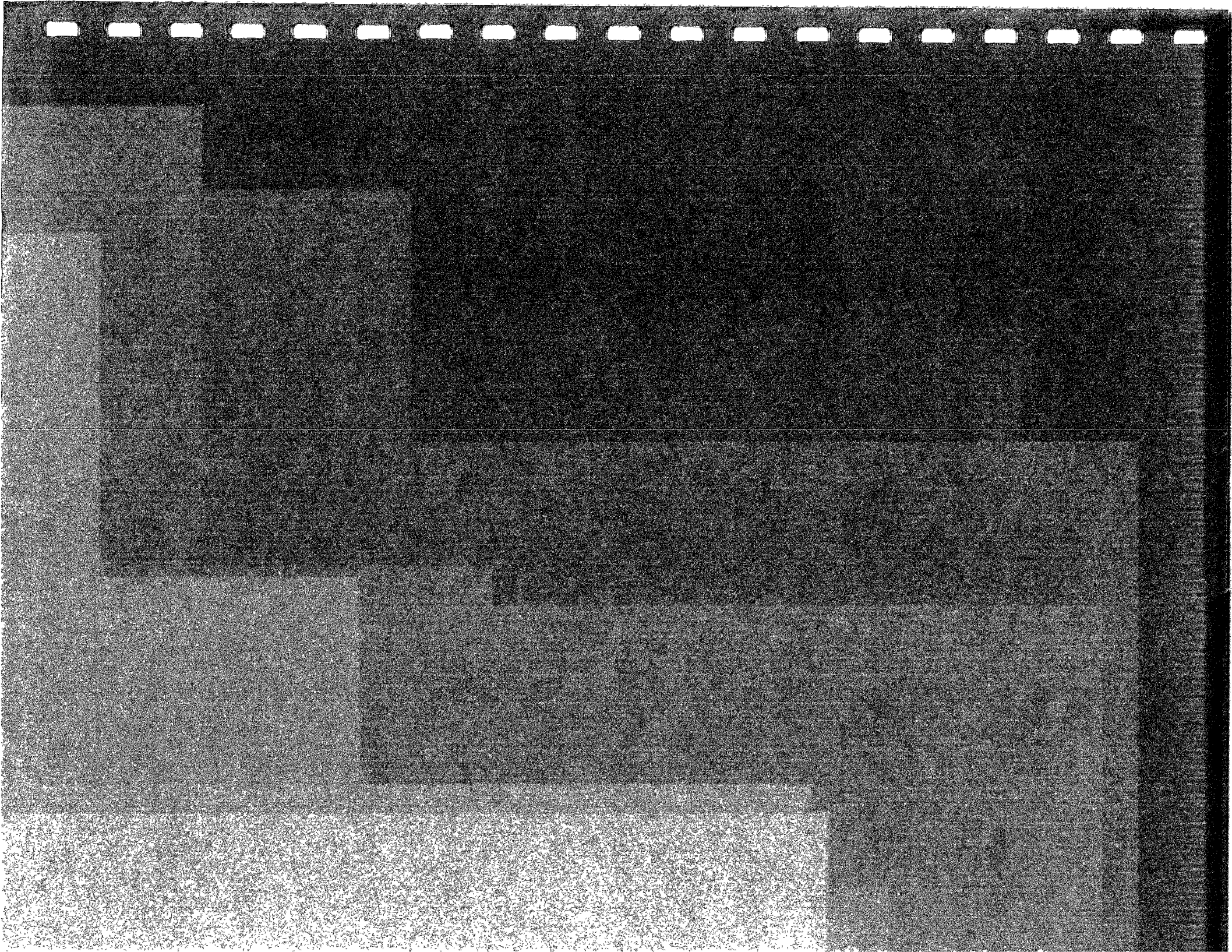
Article 2. Trial.

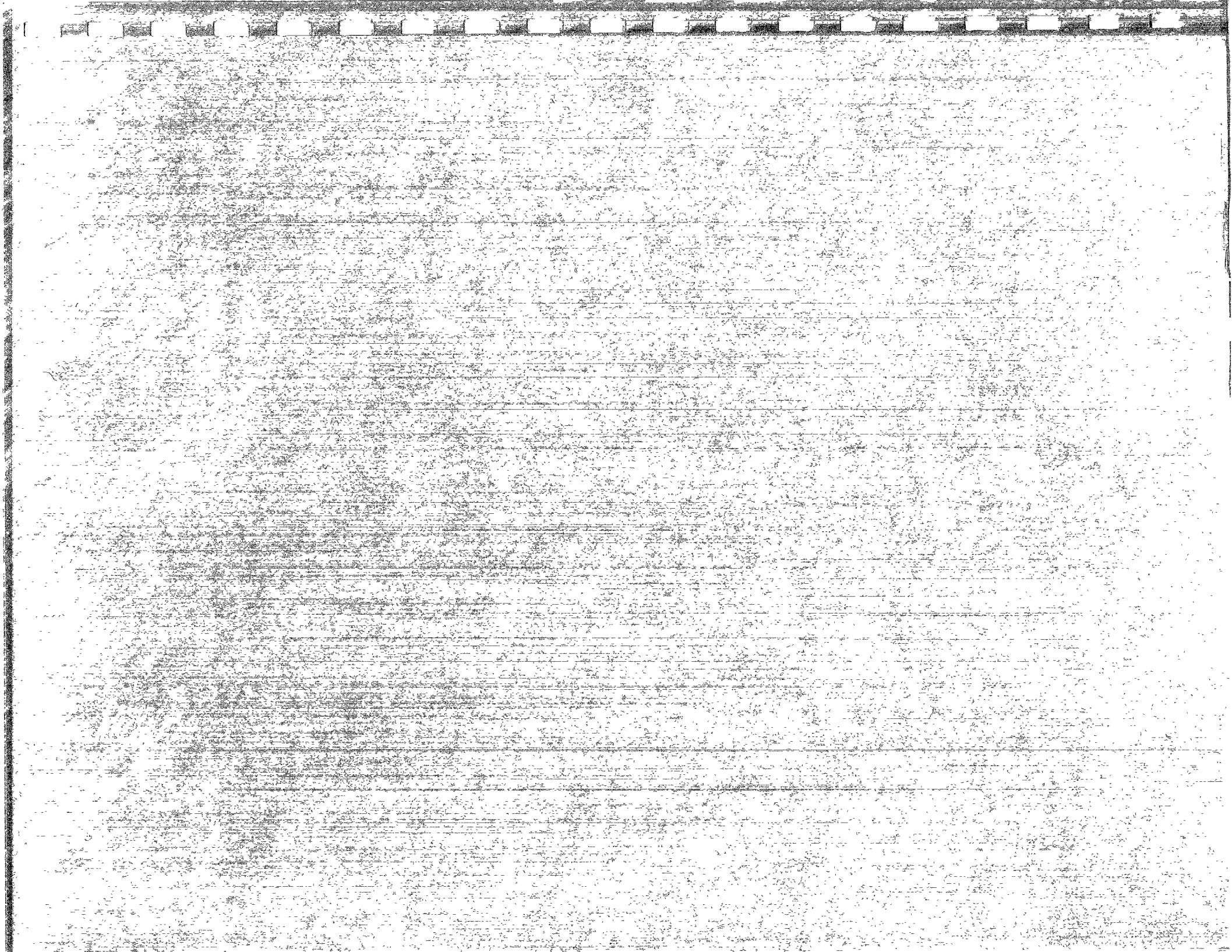
LR Cr P 2.01. Jury Instructions.

In all criminal cases, counsel for the defendant and for the government shall submit jury instructions to the court prior to the commencement of a jury trial, or earlier if ordered by the court. When it is necessary for counsel for the defendant to submit one or more jury instructions on an *ex parte* basis, those instructions must be disclosed to the government no later than the charge conference or when specified by the court. Subject to court approval, counsel may amend or supplement jury instructions after commencement of trial.

LR Cr P 2.02. Opening Statements in Criminal Trials.

At the commencement of trial in a criminal action, the government and the defendant may make non-argumentative opening statements as to their theories of the





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

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CRIMINAL RULES

RALPH K. WINTER, JR.
EVIDENCE RULES

Memorandum

TO: Honorable Alicemarie Stotler, Chairwoman, and Members of the Committee on Rules of Practice and Procedure

FROM: Mary P. Squiers, Consultant

RE: Report on the Local Rules of Criminal Practice

DATE: June 6, 1995

Attached is the Report on the Local Rules of Criminal Practice for your review. What follows is a brief history of this Committee's involvement with local rules and an explanation of the content of this Report.

General Background. As you are aware, in 1986, the United States Judicial Conference authorized the Committee on Rules of Practice and Procedure to undertake a study of federal district court local rules regulating civil practice. The study was intended to attempt: 1) a complete review of the local civil rules for legal errors or internal inconsistencies; 2) a study of the rules and rulemaking procedures to see how they work in practice; and 3) an examination of the relationship of local rules to the overall scheme of uniform federal rules. The results of this study were sent to the chief judges of the district courts in April 1989 from the Chairman of the Standing Committee, Joseph F. Weis, Jr., and entitled: "The Report of the Local Rules Project: Local Rules on Civil Practice." That Report consisted of several documents:

1. History and Methodology.
2. Uniform Numbering System.
3. Three different documents discussing the content of the local rules.
4. A list of local rules for each district court.

This Committee then authorized a study of the local rules on appellate practice. The "Report on the Local Rules of Appellate Practice" was distributed to the chief judges of the circuit courts by the Chairman of the Advisory Committee on Appellate Rules, Kenneth F. Ripple, in April of 1991. The Report on local appellate rules contained similar documents:

1. History and Methodology.
2. Uniform Number System.
3. One document discussing the content of the local rules.
4. A list of local rules for each appellate court.

This Committee authorized a review of the local rules on criminal practice at its June 1994 meeting in Washington, D.C. This study is the result of that authorization.

The Attached Report. Attached is the Report on the Local Rules of Criminal Practice. It consists of several parts, each of which is described briefly below.

1. **Methodology for the Report on the Local Rules of Criminal Practice.** The first material consists of a brief history and methodology of the current Report on criminal local rules. It explains how the rules were collected, sorted, and analyzed. It is useful to keep in mind that, throughout all of this material, the local rules are examined by topic and not by jurisdiction. For example, the available rules from all of the courts relating to grand jury proceedings, arraignments, and subpoenas were examined. There was no specific examination of all of the local rules of any one particular court. Included with the methodology are several appendices:

   Appendix A—The History and Methodology of the Local Rules Project, which was distributed in April 1989 as part of the Report of the Local Rules Project: Local Rules on Civil Practice.

   Appendix B—A sample of the letter to the chief judges of the district courts requesting local rules materials for this study, which was sent in June of 1994.

   Appendix C—An outline of the criminal rule topics examined.

   Appendix D—A sample of one of the "Rules Sorts" listing the related criminal local rules from all of the district courts.

2. **Uniform Numbering System.** This is a recommended uniform numbering system for all jurisdictions based, in large measure, on the Federal Rules of Criminal Procedure. Similar recommendations were made with respect to civil and appellate local rules. In fact, the Judicial Conference, at its September 1988 meeting, approved and urged the districts to adopt such a uniform numbering system for local rules of civil practice. *See* Report of the Judicial Conference (September, 1988) 103.

3. **Treatise.** The topics covered in the research document are arranged according to the Federal Rules of Criminal Procedure. Each topic consists of a discussion of all of the rules relating to that topic. The discussion includes five areas, where applicable:

   1. A discussion of rules that ought to remain local.

   2. A discussion of rules that may assist all jurisdictions so that the courts may want to consider adopting a model local rule on the subject.

   2. A discussion of rules that repeat existing law.

   3. A discussion of rules that are inconsistent with existing law.

   4. A discussion of those rule topics that are being referred to the Advisory Committee on Criminal Rules for possible incorporation into the Federal Rules of Criminal Procedure.

4. **List of Local Rules for Each Jurisdiction.** This is a list of the local rules for each jurisdiction, arranged according to each district court's present numbering system, that were discussed in the treatise. Each rule is numbered and then identified as a repetitive local rule, an inconsistent local rule, a rule that should remain subject to local variation, a rule that should be referred to the Advisory Committee, or a rule that may be appropriate as a model local rule for all courts to consider adopting. There is also a designation next to each of these local rules indicating where in the treatise the discussion on the particular rule can be found.

Your feedback at our July meeting in Washington, D.C., will be most helpful. At that time, the Committee may be interested in approving circulation of this material to the chief judges of the district courts for their review.

Methodology for the Report on the Local Rules of Criminal Practice

General Background

In 1986, the United States Judicial Conference authorized the Committee on Rules of Practice and Procedure to undertake a study of federal district court local rules regulating civil practice. The study was intended to attempt: 1) a complete review of the local civil rules for legal errors or internal inconsistencies; 2) a study of the rules and rulemaking procedures to see how they work in practice; and 3) an examination of the relationship of local rules to the overall scheme of uniform federal rules. The results of this study were sent to the chief judges of the district courts in April 1989 from the Chairman of the Standing Committee, Joseph F. Weis, Jr., and entitled: "The Report of the Local Rules Project: Local Rules on Civil Practice." That Report consisted of several documents:

1. History and Methodology.
2. Uniform Numbering System.
3. Three different documents discussing the content of the local rules.
4. List of local rules for each district court.

A copy of the "History and Methodology" of that Report is attached as Appendix A. Because the methodology used in studying the local criminal rules is essentially the same as that used when examining the local civil rules, it may be helpful to review that earlier document.

The Committee on Rules of Practice and Procedure then authorized a study of the local rules on appellate practice. The "Report on

the Local Rules of Appellate Practice" was distributed to the chief judges of the circuit courts by the Chairman of the Advisory Committee on Appellate Rules, Kenneth F. Ripple, in April of 1991. The Report on local appellate rules contained similar documents:

1. History and Methodology.
2. Uniform Number System.
3. One document discussing the content of the local rules.
4. List of local rules for each appellate court.

The Committee on Rules of Practice and Procedure authorized a review of the local rules on criminal practice at its June 1994 meeting in Washington, D.C. This study is the result of that authorization.

Methodology

The first step was to collect from the jurisdictions their local rules and any other directives having the same function. This was accomplished by writing to every district in the summer of 1994. A copy of the letter that was sent to each chief judge from the Chairwoman of the Committee on Rules of Practice and Procedure, Alicemarie H. Stotler, and the Chairman of the Advisory Committee on Criminal Rules, D. Lowell Jensen, and dated June 29, 1994 is attached as Appendix B. The letter specifically requested local rules and

> standing orders, general orders, internal operating procedures, a typical trial scheduling order, a typical application to plead guilty, any case assignment plan, speedy trial act plan, jury selection plan and other district-wide plans, and any other directives which are the functional equivalent of local rules and which regulate practice in criminal cases.
>
> Letter of June 29, 1994 to chief judges.

This communication resulted in sixty-five jurisdictions' sending material for evaluation. The courts were not individually contacted

after the initial letter. The fact that all ninety-four district courts failed to respond, however, does not mean that a large number of courts have rules which were not studied. To the contrary, there are some number of districts with no rules regulating criminal practice. For example, two courts, the District of South Carolina and the Western District of Virginia, acknowledged receipt of the letter and indicated that there were no criminal local rules in their respective district courts.

After collection of the material, the next step was to enter each rule into a computerized data base. The rules of each jurisdiction were individually placed on an outline based on the Federal Rules of Criminal Procedure. This resulted in a retrieval system organized by topic. It was then possible to sort and count the local rules according to each of the topics on the outline. The outline which was used for this procedure is attached as Appendix C. Next to each of the outline topics on Appendix C is a number indicating the number of jurisdictions with rules on the topic. Each of these topics was then sorted so that, for each topic, a list of the related rules from all of the district courts was generated. A sample of one of the sorts is attached as Appendix D.

The rules were then analyzed. The analysis focused on an examination of the rules covering each particular topic on the outline. The rules were studied singly and in the aggregate to determine if they were appropriate subjects for local district court rulemaking. Specifically, the rules were analyzed using five broad questions:

1. Do the local rules repeat existing law?
2. Do the local rules conflict with existing law?

3. Should the local rules form the basis of a Model Local Rule for all jurisdictions to consider adopting?

4. Should the local rules remain subject to local variation?

5. Should the subject addressed by the local rules be considered by the Advisory Committee to become part of the Federal Rules of Criminal Procedure?

A brief discussion of each of the five questions listed above follows. It is helpful to be mindful of two issues which presented themselves during the evaluation of the local rules and directives. First, the examination of the local rules from the jurisdictions included a review of other material provided by the districts. These other materials were standing orders, general orders, and various sample court documents. It is not known whether the sample documents are suggestive or binding on litigants. They were reviewed as if they served the functional equivalent of a local rule or order although, in reality, such a document may be merely representative of a variety of documents on the same subject.

Second, in making determinations on which local rules and other directives were repetitive and which were inconsistent, the intention was to err on the side of over-inclusion rather than under-inclusion. If a rule appeared, on its face, to conflict with existing law, it was deemed inconsistent, leaving any further interpretation to the particular district.

Repetitious rules were highlighted since such repetition is superfluous and may be counterproductive. It is unnecessary since the bench and bar already have access to existing federal rules and statutes through the published United States code services, as well as through handbooks of selected rules and portions of Title 18 useful for practitioners and through the available computer services. In addition, attorneys have had courses in law school on some of these subjects. The bar is

accountable, of course, for knowledge of existing law. Documentation which restates existing law simply results in more paper with its concomitant production and circulation costs. Further, if the law is restated only partially or is restated incorrectly, attorneys may be confused about what law actually applies.

Rules that are inconsistent with existing law were noted since Rule 57 of the Federal Rules of Criminal Procedure and Section 2071 of Title 28 mandate that there be no inconsistency in the local rules with existing law. The determination of whether a particular local rule is inconsistent depends, in the first instance, on the definition of "inconsistency" used. One using a narrow definition of "inconsistency" may conclude that only those local rules which flatly contradict actual statements or requirements in other law are inconsistent. If one uses a broader definition of "inconsistency," there is more opportunity for disagreement over whether a particular local rule is, in fact, inconsistent. For example, one can argue that a local rule may be inconsistent with the intent or spirit of the Federal Rules. One can also argue that local rules that take away the court's discretion in an individual case are inconsistent with the intent and spirit of the Federal Rules that case management, generally, be addressed on an individual basis. For example, one of the Federal Rules provides that time limits in the Rule can be altered "for good cause." Fed.R.Crim.P. 32(a). Many local rules, however, provide an automatic and inflexible time schedule, rather than rely on the court's discretion in an individual case. One can also argue that local rules that add further requirements than those set forth in the Federal Rules conflict with the intent and spirit of the Federal Rules.

One can argue that a local rule that is inconsistent with existing case law should be rescinded even though such an inconsistency is not prohibited in Rule 57 or Section 2071 of Title 28. Case law will surely impact on counsel's activities and the court's decisions in much the same way as the Federal Rules and statutes. For example, the use of video conferencing of arraignments has been rejected by a circuit court of appeals yet a directive in one of the district courts still exists authorizing its use. D.Ariz. GO 190; *see Valenzuela-Gonzalez v. United States District Court for the District of Arizona*, 915 F.2d 1276 (9th Cir. 1990).

Local rules may exist that, while not problematic on their face, may be inconsistent as applied in practice.

There are many local rules that seem useful in delineating certain procedures and practices in the individual district courts, in answering the third and fourth questions set out above. There are also local rules which may be advisable for other jurisdictions to consider adopting. For example, a uniform rule explaining the applicability of the local rules, their scope, and their citation form may be helpful for all courts.

Lastly, there are local rules that may more appropriately be incorporated into the Federal Rules of Criminal Procedure rather than remaining as local rules. Such topics should be brought to the attention of the Advisory Committee. Incorporation into the Federal Rules may be advisable for one of several reasons: 1) the particular topic covered by the local rule is critical to the procedural scheme of the Federal Rules ; 2) the local rule affects the substantive outcome of a class of cases; 3) the local rule affects litigation costs; 4) the local rule affects the operation of the federal courts generally; or 5) the local rule relates in a significant way to the integrity of the Federal Rules as a unified, integrated set of rules. In

addition, a Federal Rule or Rules may already cover the issue. Lastly, the local court rules may have served as an experimental device to test a particular procedure. Further experimentation is no longer necessary and the particular local rules can be incorporated into the Federal Rules or rejected. For example, there are local rules that require that the parties meet and confer about discovery disputes before any motion is filed. *E.g.*, E.D.La. 2.11; D.P.R. 409; D.Vt. 2. An analogous requirement exists in the Federal Rules of Civil Procedure and the Advisory Committee on Criminal Rules may want to consider a similar amendment to the Federal Rules.

Appendix A

(Distributed in April 1989 as part of the Report of the Local Rules Project: Local Rules on Civil Practice)

History and Methodology of the Local Rules Project

The United States Judicial Conference authorized the Committee on Rules of Practice and Procedure to undertake a study of federal district court local rules. Daniel R. Coquillette, Reporter to the Committee, submitted a proposal to the Committee for a study of these local rules in January, 1986. No committee since the Knox Committee in 1940 has attempted: 1) a complete review of local rules for legal errors or internal inconsistencies; 2) a study of the rules and rulemaking procedures to see how they work in practice; or, 3) an examination of the relationship of local rules to the overall scheme of uniform federal rules. The Local Rules Project has been fully operational at Boston College Law School since the fall of 1986.

What follows is a brief history of the Local Rules Project and an explanation of the work of the Project since its inception.

1. History

The ninety-four federal district courts currently have an aggregate of approximately 5,000 local rules, not including many "sub-rules," standing orders and standard operating procedures. These rules are extraordinarily diverse and their numbers continue to grow rapidly. To give one stark example, the Central District of California, based in Los Angeles, has about thirty-one local rules with 434 "sub-rules," supplemented by approximately 275 standing orders. At the other extreme, the Middle District of Georgia has only one local rule and just one standing order. These local rules literally cover the entire spectrum of federal practice, from attorney admission and attorney discipline, through the various

stages of trial, including pleading and filing requirements, pre-trial discovery procedures, and taxation of costs.

Some of these local rules materially supplement or expand the existing uniform Federal Rules. For example, there are rules which define the content and scope of the pre-trial conferences and scheduling requirements outlined in Rule 16 of the Federal Rules of Civil Procedure. Others rules may add to the pleading requirements for a jury demand. Some rules provide greater detail on motion practice than that provided in Rule 7(b). Also, rules may add to the class action requirements of Rule 23. Some of the rules appear to expand upon what is mandated by federal statutes in such areas as habeas corpus and civil rights proceedings. Other local rules address issues as fundamental as six-person juries or procedures which are entirely administrative in nature.

In 1983, the House Subcommittee on Courts, Civil Liberties, and the Administration of Justice of the House Committee on the Judiciary began an examination of the promulgation of local rules during its examination of rulemaking by the judiciary generally. The Subcommittee proposed amendments in 1983 and 1985 to Sections 2072 through 2076 of Title 28, which amendments are referred to as the Rules Enabling Act of 1983 and 1985, respectively. *See* H.R. 4144, 98th Cong., 1st Sess. (1983) and H.R. 3550, 99th Cong., 2d Sess. (1985). The 1985 Rules Enabling Act sought "to revise the process by which rules of procedure used in federal judicial proceedings, and the Federal Rules of Evidence, become effective, to the end that the rulemaking process provides for greater participation by all segments of the bench and bar." H.R. Rep. 422, 99th Cong., 2d Sess. 4 (1985). The Subcommittee's 1985 bill was recommended favorably by the Committee on the Judiciary, *Id.*; 131 Cong. Rec. E-177 (daily ed. Feb. 3, 1986), and passed the House unanimously, only to die before vote by the Senate due to the adjournment of the ninety-ninth Congress. On June 22, 1987, the House passed a bill, H.R. 2182,

100th Cong., 1st Sess., 133 Cong. Rec. H53331 (1987), which contained, as Title II, the Rules Enabling Act of 1987. This Rules Enabling Act, with only minor changes, is identical to the 1985 bill. 133 Cong. Rec. H5336 (daily ed. June 22, 1987) (statement of Rep. Glickman). It was referred to the Judiciary Committee of the Senate June 23, 1987. Just a few weeks later, the Court Reform, and Access to Justice Act of 1987 was introduced in the House of Representatives by Representative Kastenmeier. H.R. 3152, 100th Cong., 1st Sess. (August 6, 1987). Title II of this Act was the new Rules Enabling Act. *Id.* at §§201-206. This new Rules Enabling Act was identical to the earlier bills except that its effective date is December 1, 1988. *Id.* at §206. This Rules Enabling Act was passed November 19, 1988 as Title IV of the Judicial Improvements and Access to Justice Act, effective December 1, 1988. Pub. L. No. 100-702, §§401 407, 102 Stat. 4642, 4648-4652 (1988).

The Subcommittee noted in its 1985 report that local rules may have some obvious benefits: they can accommodate local conditions; they can offer predictability to the bar by communicating the required procedure or practice; and, they can efficiently rid the court of certain routine tasks which lend themselves to a uniform result. H.R. Rep. No. 422, 99th Cong., 2d Sess. 14 (1985). The Subcommittee further noted, however, that local rules had been severely criticized by commentators because they could be promulgated without notice or an opportunity for comment; because there is a tremendous number of such rules; and because these rules frequently conflict with the letter and spirit of national rules and federal statutes. *Id.* at 14-17.

Some of these criticisms were addressed in the 1985 changes in Rules 83 and 57 of the Federal Rules of Civil and Criminal Procedure, respectively. The 1985 amendments require that, before rules are promulgated or amended, there be "appropriate public notice and an opportunity to comment"; the amendments also authorize the circuit councils to amend and abrogate local rules of district

courts within the circuits. Fed.R.Civ.P. 83, Fed.R.Crim.P. 57. The Rules Enabling Act was proposed, in part, to regulate aspects of the local rulemaking process which were not addressed by these 198S amendments. H. R. Rep. No. 422, 99th Cong., 2d Sess. 15 (1985).

Also in 1984, the United States Judicial Conference authorized its Committee on Rules of Practice and Procedure to study and confront the problems caused by local rule proliferation. In 1985, Dean Daniel R. Coquillette of Boston College Law School, was selected Reporter to the Standing Committee and empowered to collect and organize in one location all of the local district court rules, standing orders, and any other judicial commands that perform the same functions. He was further instructed to design a project for the purpose of studying local rule issues and for proposing concrete solutions to solve problems, if and to the extent they existed. This would be the first exhaustive federal study of local rules since the 1940 Knox Committee study. Report to the Judicial Conference of the Committee on Local District Court Rules (1940) (John C. Knox, Chairman).

As a result of Dean Coquillette's recommendations, the Local Rules Project (LRP) has commenced. Assisting the Reporter are Mary P. Squiers, Esquire, and Professor Stephen N. Subrin, of Northeastern University School of Law, who are the Project Director and the Consultant to the Project, respectively.

II. Methodology

The first step for the Project was to collect from all of the jurisdictions their local rules and any other directives having the same function. This was accomplished by writing to every district in the spring of 1986. After several months, full compliance was achieved. This collection process continues. For the past two years, some jurisdictions have continued to send the Project new local rules and amendments as they are promulgated. This procedure, unfortunately,

has not been consistent among the jurisdictions. Therefore, although the Project has 'a very up-to-date compilation of local rules, it is probably lacking in some respects.

Because the Project receives new and amended local rules routinely, it was necessary to stop integrating rules into the Project's material and analysis. Accordingly, rules received by the Project after the fall of 1987 have not been incorporated into the attached materials.

After collection of the material, the next step was to enter each rule into a computerized data base. This resulted in a retrieval system organized by topic of the local rules. It was then possible to sort and count the local rules according to each of the topics on the outline. The original outline which was used for this procedure is attached hereto as Appendix A. A sample son for one of the rule topics is attached as Appendix B.

Every local rule was entered into the data base. However, because of the wide diversity among existing local rules, some "topics" consisted of only one or two local rules. Due to the large volume of material, such small topics were not generally analyzed.

The Local Rules Project submitted a Preliminary Project Report to the Committee on Rules of Practice and Procedure at its January 29, 1987, meeting. At that meeting, the Committee suggested that, in the fall of 1987, the Reporter invite a small number of leading experts on federal rulemaking to a workshop for the purpose of examining and fully discussing the tentative proposals and findings of the Local Rules Project to date. Accordingly, the Conference on Local Rules in the Federal District Courts was held at Boston College Law School November 12 and 13, 1987, and the results of the Conference were subsequently discussed at a meeting of the Committee held February 4, 1988, in Washington.

The format of the Conference was dictated by the initial research of the Local Rules Project. The Project broke down the conference discussions into four

discrete subject matters covered by the local rules. The discussion of these four topics comprised most of the work of the conferees during their two days at Boston College. These discussions were preceded, however, by some introductory remarks and an important discussion of the practical and theoretical overview of the Project, an explanation of the Project's analysis and choices, and the methodology for examining and testing local rules. Of course, the theoretical and practical aspects of rulemaking and of the Project's decision-making were discussed throughout the Conference.

The results of the Conference were quite enlightening to the Local Rules Project. The discussions helped focus the Local Rules Project on several areas: 1) workable solutions to perceived problems; 2) areas which may be outside the scope of the Project or otherwise inappropriate for Project study; and, 3) methods of implementation.

The conferees favored a uniform numbering system and structure to help make the local rules available to the public. Such a numbering system would assist not only those attorneys with multi-state practices, but also any attorney needing to locate a particular rule or to learn whether a local rule on a specific topic exists in the first instance. If the numbering system were uniform among jurisdictions, the legal publishing companies and computer services could index the rules and cases decided pursuant to those rules. At present, it is often difficult to find case law relating to a particular local rule.

The conferees were also supportive of efforts to help the district courts draft better, more effective rules and to rid the districts of out-dated and useless rules. For example, some jurisdictions still have local rules covering the procedures to be used in bringing black lung cases in federal district court pursuant to federal statute, although black lung cases are now rare at the district court level.

The conferees agreed that rules which merely repeat existing federal law should be rescinded. They are not just unnecessary, they are often inaccurate restatements, and add to the volume of court directives used by court and counsel. The attendees also favored rescission of local rules which are inconsistent with each other or other supervening federal law.

The conferees were concerned that some local rules address major policy concerns that should be outside the Project's mandate. For example, local rules on bar admission and bar discipline have been the sources of great debate. If changes are to occur with these local rules, they may more aptly come from a policy-making body rather than from the Local Rules Project.

Some local rules may be more appropriately promulgated as amendments to the Federal Rules of Civil Procedure. The conferees agreed that the Local Rules Project should seek to identify such rules.

The conferees were in agreement that the Project should not create new handbooks or pamphlets for *pro se* litigants, such as prisoners. The conferees did not believe that the Project should prepare a handbook for practitioners which states federal law and rules that have been frequently repeated by local rules.

Much of the conference discussion focused on eventual implementation of the Project's suggestions. This included discussion of how diverse the individual federal districts can or should be, consistent with the concept of a national judicial system. For example, some conferees argued that the federal judiciary is decentralized and that such decentralization is desirable. The best implementation method, therefore, would be to encourage jurisdictions to voluntarily "weed out" obviously inconsistent or unnecessary rules and just to provide a national uniform numbering system. On the other hand, others concluded that the federal system should strive to be as uniform as possible. These conferees tended to favor standardization of local rules. For example, some conferees suggested that the Project complete a set of model uniform

administrative rules, based on the best existing local rules, and then go through the national rulemaking process to incorporate such rules into the Federal Rules of Civil Procedure as an appendix.

There seemed agreement, however, that voluntary implementation would be the most successful way to proceed, at least initially. For example, each district court could receive from the Judicial Conference, the Committee on Rules of Practice and Procedure, or the Local Rules Project, a list of questionable rules in that district, together with supporting documentation. The district court could then voluntarily rescind obviously repetitive or inappropriate local rules. In addition, circuit councils are empowered by Rule 83 of the Federal Rules of Civil Procedure to abrogate inconsistent local rules regardless of voluntary district court compliance.

Another suggestion which met with wide approval was to provide a manual for federal court administration to district court judges and to the circuit councils. Such a manual could serve several purposes, including: 1) to explain or justify the Judicial Conference's conclusions with respect to those rules which are repetitive or inconsistent; 2) to provide guidance to the districts as to the types of problems commonly encountered in local rulemaking; 3) to offer sample local rules for districts to consider; and, 4) to further assist judges by providing sample orders for use in commonly recurring cases.

With these comments in mind, the Project completed its analysis of the civil local rules. The analysis focused on an examination of the existing local rules covering each particular topic on the outline.* The local rules on a topic were studied singly and in the aggregate to determine if they were appropriate subjects for local district court rulemaking. Specifically, the Project analyzed the

*The Local Rules Project originally examined the local rules on bar admission and bar discipline. The Project's preliminary findings were presented at the Conference. Some of the Conference participants expressed concern that these subjects may be better addressed by a policy-making body rather than the Local Rules Project. In fact, the Project has been instructed to refrain from a further analysis of these subjects. These topics, accordingly, are not discussed in the attached materials.

local rules using five broad questions: 1. Do the local rules repeat existing law? 2. Do the local rules conflict with existing law? 3. Should the local rules form the basis of a Model Local Rule for all of the jurisdictions to consider adopting? 4. Should the local rules remain subject to local variation? and, 5. Should the subject addressed by the local rules be considered by the Advisory Committee to become part of the Federal Rules of Civil Procedure?

Local rules that the Local Rules Project determined either repeated or conflicted with existing law are explained in detail in the document entitled: "Questionable Local Rules." Local rules that the Project determined should either remain subject to local variation or become a Model Local Rule are set out in the document entitled: "Suggested Local Rules including Model Local Rules and Rules that Should Remain Subject to Local Variation" [hereinafter *Suggested Local Rules].* Local rules that may more appropriately be the subject of a Federal Rule are set forth in the document entitled: "Local Rules Which Are Being Referred to the Advisory Committee on Civil Rules" [hereinafter *Advisory Committee].*

A brief discussion of each of the five questions listed above, with examples of local rules illustrating them, follows. It is helpful to be mindful of two issues which presented themselves during the evaluation of the local rules and directives. First, the examination of the local rules from the jurisdictions included a review of other directives provided by the districts. These other directives were typically standing orders, general orders, or miscellaneous orders. At least two jurisdictions, however, provided the Project with guides or handbooks. *See e.g.,* Western District of Arkansas; Northern District of Alabama. It is not known whether these handbooks are suggestive or binding on litigants. These handbooks were reviewed as if they served the functional equivalent of a local rule or order although, in reality, such a book may be merely suggestive and of no legal effect.

Second, the Local Rules Project intended, in making determinations on which local rules and other directives were repetitive and which were inconsistent, to err on the side of overinclusion rather than underinclusion. In some instances, for example, before a final determination could be made as to whether a rule was inconsistent, it was helpful to know how the rule was interpreted or used in practice. The Project was unable to interview or survey the individual districts in these situations. If a rule appeared, on its face, to conflict with existing law, it was included in the Questionable Local Rules material, leaving any further interpretation to the particular district.

The Local Rules Project intended to highlight local rules that repeat existing law since such repetition is superfluous and may be counterproductive. It is unnecessary since the bench and bar already have access to existing federal rules and statutes through the published United States code services, as well as through handbooks of selected rules and portions of Title 28 useful for trial practitioners and through the available computer services. In addition, attorneys have had courses in law school on some of these subjects. The bar is accountable, of course, for knowledge of existing law. Documentation which restates existing law simply results in more paper with its concomitant production and circulation costs. Further, if the law is restated only partially or is restated incorrectly, attorneys may be confused about what law actually applies.

Many of the local rules were found to repeat existing law. For example, there are local rules concerning the appointment of representatives for minors and incompetents that repeat Rule 17 of the Federal Rules of Civil Procedure. *See* Questionable Local Rules, IV.C. There are also local rules concerning depositions which will be used in foreign proceedings that repeat Section 1782 of Title 28. *Sec* Questionable Local Rules, V.C.4. There are local rules concerning pleading a claim of unconstitutionality which may be confusing to practitioners since the repetition is incomplete in repeating the applicability of the federal

statute (28 U.S.C. §2403), by omitting a statement concerning the applicability of the Federal Rule (Fed.R.Civ.P. 24(c)). *See* Suggested Local Rules, III.A.2.

The Local Rules Project noted local rules that are inconsistent with existing law since Rule 83 of the Federal Rules of Civil Procedure and Section 2071 of Title 28 mandate that there be no inconsistency in the local rules with existing law. The determination of whether a particular local rule is inconsistent depends, in the first instance, on the definition of "inconsistency" used. One using a narrow definition of "inconsistency" may conclude that only those local rules which flatly contradict actual statements or requirements in other law are inconsistent. For example, the Project identified local rules that permit the Secretary of Health and Human Services to answer a complaint in a social security ease within 120 days, while Rule 12(a) of the Federal Rules of Civil Procedure requires that the answer be filed with sixty days. *See* Questionable Local Rules III.A.2.

If one uses a broader definition of "inconsistency," there is more opportunity for disagreement over whether a particular local rule is, in fact, inconsistent. For example, one can argue that a local rule may be inconsistent with the intent or spirit of the Federal Rules. A limitation on the number of interrogatories that can be served may be inconsistent with the intent and spirit of the Federal Rules since the Advisory Committee has addressed this issue on several occasions and, each time, has chosen not to limit the number of interrogatories. This fact may be persuasive evidence of inconsistency and is, at minimum, suggestive of the procedure anticipated by the Advisory Committee for practice in the federal courts. *See* Questionable Local Rules, V.B One can also argue that local rules that take away the court's discretion in an individual case are inconsistent with the intent and spirit of the Federal Rules that case management, generally, be addressed on an individual basis. There are local rules, for instance, that limit discovery in class actions, dispensing with the

discretion given to the courts under Rule 26 of the Federal Rules of Civil Procedure. *See* Questionable Local Rules IV.A.3. One can also argue that local rules that add further requirements than those set forth in the Federal Rules conflict with the intent and spirit of the Federal Rules. Examples are local rules that supplement Rule 23 of the Federal Rules of Civil Procedure concerning class actions by adding specific pleading requirements. *See* Questionable Local Rules IV.A. I .

One can argue that a local rule that is inconsistent with existing ease law should be rescinded even though such an inconsistency is not prohibited in Rule 83 or Section 2071 of Title 28. Case law will surely impact on counsel's activities and the court's decisions in much the same way as the Federal Rules and statutes. There are local rules, for instance, that arbitrarily limit communication of the parties with potential class members in apparent contravention of existing case law as set forth by the United States Supreme Court. *Sec* Questionable Local Rules, IV.A.4.

Local rules may exist that, while not problematic on their face, may be inconsistent as applied in practice. There are local rules, for instance, on what constitutes "reasonable notice" for purposes of providing notice prior to taking an oral deposition. These local rules apparently intend to codify existing case law on the definition of "reasonable notice." In practice, however, they may shift the burden from the person who claims there was insufficient notice, and who moves for a protective order, to the person who seeks the discovery and who has given notice later than that permitted by the local rule. *See* Questionable Local Rules, V.C.2.

The Local Rules Project found many local rules that seem useful in delineating certain procedures and practices in the individual district courts, in answering the third and fourth questions set forth above. There are local rules, for example, that state the procedures used in determining motions without oral

argument. As recognized by Rule 78 of the Federal Rules of Civil Procedure, such rules are clearly within the province of local court rulemaking. *See* Suggested Local Rules, III.B. There are also local rules which may be advisable for other jurisdictions to consider adopting. For instance, the Project found rules that require that a plaintiff provide a social security number to the Secretary of Health and Human Services when bringing a social security action. Such a requirement may be worthwhile for all jurisdictions since the Secretary will have the same need for the information regardless of where the action is brought. *See* Suggested Local Rules, III.A.3.

Lastly, there are local rules that may more appropriately be incorporated into the Federal Rules of Civil Procedure rather than remaining as local rules. Such topics should be brought to the attention of the Advisory Committee. Incorporation into the Federal Rules may be advisable for one of several reasons: 1) the particular topic covered by the local rule is critical to the procedural scheme of the Federal Rules; 2) the local rule affects the substantive outcome of a class of cases; 3) the local rule affects litigation costs; 4) the local rule affects the operation of the federal courts generally; or 5) the local rule relates in a significant way to the integrity of the Federal Rules as a unified, integrated set of rules. In addition, a Federal Rule or Rules may already cover the issue. Lastly, the local court rules may have served as an experimental device to test a particular procedure. Further experimentation is no longer necessary and the particular local rules can be incorporated into the Federal Rules or rejected.

APPENDIX B

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

June 29, 1994

Honorable H. Franklin Waters
Chief Judge, U.S. District Court
P.O. Box 1908
Fayetteville, AR 72702

Dear Chief Judge Waters:

We serve as the chairs of the Standing Committee and the Advisory Commitee on Criminal Rules, respectively. Our Committees are interested in looking at the local rules of the district courts that address common criminal law issues. To that end, we seek your assistance by sending a copy of your local criminal rules to the address indicated on the next page.

Our review of these local rules is meant to educate our committees as to the content of the rules; to assist all district courts in future rulemaking; and to determine whether some of these local rules should be studied by the Advisory Committee on Criminal Rules for possible incorporation into the Federal Rules of Criminal Procedure. The Local Rules Project, under the direction of the Standing Committee, undertook a lengthy examination of the rules of civil and appellate practice over the past few years. That review was helpful to the rulemaking committees and, we think, to the district and circuit courts. We hope our review of the criminal rules will be equally helpful.

We appreciate your providing us with any local rules you have regulating practice in criminal cases. In addition, we would like to receive standing orders, general orders, internal operating procedures, a typical trial scheduling order, a typical application to plead guilty, any case assignment plan, speedy trial act plan, jury selection plan and other district-

wide plans, and any other directives which are the functional equivalent of local rules and which regulate practice in criminal cases. This material should be sent directly to the Project Director of the Local Rules Project:

Mary P. Squiers
Boston College Law School
885 Centre Street
Newton, Massachusetts 02159
(617) 552-8851

We would also like you to send any additions and amendments to these directives to Ms. Squiers as they occur.

If you have any questions, please feel free to contact either one of us or Ms. Squiers.

Thank you for your anticipated cooperation.

Very truly yours,

Alicemarie H. Stotler, Chair

D. Lowell Jensen
United States District Judge

cc: Mary P. Squiers

Appendix C

Outline of Topics with the Number of Jurisdictions Having a Local Rule on Each Topic

What follows is a copy of the outline used to sort the criminal rules from the district courts. Next to each of the topics is a number reflecting the number of jurisdictions with a rule on the respective topic. This outline was based on the outline of the Federal Rules of Criminal Procedure.

I. Scope, Purpose, and Construction

12 Rule 1. Scope

- 5 (a). Title and Citation
- 2 (b). Effective Date
- 9 (c). Scope of the Rules
- 2 (d). Relationship to Prior Rules; Actions Pending on Effective Date
- 2 (e). Rule of construction and Definitions

0 Rule 2. Purpose and Construction

II. Preliminary Proceedings

0 Rule 3. The Complaint

11 Rule 4. Arrest Warrant or Summons Upon Complaint

3 Rule 5. Initial Appearance Before the Magistrate Judge

III. Indictment and Information

18 Rule 6. The Grand Jury

- 9 (a) Summoning Grand Juries.

13	Rule 17. Subpoena
32	Rule 17.1. Pretrial Conference

V. Venue

5	Rule 18. Place of Prosecution and Trial
0	Rule 19. Transfer Within the District (Rescinded)
3	Rule 20. Transfer From the District for Plea and Sentence
1	Rule 21. Transfer From the District for Trial
1	Rule 22. Time of Motion to Transfer

VI. Trial

9	Rule 23. Trial by Jury or by the Court
27	Rule 24. Trial Jurors
0	Rule 25. Judge; Disability
1	Rule 26. Taking of Testimony
0	Rule 26.1. Determination of Foreign Law
0	Rule 26.2. Production of Witness Statements
0	Rule 26.3. Mistrial
0	Rule 27. Proof of Official Record
0	Rule 28. Interpreters
2	Rule 29. Motion for Judgment of Acquittal
4	Rule 29.1. Closing Argument
20	Rule 30. Instructions
1	Rule 31. Verdict

VII. Judgment

52	Rule 32. Sentence and Judgment

9	Rule 32.1. Revocation or Modification of Probation or Supervised Release
0	Rule 33. New Trial
0	Rule 34. Arrest of Judgment
6	Rule 35. Correction or Reduction of Sentence
0	Rule 36. Clerical Mistakes

VIII. Appeal (Abrogated)

0	Rule 37. Taking Appeal; and Petition for Writ of Certiorari (Abrogated).
3	Rule 38. Stay of Execution
0	Rule 39. Supervision of Appeal (Abrogated)

IX. Supplementary and Special Proceedings

3	Rule 40. Commitment to Another District
6	Rule 41. Search and Seizure
0	Rule 42. Criminal Contempt

X. General Provisions

7	Rule 43. Presence of the Defendant
40	Rule 44. Right to and Assignment of Counsel
10	Rule 45. Time
40	Rule 46. Release from Custody
23	Rule 47. Motions
5	Rule 48. Dismissal
14	Rule 49. Service and Filing of Papers
52	Rule 50. Calendars; Plans for Prompt Disposition
0	Rule 51. Exceptions Unnecessary

0	Rule 52. Harmless Error and Plain Error
48	Rule 53. Regulation of Conduct in the Court Room
0	Rule 54. Application and Exception
0	Rule 55. Records
22	Rule 56. Courts and Clerks
0	Rule 57. Rules by District Courts
36	Rule 58. Procedure for Misdemeanors and Other Petty Offenses
0	Rule 59. Effective Date
0	Rule 60. Title
32	Other—Duties of Magistrates
1	Other—Activities of the Clerk
1	Other—Juvenile Delinquency Proceedings

APPENDIX D

Juris/Direction	Jurisdiction	Rule 32. Sentence and Judgment
M.D.	Alabama	28: Disclosure of Presentence or Probation Recs. 33: Implementation of Guideline Sentencing
S.D.	Alabama	SO: Sentencing Procedures
D.	Arizona	4.8: Probation—Presentence Investigations; GO 194: Sentencing Procedures.... GO 221: Urine Testing for Presentence Investigations
W.D.	Arkansas	GO 4: Probation Office Reports; GO 20: Presentence Reports
C.D.	California	6.1: Policy; 6.2: Presentence Investigation Reports; 6.3: Ojections and Positions of the Parties; 6.4: Minimum Custody Questions
E.D.	California	460: Disclosure of Presentence Reports & Related Recs. 461: Disclosure of Other Probation Records
N.D.	California	330-1: Disclosure of Presentence Report; 330-2: Sentencing Information; Sample Probation Referral Form
S.D.	California	GO 344: Application of Sent. Guide. in Misdemeanors; GO 345: Application of Sent. Guide. to Petty Offenses; GO 350: Time and Procedure for Sent. Guidelines
D.	Colorado	GO1987-5: Procedures for Guideline Stendings; Order Concerning Presentence Investigation & Report
D.	Connecticut	10: Change of Plea and Sentencing Procedures; 9: Disclosure of Pre-Sentence Reports
D.	D.C.	311: Sentencing Guidelines

Juris/Direction	Jurisdiction	Rule 32. Sentence and Judgment
D.	Delaware	
M.D.	Florida	4.12: Presentence Investigation Reports; Present. Proc.
N.D.	Georgia	535: Presentence Report; Order re: Presentence Report
S.D.	Georgia	232.1: Conditions of Probation or Supervised Release; 232.2: Disclosure of Presentence or Probation Records 232.2-232.6: Sentencing
D.	Hawaii	360: Sentencing Procedure
C.D.	Illinois	3.3: Implementation of Sentencing Guidelines; 3.1: Confidential Probation Records
S.D.	Illinois	24: Confidential Probation Records
N.D.	Indiana	
S.D.	Indiana	11: Records Relating to Presentence Rep + Prob. Super.
S.D.	Iowa	27: Presentence Reports
D.	Kansas	305: Presentence Reports

Juris/Direction	Jurisdiction	Rule 32. Sentence and Judgment
E.D.	Kentucky	
W.D.	Kentucky	
E.D.	Louisiana	16E: Sentence
M.D.	Louisiana	16M: Sentencing
W.D.	Louisiana	16W: Sentencing
E.D.	Michigan	232.1: Guideline Sentencing
D.	Minnesota	83.10: Sentencing Procedures
D.	Montana	
D.	Nevada	
D.	New Hampshire	Sample Procedural Order re: Sentencing
D.	New Jersey	38: Recommendation Against Deportation

Juris/Direction	Jurisdiction	Rule 32. Sentence and Judgment
E.D.	New York	6: Sentence; Sentencing Guidelines...
N.D.	New York	32.1: Presentence Reports
S.D.	New York	6: Sentence; Sentencing Guidelines
W.D.	New York	38: Presentence Report; Local Procedural Guide....
E.D.	North Carolina	46: Petition for Disclosure of Presentence.... 50.00: Proceedings Implementing Sentencing Guide.
M.D.	North Carolina	SO20: Implementation of Sentencing Procedures....
W.D.	North Carolina	
D.	North Dakota	27: Probation and Pretrial Services Office
D.	Northern Mariana Islands	
N.D.	Ohio	3:8.1: Pre-Plea Presentence Report; 3:8.2: Deletion of Challenged Statements in Pres. Rep; 3:8.3: Presentence Report and Sentencing Proceedings;
S.D.	Ohio	102: Presentence Reports; 103: Probation Office Records

Juris/Direction	Jurisdiction	Rule 32. Sentence and Judgment
W.D.	Oklahoma	
D.	Oregon	
E.D.	Pennsylvania	19: Loan of Presentence Invest. Rep. to Parole & Prison SO: Sentencing Reform Act of 1984
M.D.	Pennsylvania	
W.D.	Pennsylvania	32.1: Procedure for Guideline Sentencing
D.	Puerto Rico	418: Procedures under Sentencing Reform Act; 427: Petition for Disclosure of Presentence/Prob. Recs.
E.D.	Tennessee	83.9: Sentencing Proceedings
W.D.	Tennessee	21: Procedural Steps for Sentencing; 22: Probation Office Records
E.D.	Texas	GO94-18: Rules and Procedure for Cases Sentenced; GO88-7: Rules and Procedure for Cases Sentenced;
N.D.	Texas	Sample Scheduling Order for Sentencing; 10.9: Procedure for Guideline Sentencing; MO26: Disclosure of Presentence in Probation Recs.
S.D.	Texas	16: Guideline Sentencing

Juris/Direction	Jurisdiction	Rule 32. Sentence and Judgment
W.D.	Texas	CR32: Sentence and Judgment
D.	Utah	310: Plea Agreements and Presentence Investigations
D.	Vermont	3: Sentencing Procedures; 4: Disclosure of Pretrial Services, Presentence... Sample Order re: Sentencing Procedures
E.D.	Virginia	
E.D.	Washington	Order (5/22/81): Disclosure of Present. Invest. Report
W.D.	Washington	CrR32: Sentence and Judgment; GO(7/1/93): Sentencing Procedures
N.D.	West Virginia	3.06(c): Sentencing After Guilty Plea; 3.08: Petition for Disclosure of Present. or Prob. Recs.; 3.10: Guideline Sentencing
S.D.	West Virginia	3.01: Petitions for Disclosure of Pres. and Prob. Recs; 3.02: Gu9ideline Sentencing Implementation....; 3.03: Pretrial Services and Presentence Interviews
W.D.	Wisconsin	
D.	Wyoming	105: Presentence and Postsentence Investigation Reps.

Uniform Numbering System for Local Criminal Rules

Currently, there is no uniform numbering system for federal district court local rules on criminal practice. Some of the jurisdictions have local rules which are simply numbered sequentially beginning at "1". *E. g.*, Central District of California, District of Connecticut. Other jurisdictions have rules which are arranged by topic, designed with a "100," "200," or "300," followed by a hyphen and the actual rule number. *E.g.,* Northern District of California, District of the Northern Mariana Islands. Still other jurisdictions have local rules which are arranged by topic, designed "1," "2," or "3," followed by a decimal point or colon and the actual rule number. *E.g.*, Northern District of Ohio.

The Judicial Conference recommended that a uniform numbering system be adopted for local rules on civil practice which would standardize the numbering of all local rules. *See* Report of the Judicial Conference (September, 1988) 103. It is now recommended that a similar uniform numbering system for the local rules on criminal practice be adopted.

Such a uniform system has many advantages. It would be helpful to the bar in locating rules applicable to a particular subject. This is especially important for those attorneys with multi-district practices. It is also significant for any attorney needing to locate a particular rule or to learn whether a local rule on a specific topic exists in the first instance. At present, it is sometimes difficult to find any case law relating to a particular local rule, in part because there is no uniform numbering. The uniform system will also ease the incorporation of local rules into the various indexing services such as West Publishing Company and the Lexis computer services.

The system, as proposed, focuses on the numbering system already used for the Federal Rules of Criminal Procedure. This system is already familiar to the bar. What follows, therefore, is a numbering system for local rules which tracks the Federal Rules of Criminal Procedure. Each local rule number corresponds to the number of the related Federal Rule of Criminal Procedure. For example, the designation "LCrR4.1" refers to the local criminal rule relating to the arrest warrant or summons upon the complaint. The designation "LCrR" indicates it is a local criminal rule; the number "4" indicates that the rule is related to Rule 4 of the Federal Rules of Criminal Procedure; and, the number "1" indicates that it is the first local rule concerning Rule 4 of the Federal Rules of Criminal Procedure. The same system applies with respect to those Federal Rules of Criminal Procedure with a "1" or a "2" after the initial rule number, such as Rule 12.1 entitled "Pleadings and Motions before Trial; Defenses and Objections. Thus, for example, the first local rule concerning Federal Rule 32 "Sentence and Judgment" is designated "LCrR32.1," while the first local rule concerning Federal Rule 32.1 "Revocation or Modification of Probation or Supervised Release" is designated "LCrR32.1.1."

I. Scope, Purpose, and Construction

LCrR1.1 Scope

LCrR2.1 Purpose and Construction

II. Preliminary Proceedings

LCrR3.1 The Complaint

LCrR4.1 Arrest Warrant or Summons Upon Complaint

LCrR5.1 Initial Appearance Before the Magistrate Judge

III. Indictment and Information

IV. Arraignment, and Preparation for Trial

V. Venue

VI. Trial

VII. Judgment

VIII. Appeal (Abrogated)

IX. Supplementary and Special Proceedings

X. General Provisions

I. Scope, Purpose, and Construction

Rule 1. Scope

Twelve jurisdictions have local criminal rules which explain the applicability of the local rules in the respective jurisdictions. The substance of most of these rules should be incorporated into a Model Local Rule for all jurisdictions to consider adopting. In addition, rules in five jurisdictions repeat existing law, and rules in two other courts are inconsistent with existing law. These inconsistent and repetitious rules should be rescinded.

There are analogous rules governing the scope and purpose of local rules in the civil context. These local civil rules cover five broad areas: 1. The title and citation form for the local rules; 2. The effective date of the local rules; 3. The scope of the local rules; 4. The relationship of the local rules to prior rules; and, 5. The rules of construction and definition. The Local Rules Project recommended, with respect to the civil rules, that one Model Local Rule be adopted by the jurisdictions covering these five topics. It is recommended that the jurisdictions consider adopting an analogous Model Local Rule for criminal practice that encompasses all of these areas.

The full text of this Model Local Rule is set forth below. A detailed discussion of each of the five areas follows.

Model Local Rule 1.1.

Scope of the Rules.

(a) **Title and Citation**. These Rules shall be known as the Local Criminal Rules of the United States District Court for the _____ District of _____. They may be cited as "___.D.___. LCrR___."

(b) **Effective Date.** These Rules become effective on

_____.

(c) **Scope of Rules.** These Rules shall apply in all proceedings in criminal actions. Rules governing criminal proceedings before magistrate judges [are incorporated here] [may be found at...]. [Civil local rules shall apply insofar as they do not conflict with any statute, federal rule, local criminal rule, or individual order.] [The following civil/general local rules shall apply in criminal actions: _____.]

(d) **Relationship to Prior Rules; Actions Pending on Effective Date**. These rules supersede all previous rules promulgated by this court or any judge of this court. They shall govern all applicable proceedings brought in this court after they take effect. They also shall apply to all proceedings pending at the time they take effect, except to the extent that in the opinion of the court the application thereof would not be feasible or would work injustice, in which event the former rules shall govern.

(e) **Rule of Construction and Definitions.**

1. United States Code, Title 1, sections 1 to 5, shall, as far as applicable, govern the construction of these rules.
2. The following definitions shall apply:

[The underlined portions of this Model Local Rule signify those areas which must be completed, if at all, by the individual districts.]

a. Title and Citation

Subsection (a) of this Model Local Rule includes the title and citation form for the local rules. Five districts currently have criminal local rules on this subject. C.D.Cal. 1.0; N.D.N.Y. 1.1; E.D.N.Car. 1.00; E.D.Pa. 1; W.D.Tex. 1.

The Local Rules Project recommended a standard method of labeling and citing all local civil rules in 1989. The criminal rules should be similarly cited. The method used consists of using the abbreviation of the district court, followed by the designation "LCrR" to denote a local criminal rule, and the number. Accordingly, Local Criminal Rule 1.1 of the Central District of California would be cited as: "C.D.Cal. LCrR1.1."[1]

A standard and uniform system of labeling and citing the local rules is preferable, for several reasons, to the variations which currently exist. First, uniformity among the jurisdictions will be helpful to those attorneys with multi-state practices. Second, uniformity will assist the companies that index legal materials. This is particularly significant for those companies that have computer systems which rely on exact citation forms for retrieving information. For example, a user of a computer research system who attempts to find cases challenging a particular local rule and who types in a local rule number which deviates only slightly from the form used by the jurisdiction may not find the information requested. Lastly, the citation form employs the district court abbreviations already in use when citing district court opinions so all attorneys can easily conform to the method.

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1 This Report does not use the recommended citation form since some of the local rules examined were criminal local rules, some were general rules, and some were civil and criminal rules combined. It was easier for the purpose of this study to simply refer to the rules by number; each individual district court will be familiar with the particular rules.

At present, there are only four jurisdictions with a stated form for citing the local criminal rules, and each method differs from the others. N.D.N.Y. 1.1 (cite "L.R.Cr.P. ___"); E.D.N.Car. 1.00 (cite "Local Rule ___, EDNC"); E.D.Pa. 1 (cite "L.C.R."); W.D.Tex. 1 (cite "Local Court Rules"). Uniformity would be desirable to avoid these variations.

b. Effective Date.

Subsection (b) of the Model Local Rule sets forth the effective date of the local criminal rules. This subsection simply provides a sentence indicating that the local rules become effective on a particular date. The exact date is inserted by the individual jurisdictions in the blank space provided. Two of the courts currently provide this information in the text of a rule. E.D.Pa. 1; W.D.Tex. 1.

c. Scope of the Rules.

Subsection (c) of the Model Local Rule concerns the scope of the rules. Nine rules have similar provisions, listing what actions the local rules "apply to" or "govern." *E.g.*, C.D.Cal. 1.1; W.D.Tex. 1. In order to convey the rules' scope, the Model Local Rule defines, in the first paragraph, to which actions the local rules apply rather than listing which Federal Rules (*e.g.*, Federal Rules of Civil Procedure; Federal Rules of Criminal Procedure) the local rules "supplement" as some of the local rules do. *E.g.*, D.Vt. 1. The "apply to" language is more accurate than the "supplementing" language because local court rules supplement all federal law, but their scope is defined by the kind of actions in which they are used. Provision is also made in this Model Local Rule for a statement about the applicability of the civil and criminal rules as is currently done in some jurisdictions. *E.g.*, D.Nev. 300; S.D.Ohio 100, 101.

d. Relationship to Prior Rules; Actions Pending on Effective Date.

Subsection (d) of the Model Local Rule provides that the local rules supersede all previous rules promulgated by the court or any judge of the court. Subsection (d) also includes a provision which allows the court to use the previous local rules, when necessary, in cases that are pending at the time the new local rules become effective. Two courts have rules governing this topic at present. W.D.Tex. 1; E.D.Pa. 1.

e. Rule of Construction and Definitions.

Subsection (e) of the Model Local Rule provides that the United Sates code, Title 1, sections one through five, shall govern the construction of the local rules. Because these sections also govern the construction of other federal statutes, it is appropriate to use them to construe local court rules as well.

Subsection (e) also includes any definitions a local district may feel are necessary. Two district courts have a similar "definitions" section. E.D.Pa. 1; C.D.Cal. 1.4.

Two jurisdictions have local rules that are inconsistent with Rule 57 of the Federal Rules of Criminal Procedure by providing that a judge may ignore the local rules and direct the parties to proceed otherwise. E.D.N.Car. 1.00; N.D.Tex. 1.1. Rule 57 contemplates that the local rules govern a district court's practice from the effective date, unless amended or abrogated, and that the judges and magistrate judges may regulate their practice individually only in those cases "not provided for by rule." Fed.R.Crim.P. 57. Rule 57 does not anticipate that local rules will be used only when a particular judge or magistrate judge wants to use them. These local rules should be rescinded.

Five courts have local rules that repeat existing law. Three of the courts have rules that provide that, if a local rule conflicts with existing law, then the Federal Rules and statutes take precedence and apply. C.D.Cal. 1.2; S.D.Ga. 201.1; D.Vt. 1. These rules repeat Rule 57 and the Rules Enabling Act in requiring that the local rules be consistent with existing law. Fed.R.Crim.P. 57; 28 U.S.C. §§2071 *et seq.*. To the extent they are inconsistent, of course, they may be invalid. *Id.*

Two courts have local rules indicating that, if there is no stated procedure, a court may proceed in any manner not inconsistent with existing law. D.N.J. 44; W.D.Tex. 1. These rules simply repeat the last sentence of Rule 57 and, as such, are unnecessary. Fed.R.Crim.P. 57.

Rule 2. Purpose and Construction

There are no local criminal rules directly relating to this Federal Rule.

II. Preliminary Proceedings

Rule 3. The Complaint

Similarly, there are no local rules relating to this Rule.

Rule 4. Arrest Warrant or Summons Upon Complaint

Eleven jurisdictions have local rules addressing the arrest warrant or summons. Five of these rules are appropriate as local directives and should remain subject to local variation. Rules in six of the district courts are inconsistent with existing law and should, therefore, be rescinded. Because these rules may be helpful, however, it would be useful for the Advisory Committee on Criminal Rules to examine whether the topic covered by these local rules should be incorporated into the Federal Rules.

Rules in five of the district courts concern subsection (a) of Rule 4 addressing the issuance of the arrest warrant or summons. *See* Fed.R.Crim.P. 4(a). Directives in these courts are appropriate supplements to subsection (a). D.Ariz. GO 226; W.D.Ark. GO 19; D.Utah 304; D.Wyo. Order (4/8/93); E.D.Tex. GO 93-4.

Four of these directives attempt to maintain the confidentiality of documentation supporting the issuance of certain arrest warrants. D.Ariz. GO 226; W.D.Ark. GO 19; D.Wyo. Order (4/8/93); E.D.Tex. GO 93-4. The order in the District of Arizona indicates that a miscellaneous file will be kept which houses documentation relating to the issuance of an arrest warrant in connection with a violation of probation, conditions of supervised release, or pretrial conditions of release. It requires that the file be sealed until the marshal returns the warrant. D.Ariz. GO 226. The order in the Western District of Arkansas requires that all papers in connection with the complaint be sealed until return of the warrant or the appearance of the defendant. W.D.Ark. GO 19; *see also* D.Wyo. Order (4/8/93); E.D.Tex. GO 93-4.

The local rule in the District of Utah provides that a request for a summons be made either orally or in writing. D.Utah 304(a). This is also an appropriate addition to Rule 4(a). Fed.R.Crim.P. 4(a).

The rules in the other six districts concern the notice required to be given by arresting officers or agencies to other agencies. Directives in these districts require that the arresting officer give prompt notice of the arrest to other person such as a pretrial services officer or United States marshal. C.D.Cal. 11.1; D.Haw. 310; N.D.N.Y. 5.1; N.Mar.Isl. 330-1; S.D.Tex. Order 91-26 (Houston Division); W.D.Wash. 5. Two of these jurisdictions have additional notice requirements for United States marshals. C.D.Cal. 11.2; W.D.Wash. 5. Upon receiving notice of arrest from an arresting officer or

agency, the marshal must notify the United States attorney and the clerk (C.D.Cal. 11.2) or the chief probation officer, the magistrate judge, and the United States attorney (W.D.Wash. 5). Rule 4 of the Federal Rules of Criminal Procedure requires only that the arresting office make return to the magistrate judge or other officer before whom the defendant is brought. Fed.R.Crim.P. 4(d)(4). To the extent these directives seek to impose additional notice requirements on any arresting office, other than those set forth in the Federal Rules, they are inconsistent with Rule 4(d)(4) and should be rescinded. These directives may be quite burdensome if the defendant is arrested in a distant jurisdiction and the arresting officer is not aware of the requirements.

As a practical matter, it may be very helpful for the arresting officer, who is obviously the first to know of the defendant's arrest, to provide notice to others who will be involved in processing the defendant through the court system. Accordingly, it is recommended that the Advisory Committee on Criminal Rules examine these rules to see if their substance should be incorporated into the existing Federal Rules.

Rule 5. Initial Appearance Before the Magistrate Judge

Three jurisdictions have local rules concerning the defendant's initial appearance before the magistrate judge. Rules in two of these districts should remain subject to local variation. In addition, one district court has a rule that may conflict with existing law and another court has a rule that repeats existing law.

An order in the Eastern District of Texas requires that the date of arrest of a defendant be established at the first appearance in response to

each warrant served upon the defendant. E.D.Tex. 92-11. This directive is appropriate as a local rule.

Two provisions in the rules of the Eastern District of Michigan should also remain subject to local variation. There is a requirement that the United States attorney provide the relevant papers to the magistrate judge at the initial appearance. E.D.Mich. 205.1(c). Another directive explains that a defendant, appearing voluntarily, must report to pretrial services and the marshal's office before the defendant's initial appearance in court. E.D.Mich. 205.1(b). Although appropriate as a local directive, there may be a notice concern for those defendants who are unrepresented by counsel and who would be unaware of the local rule requirement.

The District of Arizona has an order allowing video conferencing of initial appearances when elected by the defendant and permitted by the magistrate judge.[2] D.Ariz. GO 190. This directive may be appropriate as a local rule. This directive also permits video conferencing of arraignments. The Ninth Circuit has rejected the use of video conferencing of arraignments in the District of Arizona pursuant to this order. *See Valenzuela-Gonzalez v. United States District Court for the District of Arizona*, 915 F.2d 1276 (9th Cir. 1990).

One provision simply repeats the applicability of Federal Rule 5 and is, therefore, unnecessary. E.D.Mich. 205.1(a).

Rule 5.1. Preliminary Examination

Three districts have local rules concerning the preliminary examination. Two of the courts have rules that should remain subject to local

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2 This order was dated in 1990 and indicated it was valid for one year. It appears to continue in force, however, since it was provided by the district court as an existing local directive.

variation. The other jurisdiction has a rule that repeats existing law and should, therefore, be rescinded.

Rule 5.1 provides that a court may, by local rule, appoint the place and define the conditions under which the defendant may obtain the recording of the preliminary examination. Fed.R.Crim.P. 5.1(c)(1). Two districts have adopted such a rule. One rule indicates that the attorney must make arrangements with the magistrate judge for a specific time and place when the equipment will be available for listening. S.D.Iowa 30. The other district court has a local rule which goes further to state that, if the recording is insufficient for the party's need, the party can make application to the court for preparation of transcripts of preliminary examinations. W.D.Wash. 5.1(c).

The other jurisdiction has a local rule that simply indicates that preliminary examinations are conducted pursuant to Rule 5.1 of the Federal Rules of Criminal Procedure and 18 U.S.C. §3060. N.D.Ga. 505-2. This rule repeats Rule 5.1 and is unnecessary.

III. Indictment and Information

Rule 6. The Grand Jury

Eighteen jurisdictions have local rules concerning the activities of the grand jury. Rules in fifteen of these jurisdictions should remain subject to local variation. One court has a local rule that is inconsistent with existing law. Six jurisdictions have local rules that repeat existing law. Lastly, one district court has a local rule that is either inconsistent or repetitious. A brief discussion of these rules, organized according to the sections of Rule 6, follows.

(a) Summoning Grand Juries.

Nine jurisdictions have local rules concerning the selection of grand jurors and alternates. Rules in eight of these courts are appropriate and should remain local. For example, several jurisdictions have local rules that indicate when and where a grand jury will be convened. C.D.Cal. 8.2; S.D.Ind. 10; W.D.N.Car. Order 10/31/75; E.D.Va. 26. Other courts have local rules that discuss the method of selection of jurors or refer the reader to the relevant jury selection plan. N.D.Ga. 400-1; W.D.Tex. 6. Still other rules explain who is responsible for impaneling the grand juries. N.D.Ohio 3:2.1 (chief judge or designate); E.D.Pa. 4(a) (emergency judge).

Rules in three of the nine jurisdictions repeat existing law and should, therefore, be rescinded. For example, two of the jurisdictions have local rules that indicate that a grand jury will be convened "at such time as the public interest may require." N.D.Ga. 400-2; *see also* W.D.N.Y. 35(a). Such a statement repeats the first sentence of Rule 6(a)(1). *See* Fed.R.Crim.P. 6(a)(1). Another rule indicates that extra jurors may be impaneled when necessary. C.D.Cal. 8.2.2. This directive, in essence, repeats Rule 6(a)(1) and (g). Fed.R.Crim.P. 6(a)(1), (g). Lastly, one local rule simply repeats that Federal Rule 6 governs grand jury proceedings. W.D.N.Y. 35(b).

(b) Objections to Grand Jury and to Grand Jurors.

Two jurisdictions have local rules concerning subsection (b) of Rule 6, and these rules should remain subject to local variation. One of the directives sets forth the procedure for making pre-indictment challenges to the grand jury proceedings. S.D.Ind. 10(d). The other rule explains that

motions for relief from grand jury orders or process are made returnable before the judge who impaneled the grand jury W.D.N.Y. 35.

(c) Foreperson and Deputy Foreperson.

There are no local rules addressing this topic.

(d) Who May Be Present.

Three jurisdictions have local rules relating to this subsection of Rule 6. Three of the rules are appropriate as local rules. They describe, generally, the physical areas used by the grand jury and who is allowed near these areas. N.D.Ga. 400-5; N.D.Ind. 108.1; E.D.Tex. GO 91-5. A portion of the local rule from the Northern District of Georgia, however, simply repeats Rule 6(d) and should be rescinded. N.D.Ga. 400-5; *see* Fed.R.Crim.P. 6(d).

(e) Recording and Disclosure of Proceedings.

Twelve jurisdictions have local rules relating in some way to the secrecy of grand jury proceedings. Rules in five of the district courts should remain subject to local variation. Rules in seven of the jurisdictions repeat existing law. Rules in three of the district courts are inconsistent with existing law.

Directives in three jurisdictions require that juror data be maintained in confidence. C.D.Cal. 8.5; D.N.Dak. 8(B); E.D.Tex. GO 92-5. These rules are appropriate supplements to subsection (e) and are authorized by the Plan for Random Jury Selection. *See* 28 U.S.C. §1863. There are rules concerning how confidentiality of grand jury documents will be maintained. M.D.N.Car. SO 11; E.D.Pa. 4(b); E.D.Tex. GO 94-9. A local rule in the Eastern District of Michigan requires that a party prepare a motion for sealing papers before the grand jury. E.D.Mich. 206.1(c). An order in the

Eastern District of Texas sets forth the circumstances under which indictments may be sealed. E.D.Tex. GO 93-3. These rules are also appropriate as local rules.

Six jurisdictions have local rules that repeat existing law. For example, two jurisdictions have local rules repeating that grand jury proceedings are secret. C.D.Cal. 8.3; D.D.C. 302. These rules repeat the general language of Rule 6(e)(2). Fed.R.Crim.P. 6(e)(2). There are also rules stating that grand jury materials are kept under seal. N.D.Ga. 400-4; S.D.Ind. 10(c); E.D.Mich. 206.1(b). These rules repeat Rule 6(e)(6). Fed.R.Crim.P. 6(e)(6). The local rule from the Southern District of Indiana also explains that grand jury materials are given a miscellaneous docket number for confidential filing. This information is unnecessary in a local rule since the directive, to the extent it intends to require particular behavior, only requires that behavior of a court clerk. This type of mandate is better placed in an internal operating procedure since it does not regulate attorney conduct in any way. Another district court has a rule that repeats Rule 6(e)(1), that grand jury proceedings are recorded. W.D.Wash. 6. All of these rules should be rescinded.

A rule in the Eastern District of Pennsylvania either repeats Rule 6(e)(2) or is inconsistent with that Federal Rule. E.D.Pa. 4(c). The local rule sets out detailed requirements and explanations for how disclosures concerning the activities of the grand jury are made. *Id.* To the extent this rule simply paraphrases Rule 6(e)(2), it is repetitious and should be rescinded. To the extent it sets forth more requirements for secrecy than what is already set forth in that Federal Rule, it is inconsistent with Rule 6(e)(2) which states: "No obligation of secrecy may be imposed on any person except in accordance with this rule." Fed.R.Crim.P. 6(e)(2).

One local rule indicates that all indictments "shall not be made public" until the defendant is apprehended or appears in response to a criminal summons. D.Mont. 345-1. This local rule is inconsistent with the statement in Rule 6(e)(4) allowing the indictment to be kept secret perhaps longer. Fed.R.Crim.P. 6(e)(4). It states that indictments may be kept secret "until the defendant is in custody or has been released pending trial." *Id.* To the extent the local rule only paraphrases Rule 6(e)(4), it is repetitious and unnecessary.

(f) Filing and Return of Indictment.

Two rules exist which state that the return of the indictment is to the magistrate or emergency judge (E.D.Pa 4(e)) or to a judge (D.Utah 303). These rules are appropriate supplements to subsection (f). Fed.R.Crim.P. 6(f). One of these rules, however, explains the duty of the magistrate judge in filing material. D.Utah 303. Because this portion of the rule does not regulate attorney behavior, its content is probably better omitted from a local rule and, instead, may be set out in a guide for magistrate judge conduct or some other internal operating procedure.

(g) Discharge and Excuse.

Three jurisdictions have rules explaining, generally, who supervises or discharges a grand jury. C.D.Cal. 8.1, 8.4 (chief judge or designate); E.D.Mich. 206.1(a) (chief judge or designate); N.D.Ohio 3:2.2 (miscellaneous docket clerk). These rules are appropriate as local rules. One of these courts has a local rule permitting the extension of the service of the grand jury. C.D.Cal. 8.1.4. This rule repeats Rule 6(g) and 18 U.S.C. §3331(a) and should, therefore, be rescinded.

Rule 7. The Indictment and the Information

Two jurisdictions have local rules requiring that the United States attorney file a "Criminal Designation Form" with each new indictment or information. N.D.N.Y. 57.1; N.D.Ohio 3:2.3. Both of these rules are appropriate as local directives.

Rule 8. Joinder of Offenses and of Defendants

Five jurisdictions have local rules or other directives regulating related criminal cases. Rules in three of the jurisdictions are appropriate as local rules. E.D.Cal. 401; N.D.Cal. 320-1, 320-2; E.D.Mich. Samps; S.D.N.Y. DOB 15, 27. One of the rules requires that the United States attorney's office file a notice of related case document. E.D.Cal. 401; *see also* N.D.Cal. 320-1. One of the district courts provide two sample notices, one explains the procedure for multiple defendants to join in co-defendant's motions and the other explains the procedure for obtaining a separate trial if one of the defendants inculpates another. E.D.Mich. Samps. One jurisdiction has a rule that states that motions to consolidate are heard by the judge with the lowest docket number and another that the consolidated cases are heard at the place where the earliest case was filed. S.D.N.Y. DOB 15, 27. Another court has a rule explaining that notice of common defendants or common offenses must be provided in order to facilitate assignment of the cases. N.D.Cal. 320-2.

The first sentence of one of the rules in the Southern District of New York simply repeats that motions to consolidate are regulated by the Federal Rules. S.D.N.Y. DOB 15. Such a statement is unnecessary.

A rule in the Central District of California explains that the United States attorney's office must give notice of any matter set forth in a particular

section of a general order. C.D.Cal. 2.3. The portion of the General Order mentioned in the rule, however, appears to have been deleted from the General Order. *Id.* As written, then, the rule serves no effect.

Rule 9. Warrant or Summons Upon Indictment or Information

Four jurisdictions have local rules concerning the issuance of a warrant or summons upon an indictment or information. One jurisdiction has a local rule that should remain subject to local variation. The other three jurisdictions each have directives that repeat existing law. Two of these courts also have rules that are inconsistent with existing law.

An order in the Western District of Wisconsin sets forth the procedure used to contact the defendant after a summons has been issued. W.D.Wisc. Order (2/20/87). This procedure is appropriate as a local directive.

Three local rules repeat portions of Rule 9(a) of the Federal Rules of Criminal Procedure. Fed.R.Crim.P. 9(a). One of the jurisdictions has a rule indicating that a warrant or summons will issue upon an indictment. D.Ariz. 4.2. A rule in the District of Utah indicates that a warrant may issue on an information only if it is accompanied by a written probable cause statement given under oath. D.Utah 304(a). Another jurisdiction has a rule explaining the consequences of a failure to appear in response to a summons. C.D.Cal. 4.6. Each of these rules repeats portions of Rule 9(a). Fed.R.Crim.P. 9(a).

There is a rule that repeats, in substance, Rule 9(c)(2), that an indictment must be returned. C.D.Cal. 3.1. Another rule in this jurisdiction repeats Rule 9(c)(2), that there must be a return of service. C.D.Cal. 4.4.1. All of these repetitious rules should be rescinded.

Two jurisdictions have local rules that may be inconsistent with Rule 9(a). Rule 9(a) indicates that the government attorney decides whether

a warrant or a summons shall issue. Fed.R.Crim.P. 9(a). If the government does not make a request, then the court "may issue either a warrant or a summons in its discretion." *Id.* One local rule states that a summons will issue unless the government makes a written request for a warrant. D.Utah 304(a). To the extent this rule precludes the government from making an oral request for a warrant which will be honored, it is inconsistent with Rule 9(a). Another local rule requires the government "whenever practicable" to use a summons rather than a warrant. C.D.Cal. 4.5. To the extent this local rule intends to restrict the discretion of the government in deciding whether to request a summons or warrant, it is also inconsistent with Rule 9(a).

Another rule in the Central District of California requires that a copy of the indictment be served along with the summons or warrant. C.D.Cal. 4.4. Rule 9(b) only requires that the warrant or summons "describe the offense charged in the indictment or information...." Fed.R.Crim.P. 9(c)(1). To the extent this local rule requires more than the Federal Rule to effect service of a summons or a warrant, it is inconsistent with Rule 9(b).

IV. Arraignment, and Preparation for Trial

Rule 10. Arraignment

Eleven jurisdictions have local rules relating to the arraignment process. Rules in ten of these courts should remain subject to local variation. In addition, four jurisdictions have local rules that repeat existing law. One court has a local directive that is inconsistent with existing law.

The local rules from the ten district courts that should remain as local rules cover diverse topics. Two courts have local rules that require the United States attorney to provide sufficient copies of the indictment to the clerk to be given to each defendant at the arraignment. D.Ariz. 4.3; E.D.Pa.

8. Two courts have local rules that require the defendant to provide his or her true name at the indictment and provide that the indictment may be amended to reflect the new name. D.Ariz. 4.4; C.D.Cal. 4.1, 4.2, 4.3. Three rules allow the magistrate judge to conduct arraignments under certain circumstances. W.D.N.Y. 33; E.D.Pa. 8; W.D.Pa. 10.1. Two courts have local rules that explain how arraignments are scheduled. E.D.Mich. 210.1 (United States attorney responsible for scheduling); N.D.Ga. 505-3 (scheduling occurs automatically upon filing indictment). Three courts have local rules explaining who gives notice of the pending arraignment to the defendant. N.D.Ohio 3:3.1 (notice from clerk); N.D.W.Va. 3.05 (notice from United States attorney to defendant); S.D.W.Va. 1.02 (notice from United States attorney to defendant). One of these courts, the Northern District of West Virginia, also requires the United States attorney to give the clerk a list of all indictments upon discharge of the grand jury. N.D.W.Va. 3.05. Lastly, one court requires defense counsel or, if defendant is unrepresented, the United States attorney to inform the defendant of the need to go to the Pretrial Services Agency and the United States Marshals office. E.D.Mich. 210.1.

Two courts have local rules that simply repeat that Rule 10 of the Federal Rules of Criminal Procedure governs arraignments. E.D.Mich. 210.0; E.D.N.Car. 42.01. A portion of the rule from the Eastern District of North Carolina indicates that arraignments are conducted under "Rule 19(B)(4), F.R.Crim.P."; this cited rule does not exist. E.D.N.Car. 42.01. Three jurisdictions have local rules that say that the arraignments will be recorded. E.D.Mich. 255.1; N.D.Ohio 3:3.2; N.D.Ga. 505-3(c). These rules repeat the Court Reporter's Act, 28 U.S.C. §753(b), which requires that open criminal proceedings be recorded. All of these rules should be rescinded.

A 1990 directive in the District of Arizona permits video conferencing of arraignments in the court's discretion.[3] D.Ariz. GO 190. The Ninth Circuit rejected the use of video conferencing of arraignments in the District of Arizona pursuant to this order. *See Valenzuela-Gonzalez v. United States District Court for the District of Arizona*, 915 F.2d 1276 (9th Cir. 1990). Accordingly, this general order should be stricken.

Rule 11. Pleas

Nineteen jurisdictions have local rules relating to pleas and plea agreements. Rules in all of these courts should remain subject to local variation. In addition, rules in two of the jurisdictions repeat existing law. A rule in one jurisdiction appears inconsistent with Rule 11 and should, therefore, be rescinded.

All of the rules except one relate specifically to the plea agreement procedure set forth in Rule 11(e) of the Federal Rules of Criminal Procedure. Fed.R.Crim.P. 11(e). Five of the jurisdictions have local rules that set forth the format for plea agreements submitted before the court and the procedure for their acceptance. M.D.Ala. 31 (plea agreement must be placed on consent docket); N.D.Cal. 315-2 (questionnaire completed by defendant and signed in open court if court accepts plea); D.Colo. 40.1 (written notice of plea agreement at least ten days before Monday of week set for trial); N.D.Ga. 505-4 (procedure for acceptance of plea of nolo contendere); D.Utah 310(a) (plea agreement in writing and accompanied by written stipulations of fact relevant to sentencing). Three other courts have local rules that provide

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[3] This order was dated in 1990 and indicated that it was valid for one year. It appears to continue in force, however, since it was provided by the district court as an existing local directive.

similar procedures for those defendants seeking to change pleas. N.D.Cal. 315-1; N.D.N.Y. 11.1; D.P.R. 414. All of these rules should remain local.

Sixteen jurisdictions have documentation relating directly to the content of the plea agreement. One of these courts sets out the criteria in a local rule. D.Haw. 360. The other courts rely, instead, on a sample or form plea agreement or a sample plea questionnaire. *E.g.*, D.Colo (plea agreement); D.P.R. (plea agreement); D.Utah (plea agreement). These plea documents take on several different forms. Some of them are in the first person, in a narrative form; others are in the third person, also in a narrative form; still others are in a question and answer format. They cover a wide range of topics such as the following:

1. Charges.
2. Nature of the charges and the elements of the crime.
3. Possible defenses to the charges.
4. Whether English is the defendant's native language.
5. Education level of the defendant.
6. Agreements made by the defendant.
7. Agreements made by the government.
8. Factual basis for the plea.
9. Reasonable doubt standard which the government must meet.
10. Fact that defendant need not testify and no negative inference can be drawn from a refusal to testify.
11. Potential sentence including possible enhancements of the sentence.
12. Effect of this plea agreement on current probation or parole.
13. Applicability of any forfeiture provision.

14. Waiver of rights.

15. Fact that court may question defendant in open court and defendant must answer honestly.

16. This is entire agreement.

17. Court not a party.

18. Presentence report will help determine sentence.

19. If charges will be dismissed in agreement, statement as to whether remaining charges adequately reflect seriousness of behavior and why dismissal will not undermine purposes of sentencing.

These topics are appropriately the subject of local rulemaking if a court chooses to incorporate them into a local rule. It may be preferable to have one local rule with all relevant plea agreement topics set forth than to have multiple plea agreements in one district court, each outlining an individual judge's preferences. This is particularly true given that the rulemaking process will allow many constituencies an opportunity comment on the substance of the local rule.

Two of the courts have local rules that repeat portions of Rule 11 of the Federal Rules of Criminal Procedure. W.D.Okla. 41 (plea agreement shall be as set forth in Rule 11(e)); N.D.Tex. 9.3 (says court not under obligation to accept plea agreement as already acknowledged in Rule 11(e)(2), (3), and (4)). These rules should be rescinded.

One court has a paragraph in a local rule entitled "Plea Bargain Arrangements" that is, at least arguably, inconsistent with section (d) of Rule 11 which requires that a plea be voluntary. M.D.Ala. 31; *see* Fed.R.Crim.P. 11(d). The paragraph reads:

> This Court is unanimously of the opinion that attorneys, whose professions must ultimately suffer from excessive expenses or litigation, must accept the burden of attempting to limit such expenses. In unusual cases, this court will

> invoke the provisions of the statute providing that the Court may assess the costs of frivolous litigation, including the jury expense, against attorneys causing the same.
>
> M.D.Ala. 31.

The mere existence of this provision may influence an attorney to push a plea agreement even though that attorney may not think the case merits an agreement in order to avoid personal sanctions. Such a result is inconsistent with Rule 11, in its entirety, and with section (d), specifically, both of which stress the voluntary nature of any plea agreement.

Rule 12. Pleadings and Motions before Trial; Defenses and Objections

Twenty-eight courts have local rules relating to pretrial motions and pleadings. All of the courts have rules that should remain subject to local variation. In addition, the Advisory Committee on Criminal Rules may want to consider whether the topics addressed in local rules in two jurisdictions should be incorporated into the Federal Rules of Criminal Procedure. Six courts have directives that repeat existing law. Lastly, one local rule is inconsistent with the language of Rule 12.

Rule 12 requires that certain motions be made prior to trial or be deemed waived. Fed.R.Crim.P. 12(a) and (f). Section (c) of Rule 12 provides that the court may, by local rule, set a time for the making of pretrial motions and, if needed, a hearing date. *Id.* at (c). All of the courts have rules that supplement this Federal Rule. Generally, the local rules establish the times for filing and hearing pretrial motions. *E.g.*, N.D.Cal. 320-3 (not less than fourteen nor more than twenty-one days after arraignment); D.Haw. 325 (between fortieth and fiftieth days following arraignment); E.D.Ky. 6 (within eleven days after arraignment); N.D.Ind. 109.1 (dates set at arraignment).

Other rules explain what documentation must accompany the pretrial motion. *E.g.*, C.D.Cal. (declaration in support); E.D.Pa. 11 (factual statement and list of authorities); W.D.Pa. 12.1 (memorandum with reasons and legal support). All of these rules are appropriate.

Rule 12(b) lists those motions which must be raised prior to trial or be deemed waived:

> (1) Defenses and objections based on defects in the institution of the prosecution; or
> (2) Defenses and objections based on defects in the indictment or information ...; or
> (3) Motions to suppress evidence; or
> (4) Requests for discovery under Rule 16; or
> (5) Requests for a severance of charges or defendants under Rule 14.
>
> Fed.R.Crim.P. 12(b).

Two district courts have local rules stating that the defense of entrapment must also be raised through a pretrial motion. M.D.Ala. 30; S.D.Ga. 212.2. There is case law indicating that a defense of outrageous government involvement may implicate due process concerns by challenging the institution of the prosecution itself so that a pretrial motion is appropriate. *See United States v. Wylie*, 625 F.2d 1371, 1377 (9th Cir. 1980) *cert. denied* 449 U.S. 1080 (1981), *and cases cited therein*; *see also United States v. Washington*, 705 F.2d 489, 495 (D.C.Cir. 1983); *United States v. Numez-Rios*, 622 F.2d 1093 (2d Cir. 1980). The Advisory Committee may want to consider whether a claim of entrapment should be raised by pretrial motion so that the court can determine whether the alleged government misconduct rises to the level of excessive or outrageous government involvement. If so, an amendment to Rule 12(b) would be appropriate.

Six courts have rules that repeat various portions of Rule 12 or Rule 49 of the Federal Rules of Criminal Procedure. Fed.R.Crim.P. 12, 49. For example, several jurisdictions have rules repeating Rule 12(f), requiring that the pretrial motions be made or they are lost. *E.g.*, N.D.Ga. 515-2; E.D.Va. 27. Some courts have rules that repeat the list of motions set forth in Rule 12(b) that must be raised prior to trial. *E.g.*, E.D.Va. 27; D.Nev. 320. Lastly, some courts have rules that repeat Rule 49(a), that motions must be served on the parties. *E.g.*, S.D.Tex. 7; N.D.W.Va. 3.06(b). These rules are unnecessary.

One local rule indicates that a pretrial motion is called a "written pleading". M.D.Ala. 30. Rule 12(a) indicates that "pleadings" consist only of the indictment, information, and the please of not guilty, guilty, and nolo contendere. Fed.R.Crim.P. 12(a). The language in this local rule, then, is inappropriate.

Rule 12.1. Notice of Alibi

Only one jurisdiction has a rule concerning defendant's notice of an intent to rely on a defense of alibi. D.Nev. 315(e). This local rule provides that the defense must serve notice of such a defense "within 2 weeks after arraignment." *Id.* Rule 12.1 of the Federal Rules of Criminal Procedure requires the defendant to serve such a notice "within ten days" after receiving a written demand from the government stating the time, date, and place at which the offense was committed" or at such different time as the court may direct." Fed.R.Crim.P. 12.1(a). The local rule is inconsistent with the Federal Rule because it is not clear that the arraignment will establish the time, date, and place at which the offense was committed sufficiently to trigger the notice requirement of Rule 12.1. To the contrary, Federal Rule 12.1

anticipates that the arraignment will be insufficient by requiring that the government make a separate "written demand" setting forth the "time, date, and place at which the alleged offense was committed." Fed.R.Crim.P. 12.1(a).

Even if the arraignment does provide enough specificity to trigger the notice requirement of Rule 12.1, this local rule is still problematic. Arguably, the "different time" suggested by the Federal Rule is one determined on a case-by-case basis by the court and not by a local rule affecting all cases. Imposing a different time by local rule, then, is inconsistent with Rule 12.1. Lastly, to the extent that this local rule precludes a defendant in a particular case from seeking a time within which to serve a notice of alibi which is later than two weeks after the arraignment, it is inconsistent with Rule 12.1.

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

Two jurisdictions have rules concerning defendant's notice of mental incompetency. D.Nev. 315(e); D.Ariz 4.12. These local rules provide that the defense must serve notice of such a defense either "within 2 weeks after arraignment" (D.Nev. 315(e)) or within fifteen days after arraignment (D.Ariz. 4.12). Rule 12.2 of the Federal Rules of Criminal Procedure requires the defendant to notify the government in writing of an intention to rely on the defense of insanity "within the time provided for the filing of pretrial motions or at such later time as the court may direct".... Fed.R.Crim.P. 12.2(a). These rules are appropriate supplements to Federal Rule 12.2.

One of these local rules provides that for good cause shown the court may permit filing such a notice after the fifteen-day time limit. *See*

D.Ariz. 4.12. The Federal Rule provides that the court may direct a "later time" for filing the notice. To the extent that the other local rule, which requires that the notice be provided within two weeks of the arraignment, precludes a defendant in a particular case from seeking a "later time", it is inconsistent with Rule 12.2. *See* D.Nev. 315(e).

Rule 12.3. Notice of Defense Based Upon Public Authority

There are no local criminal rules directly relating to this Federal Rule.

Rule 13. Trial Together of Indictments or Informations

Four jurisdictions have local rules concerning the procedure used to determine if a case is a related case and how such a case will be assigned. D.Colo. 7.1(D), GO 1993-5; E.D.N.Y. DOB 50.3; W.D.Okla. 8; D.Utah 107(b). For example, two of the rules require that the United States attorney notify the clerk, in writing, that an action is related to a previously filed case. D.Colo. GO 1993-5; W.D.Okla. 8. If related, then the case is assigned to the same judge. *Id.* If a motion to consolidate is filed, the judge who will decide the motion is the judge assigned to the case with the oldest docket number. D.Colo. 7.1(D). E.D.N.Y. DOB 50.3; W.D.Okla. 8. In another jurisdiction, either judge may hear a motion to consolidate but, if consolidated, the case will be heard by the judge assigned to the case with the oldest docket number. D.Utah 107(b). These rules are appropriate as local directives.

Rule 14. Relief from Prejudicial Joinder

One court has a sample order to participants in multiple defendant cases indicating that the government must, within ten days from the date of the order, indicate whether the government intends to proffer a post-arrest

statement from one defendant, which may inculpate another defendant, so that the court has the opportunity to determine the need for separate trials of the accused individuals. E.D.Mich. Samp. Such an order is appropriate pursuant to Rule 14.

Rule 15. Depositions

Two jurisdictions have local rules that specifically indicate that depositions not be filed in a criminal case. N.D.Tex. 6.1; W.D.Tex 15, 49. These rules are inconsistent with Rule 15 of the Federal Rules of Criminal Procedure and should, therefore, be rescinded. Fed.R.Crim.P. 15. Rule 15 explains that depositions "shall be taken and filed in the manner provided in civil actions except as otherwise provided in these rules...." Fed.R.Crim.P. 15(d). The applicable civil rule is Rule 5(d) which states that "the court may on motion of a party or on its own initiative order that depositions ... not be filed unless on order of the court or for use in the proceeding." Fed.R.Civ.P. 5(d). The use of a court order in this Rule refers to an order made in an individual case and not a standing order or local rule applicable to all cases. This interpretation is established by the Advisory Committee Notes and the Federal Rules of Civil Procedure. To interpret this language otherwise would thwart the intent of the Advisory Committee that discovery materials should generally be accessible.

Further, the language in the Advisory Committee Notes indicates that the Advisory Committee intended in Rule 5(d) that filing be the norm and that non-filing only be permitted in particular cases. The Advisory Committee Notes to the 1980 Amendments state that the requirement of filing is

> subject to an order of the court that discovery materials not be filed unless filing is requested by the court or is effected by

> parties who wish to use the material *in the proceeding*.
>
> Fed.R.Civ.P. 5 Advisory Committee Notes to 1980 Amendments (emphasis added).

The Advisory Committee used similar language in its 1970 Amendments and clearly intended to refer to orders made in individual cases. The Advisory Committee amended Rule 5(a) in 1970 to permit that discovery papers and pleadings be served on all parties "unless the court orders otherwise." Fed.R.Civ.P. 5(a). the Advisory Committee Notes to this Amendment state:

> Discovery papers may be voluminous or the parties numerous, and the court is empowered to vary the requirement if *in a given case* it proves needlessly onerous.
>
> Fed.R.Civ.P. 5 Advisory Committee Notes to 1970 Amendments (emphasis added).

Rule 5(d), as it currently reads, requires that a court issue an order that discovery not be filed in each case. This rule, read in conjunction with Rule 15 of the Federal Rules of Criminal Procedure, regulates the filing of depositions in criminal proceedings. A local rule permitting routine non-filing of depositions is inconsistent with these Federal Rules.

Rule 16. Discovery and Inspection

Thirty-eight jurisdictions have local rules concerning discovery in criminal actions. Rules in all of these courts should remain subject to local variation. Rules in eight district courts may be helpful to all of the district courts; accordingly, it is recommended that the Advisory Committee on Criminal Rules consider incorporating the procedure reflected in these rules in a Federal Rule. In addition, rules in eighteen of the jurisdictions repeat existing law and should be rescinded. Lastly, a rule in one of the courts is inconsistent with other Federal Rules.

Rule 16 of the Federal Rules of Criminal Procedure explains, in the main, the procedure for the parties to obtain discovery and what material may actually be discovered. Fed.R.Crim.P. 16. All of the courts have local rules that appropriately supplement this Federal Rule. For example, most of the rules provide a time limit within which discovery must be completed or a general schedule for completing each phase of discovery. *E.g.*, N.D.Ga. 520-1 (discovery made available by prosecution at arraignment and by defendant at least twenty-one days before trial); D.Wyo. 103 (discovery made available by prosecution within seven days of arraignment); E.D.Mich. SO 90-AO-010 (within ten days of arraignment, parties meet to confer and prosecution provides discovery). Many of the rules explain the procedure the government may use to decline a discovery request from the defendant. *E.g.*, W.D.Pa. 16.1; D.N.J. Sample Order; E.D.Pa. 9. Some of the other rules set forth the required contents of any motion to compel. *E.g.*, E.D.Tex. Sample Order.

Eight jurisdictions have local rules requiring that the parties meet to confer about discovery disputes before any motion is filed. *E.g.*, E.D.La. 2.11; D.P.R. 409; D.Vt. 2. Several of the rules also require that the moving party file a certification explaining that such a conference occurred or setting forth the reasons why such a conference did not occur. *E.g.*, E.D.N.Y. 3; S.D.N.Y. 3. These rules are appropriate supplements to Rule 16. There are directives in the Federal Rules of Civil Procedure that require a conference and a certification before a motion for a protective order or a motion to compel is filed. Fed.R.Civ.P. 26(c), 37(a)(1). The Advisory Committee on Criminal Rules may want to consider a similar amendment to Rule 16.

The rules in eighteen of the courts repeat portions of Rule 16 of the Federal Rules of Criminal Procedure. Fed.R.Crim.P. 16. Most of them repeat subsections (a)(1) and (b)(1) of Rule 16, describing what information is subject

to disclosure. *E.g.*, N.D.W.Va. 3.06(d); D.Conn. Appendix; D.Haw. 320-1. Others repeat section (c) of Rule 16, explaining that the parties are under a continuing duty to disclose. *E.g.*, S.D.Ga. 212.4; S.D.Ind. Sample Order; E.D.N.Car. 43.00. Still others repeat portions of section (d), that protective orders may be granted and that sanctions may be imposed for failure to comply with a discovery request. *E.g.*, E.D.Pa. 9; E.D.Wash. Sample Order; E.D.Cal. 440.

This repetition may be quite problematic. Frequently, the local rules paraphrase the Federal Rule. To the extent the different language is interpreted to mean something different than what is meant by the Federal Rule, the local rule may actually be inconsistent with the Federal Rule. At a minimum, such variance may lead to confusion. In addition, sometimes the local rules repeat only portions of the Federal Rule. It is unclear to someone reading the local rule what the effect of the omission may be. Such a gap may only mean that a practitioner should look to the Federal Rule for the remainder; on the other hand, it may mean that the omitted material is not relevant to practice in the particular district. Lastly, it is unnecessarily cumbersome to simply repeat the Federal Rule, or a large portion of it, in a local rule. It is unwieldy to reproduce, distribute, and read local rules that repeat Federal Rules.

Many jurisdictions provided sample orders used for discovery. While these orders do not purport to be local rules, the reasons to avoid repetition within them is the same. An order with a reference to Rule 16 disclosures would be preferable to an order with three or four pages reciting portions of that Rule.

One court has a local rule stating that discovery material is not to be filed. E.D.N.Car. 3.08. As discussed above, nonfiling of discovery is

inconsistent with Rule 5(d) of the Federal Rules of Civil Procedure and Rule 15 of the Federal Rules of Criminal Procedure. *See* discussion at Rule 15, *supra*.

Rule 17. Subpoena

Thirteen courts have local rules concerning the use of subpoenas. Rules in all of these jurisdictions should remain subject to local variation. Rules in five of the courts repeat existing law. Lastly, rules in three of these district courts are inconsistent with existing law.

All of the courts have local rules that are appropriate supplements to Rule 17 of the Federal Rules of Criminal Procedure. For example, many rules explain the required procedure for a defendant who is unable to pay the witness fee to obtain a subpoena in blank for a witness. *E.g.*, C.D.Cal. 7.1; E.D.Mich. 217.1; N.D.N.Y. 17.1. Some of these rules also require that all subpoenas be served within a set time before the proceeding to provide the marshal with sufficient time for service. *E.g.*, E.D.N.Car. 47 (seven days before Monday of week in which case is set for trial); E.D.Pa. 35 (five days before trial.

Five jurisdictions have local rules that repeat existing law. One court has a rule that repeats section (f) of Rule 17, that there be an order to take a deposition before the subpoena issues. N.D.N.Y. 17.1. Another rule repeats section (d) of Rule 17, that service of a subpoena may be by the marshal. E.D.Mich. 217.1(c). Three courts have rules that repeat portions of Rule 17 as well as a portion of Title 28 concerning the payment of fees. E.D.La. 5.12; M.D.La. 5.12; W.D.La. 5.12; *see* Fed.R.Crim.P. 17; 28 U.S.C. §1825. Rule 17(d) and section 1825(c) of Title 28 both indicate that, upon service of the subpoena, the witness fees need not be tendered if the subpoena

is issued in behalf of the United States. Fed.R.Crim.P. 17(d); 28 U.S.C. §1825(c). The local rules repeat this statement and are, therefore, unnecessary.

Three jurisdictions have rules that are inconsistent with Rule 17 and section 1825 of Title 28. E.D.La. 5.12; M.D.La. 5.12; W.D.La. 5.12. Rule 17 provides that service is made by delivering a copy of the subpoena to the person served along with the witness fee and mileage. Fed.R.Crim.P. 17(d). The Rule further provides that fees and mileage need not be tendered to the witness if the subpoena was issued in behalf of the United States. *Id.* If a subpoena is issued in behalf of a defendant who cannot pay, the fees "shall be paid in the same manner in which ... fees are paid in case of a witness subpoenaed in behalf of the government." *Id* at (b). Section 1825 explains that witness fees for subpoenas issued in behalf of defendants unable to pay are paid by the marshal. 28 U.S.C. §1825(b). The three local rules indicate that it is

> the duty of the person provoking the issuance of any subpoena for a witness to cause to be tendered to the witness at the time of service of the subpoena..., one day's attendance fee and ... mileage... and ... the daily attendance fee for each day he or she is required to attend said trial or hearing.
>
> E.D.La. 5.12; M.D.La. 5.12; W.D.La. 5.12.

To the extent these local rules do not permit defendants who are unable to pay the fees and mileage from obtaining service of subpoenas, they are inconsistent with the Federal Rules and Title 28.

Rule 17.1. Pretrial Conference

Thirty-two district courts have rules relating to pretrial conferences. Rules in all of these jurisdictions should remain subject to local variation. A rule in one court repeats existing law and should be rescinded.

The rules in all the jurisdictions cover essentially one or more of the following broad topics: the agenda for discussion at the pretrial conference; the dates and time limits for various motions, discovery, and other activities; and the development and issuance of the pretrial order. *E.g.*, N.D.Ga. 520-2 (agenda consists of many items, a date for the hearing is determined, and pretrial order prepared at end of conference); D.Haw. 340 (same); N.D.N.Y. 17.1.1 (list of agenda items). The agenda for the pretrial conferences consists of the following topics:

1. Production of statements under Rule 26.2 of the Federal Rules of Criminal Procedure
2. Production of grand jury testimony.
3. Stipulation of facts.
4. Appointment of court interpreters.
5. Severance of trial.
6. Exchange of witness lists.
7. Pretrial resolution of evidence issues.
8. Preparation of trial briefs for problematic issues.
9. Submission of jury instructions.
10. Submission of voir dire questions.
11. Dates for completion of discovery.
12. Exhibit lists.
13. Trial date.

In addition, three of the jurisdictions have local rules suggesting the use of settlement conferences in complex criminal cases. S.D.Cal. GO 39; C.D.Cal. 14; D.Mont. SO 6. All of these rules are appropriate as local directives.

The rule in the Western District of Oklahoma states, basically, that the court may consider matters at a pretrial conference that will promote a fair trial. W.D.Okla. 17(G). This rule repeats Rule 17.1 that indicates that the court may "consider such matters as will promote a fair and expeditious trial." Fed.R.Crim.P. 17.1. The local rule is unnecessary.

V. Venue

Rule 18. Place of Prosecution and Trial

Five jurisdictions have local rules concerning intradistrict venue of criminal actions. Rules in all of these courts are appropriate as local rules. In addition, one jurisdiction have a rule that repeats existing law.

One rule indicates that cases should be filed in the division where the offense was allegedly committed. N.D.Ga. 105-3. That same rule provides that papers from proceedings such as the arraignment or sentencing, which may occur in a different place, are transferred and held where the case was originally filed. *Id.* Another jurisdiction has a rule indicating that the government may file a case in either division if the alleged offense was committed in more than two. D.Nev. 110-2. Another court has a rule providing that a motion may be filed seeking an intradistrict transfer if it is made during the time permitted for submission of all other pretrial motions. W.D.Wash. 18. One jurisdiction has a local rule indicating that all criminal actions are filed in one division and can then be transferred to another location within the district upon a motion or stipulation. E.D.Cal. 402. Lastly, one court has a rule indicating that an appeal to the district court of a decision from a magistrate judge must be made within the same division. D.N.Dak. 7(B).

A rule in the District of North Dakota repeats the applicability of the Federal Rules of Criminal Procedure to determinations concerning the place of prosecution and trial. This rule repeats, generally, Rule 18 of the Federal Rules of Criminal Procedure and should, therefore, be rescinded.

Rule 19. Transfer Within the District (Rescinded)

There are no local criminal rules directly relating to this topic.

Rule 20. Transfer From the District for Plea and Sentence

Three jurisdictions have local rules concerning interdistrict transfers. N.D.Ga. 505-1(b); N.D.N.Y. 20.1; D.Utah 311. The local rule in the District of Utah explains that the United States attorney, after receiving a request for such a transfer from a defendant, must notify the clerk of this request and of whether the particular defendant is also a named defendant in a case currently pending in Utah; the United States attorney must also promptly process the transfer documents. D.Utah 311. The delegation of these tasks to the United States attorney is appropriately accomplished through local rulemaking.

The other two jurisdictions have rules that simply repeat existing law. One of the rules repeats the applicability of Rule 20 of the Federal Rules of Criminal Procedure. N.D.Ga. 505-1(b). The other rule repeats existing law explaining that the defendant may consent in writing to a trial of a misdemeanor before a magistrate judge. N.D.N.Y. 20.1; *see* 18 U.S.C. §3401.

Rule 21. Transfer From the District for Trial

There is only one court with a rule relating to the procedure used when a person is removed from one district to another. D.Utah 312. Specifically, this directive requires that the United States attorney or

marshal give notice to the magistrate judge that a person is being removed to the District of Utah; it also explains that the clerk must obtain the relevant documents. *Id.* This rule is appropriate as a local rule.

Rule 22. Time of Motion to Transfer

One jurisdiction has a local rule requiring that a motion for change in venue "be made within the time allowed for filing pretrial motions under these rules." W.D.Wash. 22. This rule is inconsistent with Rule 22 and should, therefore, be rescinded. Fed.R.Crim.P. 22. Rule 22 requires that such a motion be made "at or before arraignment or at such other time as the court or these rules may prescribe. *Id.* The Rule anticipates that decisions about venue will be made early, sufficiently before the case is prepared for trial so that the expense and time of preparing again, in a different court after transfer, will not occur. *See generally United States v. Polizzi*, 500 F.2d 856 (9th Cir. 1974), *cert. denied* 419 U.S. 1120 (1975). The Federal Rule recognizes that, in certain situations, a motion for transfer could not be made at or before the arraignment. Accordingly, the Rule gives the court discretion to prescribe a later time. Such discretion must be exercised on an individual basis, and not by local rule, or the provision loses force. A local rule setting a different time limit in all cases still misses those cases that require individual attention. For example, a motion to transfer may be made after the time for filing pretrial motions has expired and still be timely in the particular circumstances of the case. This situation is ignored by the local rule.

VI. Trial

Rule 23. Trial by Jury or by the Court

Nine courts have local rules relating to Rule 23. One of these rules is appropriate as a local rule. Five rules repeat Rule 23. The other three rules are inconsistent with existing law.

The rule in the Western District of Pennsylvania explains that the court, in a nonjury case, may direct the parties to submit findings of fact and conclusions of law with appropriate record and exhibit references. W.D.Pa. 23.1. This is appropriate instruction to parties.

Two jurisdictions have local rules that simply repeat the applicability of Rule 23. N.D.Ga. 525-2; W.D.N.Y. 35A. Other rules repeat that juries shall consist of twelve members. D.N.H. 31(a); N.D.Tex. 8.2(d); D.Utah 113. These rules are unnecessary.

Two rules explain that trial by jury is available only for those crimes carrying a maximum penalty of imprisonment for six months or a fine of $500 or both. E.D.La. 13.01; W.D.La. 13.01. These rules seem to allow jury trials in more situations than currently anticipated by the Supreme Court. *See Blanton v. City of North Las Vegas*, 489 U.S. 538, 109 S.Ct. 1289, 103 L.Ed.2d 550 (1989). In *Blanton*, the Court explained that Congress' most recent definition of a "petty" offense consisted of a prison sentence of six months or less or a fine of up to $5,000 and not $500 as it had been previously. *Id.* at 544 *citing* 18 U.S.C. @1 (1982 ed., Supp. IV). Under this view, a jury trial would be available only for crimes carrying a maximum penalty of imprisonment for six months or a fine of $5,000.

A rule in one court conflicts with Rule 23(b). E.D.Cal. 162. Rule 23(b) requires that a jury consist of twelve persons unless

> the parties ... stipulate in writing with the approval of the court that the jury shall consist of any number less than 12 or that a valid verdict may be returned by a jury of less than 12 should the court find it necessary to excuse one or more jurors for any just cause after trial commences.
>
> Fed.R.Crim.P. 23(b).

The local rule provides that a jury shall consist of twelve members "[u]nless waived by the defendant in writing and in the presence of the Court". E.D.Cal. 162(a). In those situations when the government is unwilling to stipulate to fewer than twelve jurors, this rule would permit the defendant to unilaterally agree to a smaller jury. Such a result is inconsistent with Rule 23.

Rule 24. Trial Jurors

Twenty-seven jurisdictions have local rules dealing, in some manner, with Rule 24. Rules in twenty-five of these courts should remain subject to local variation. In addition, five courts have rules that repeat existing law and should be rescinded. Forty-four jurisdictions have Jury Selection Plans which should also remain subject to local variation.

Most of the rules in twenty-five of the jurisdictions address three broad topics relating to jurors. Many courts have rules supplementing Rule 24 (a) that explain that the court examines potential jurors and that counsel are permitted to submit voir dire questions to the court in advance of the examination. *E.g.*, D.Mont. 326-1 (questions to be submitted at least one day in advance); D.P.R. 412 (questions to be submitted no later than three days before trial); S.D.Ga. 230.1 (questions to be submitted seven days before jury selection). Other rules require that counsel refrain from any contact with jurors before, during, and, sometimes, after trial. *E.g.*, E.D.Ky. 12; E.D.Wash. 47; N.D.Tex. 82(e). Still others supplement Rule 24 (b) by

explaining how peremptory challenges will be exercised. *E.g.*, D.Ariz. 4.10; D.N.J. 20; D.N.Dak. 8(D). All of these rules are appropriate.

Four courts have local rules that repeat the applicability of Rule 24 of the Federal Rules of Criminal Procedure. E.D.Cal. 451; N.D.Ga. 525-2; W.D.N.Y. 35A; N.D.Tex. 8.2(b). Another rule repeats, in large part, the substance of sections (a) and (c) of Rule 24. D.Mont. 326-1. These rules are unnecessary.

Section 1863 of Title 28 requires that each district court develop and use a plan for random jury selection. 28 U.S.C. §1863. The plan must be approved by a reviewing panel before it becomes operational. *Id.* Forty-four courts submitted jury selection plans that have been approved and are operational. *E.g.*, W.D.Ark. Plan; M.D.Pa. Plan; D.Del. Plan. These plans are appropriate supplements to the local rules.

Rule 25. Judge; Disability

There are no local criminal rules directly relating to this Federal Rule.

Rule 26. Taking of Testimony

There is one rule concerning the responsibilities of counsel. W.D.Wash. 26. This rule is appropriate as a local rule. It indicates that counsel should use a lectern, that counsel should rise when addressing the court or objecting, and that only one attorney for each party is permitted to examine or cross-examine each witness.

Rule 26.1. Determination of Foreign Law

There are no local criminal rules directly relating to this Federal Rule.

Rule 26.2. Production of Witness Statements

Local rules regulating the production of witness statements are routinely found, if they exist at all, with the local rules regulating discovery generally pursuant to Rule 16 of the Federal Rules of Criminal Procedure. Accordingly, the discussion of these local rules is set forth in the discussion of Rule 16, *supra*.

Rule 26.3. Mistrial

There are no local criminal rules directly relating to this Federal Rule.

Rule 27. Proof of Official Record

There are no local criminal rules directly relating to this Federal Rule.

Rule 28. Interpreters

Similarly, there are no local rules relating to this Rule.

Rule 29. Motion for Judgment of Acquittal

Two courts have local rules explaining the general procedure used to submit a motion for judgment of acquittal pursuant to Rule 29. E.D.Pa. 14; N.D.W.Va. 3.09. Both of these rules are appropriate supplements to Rule 29.

Rule 29.1. Closing Argument

Four courts have local rules concerning closing arguments. E.D.La. 13.03; M.D.La. 13.03; W.D.La. 13.03; W.D.Wash. 26(a).

The rules in three jurisdictions are appropriate supplements to this Federal Rule in requiring that counsel refrain from arguing law to the jury. E.D.La. 13.03; M.D.La. 13.03; W.D.La. 13.03.

> represents an attempt to reflect an appropriate sequential order in the sentencing procedures.
>
> Fed.R.Crim.P. Advisory Committee Note of 1994.

Because the new amendments to Rule 32 incorporated much of the model local rule that was already set forth in the local rule, significant amounts of the content of the local rules will now probably be unnecessary. It is difficult to precisely define those portions of the rules which are repetitious, although that has been done in some instances. *See* discussion, *infra*. Rather, it is suggested that the district courts review their respective rules in an effort to reduce the sheet volume of the rules in light of the new amendments.

Rule 32 explains the procedure, generally, for sentencing defendants. Fed.R.Crim.P. 32. The Rule sets forth the time limits for conducting a presentence investigation and submitting a report. *Id.* at (a) and 9b). These time limits may be "either shortened or lengthened for good cause." *Id.* at (a). The Rule also outlines the contents of the presentence report, *Id.* at (b). The Rule explains, generally, the sentencing hearing and procedure to impose sentence. *Id.* at (c). The rule also explains the contents of a judgment of conviction and the effect of a plea withdrawal on sentencing. *Id.* at (d) and (e).

Rules in fifty-one of the district courts are appropriate supplements to Rule 32. For the most part, these local rules explain that the presentence report is a confidential report and that there are specified procedures which must be followed to disclose the report. *E.g.*, W.D.Ark. GO 20; D.Conn. 9; D.Kan. 305. Other rules explain that the presentence report will be deemed delivered on a particular day. *E.g.*, D.D.C. 311 (either (1) when physically delivered, (2) one day after available for inspection, or (3) three days after

copy mailed); M.D.Fla. 4.12. Still others provide a detailed procedure for objecting to the contents of the presentence report. *E.g.*, S.D.Ill. 24.

Rules in nine of the district courts repeat various portions of Rule 32 and, as such, are unnecessary. *E.g.*, M.D.Ala. (repeats 32(b)(6)); W.D.La. 16 (repeats 32(b)(6)(B)); S.D.Iowa 27 (repeats general applicability of Rule 32).

Rules in five of the courts are either inconsistent with Rule 32 or repeat it. Rule 32(b)(6)(B) requires the parties to "communicate in writing to the probation officer, and to each other, any objections to any material information ...." Fed.R.Crim.P. b)(6)(B). The five jurisdictions have rules that require objections to be made in a "pleading" which must be entitled "'Position of Parties with Respect to Sentencing Factors' in accordance with 6A1.2 of the Sentencing Guidelines and policy Statements (Oct. 1987)." M.D.N.Car. SO 20; *see also* S.D.Ala. SO; W.D.Pa. 32.1; D.Utah 310; E.D.Tenn. 83.9 . The only "pleadings" permitted in criminal proceedings are the indictment, the information, and the pleas. *See* Fed.R.Crim.P. 12(a). It is inconsistent to characterize this document, then, as a pleading. In addition, the Federal Rule is silent as to the form of the document, requiring only that it be in writing. It is arguably inconsistent for a local rule to require a particular form for this document since, presumably, failure to conform to the correct format may cause the court to reject the document. To the extent, however, that these rules merely require written objections to the presentence report, they are repetitive and unnecessary.

Thirty-six courts have local rules that are inconsistent with existing law. All of the courts have rules dealing with some of the time limits of Rule 32. Specifically, these local rules provide for different time limits than those set forth in subdivision (b)(6) of Rule 32 concerning the disclosure of the

presentence report and making objections to the report. *E.g.*, N.D.Tex. 10.9; S.D.Ill. 24; M.D.Fla. 4.12.

Rule 32(a) indicates that the time limits set forth in the Rule for disclosing the presentence report and making objections "may be either shortened or lengthened for good cause." Fed.R.Crim.P. 32(a). The change in time limits "for good cause" should be interpreted to refer to a change made in an individual case and not by local rule. There are many instances in the Federal Rules of Criminal Procedure where a "good cause" requirement is imposed which is clearly intended to refer to a discretionary determination made by the court in an individual case. *E.g.*, Fed.R.Crim.P. 5.1 (government may move for copy of transcript "for good cause shown"), 12(e) (motions determined before trial unless court, "for good cause," orders deferral), 15(b) (court may "for cause shown" change time or place of deposition). These situations can be contrasted with the instances in the Federal Rules where a particular procedure may be imposed by local rule. Local rules are used to set forth a procedure when discretion is unnecessary or undesirable. *E.g.*, Fed.R.Crim.P. 5.1 (court may, "by local rule" determine time and place for providing preliminary examination records), 12(c) (unless provided "by local rule", the court may establish a pretrial schedule), 49(e) (dangerous offender notice sealed "as permitted by local rule"). In fact, another portion of Rule 32 draws a distinction between local rules and discretionary decisions made in an individual case:

> The court may, by local rule or in individual cases, direct that the probation officer not disclose the probation officer's recommendation, if any, on the sentence.
>
> Fed.R.Crim.P. 32(b)(6)(B).

In addition, the stated intention of the Advisory Committee on Criminal Rules is that the time limits of Rule 32 (b)(6) be changed only on an individual basis:

> The amendment to subdivision (a)(1) [now subsection (a)] is intended to clarify that the court is expected to proceed without unnecessary delay, and that it may be necessary to delay sentencing when an applicable sentencing factor cannot be resolved at the time set for sentencing. Often the factor will relate to a defendant's agreement to cooperate with the government. But, other factors may be capable of resolution if the court delays sentencing while additional information is generated. As currently written, the rule might imply that a delay requested by one party or suggested by the Court sua sponte might be unreasonable. The amendment rids the rule of any such implication and provides the sentencing court with desirable discretion to assure that relevant factors are considered and accurately resolved. In exercising this discretion, the court retains under the amendment the authority to refuse to delay sentencing when a delay is inappropriate under the circumstances.
>
> Fed.R.Crim.P. Advisory Committee Note to 1989 Amendments.

Because the local rules apply an automatic and inflexible time schedule, when discretion was anticipated, the rules in the thirty-six courts should be rescinded.

There is another local rule that is inconsistent with Rule 32. It requires that an affidavit accompany the written objections made pursuant to Rule 32(b)(6)(B). E.D.Tex. GO 94-18. The Federal Rule only requires that written objections be made. Fed.R.Crim.P. 32(b)(6)(B).

Rule 32.1. Revocation or Modification of Probation or Supervised Release

Nine courts have local rules addressing the revocation or modification of probation pursuant to Rule 32.1 of the Federal Rules of Criminal Procedure. Rules in all of these jurisdictions should remain local.

In addition, one of the rules repeats a portion of Rule 32.1 and should, therefore, be rescinded.

The local rules address two broad topics related to this Federal Rule. Rules in eight jurisdictions set forth the conditions of probation. *E.g.*, N.D.Cal. 330-3; S.D.Ga. 232.1; N.D.Ohio 3:8.4. Another six rules explain and supplement the procedure for revocation of probation. *E.g.*, E.D.Tex. GO 93-5; D.D.C. 309; N.D.Ohio 3:8.5. These rules are appropriate additions to Rule 32.1.

Rule 32.1(a)(2) sets forth the procedure for the revocation hearing and the rights and opportunities available to the defendant. Fed.R.Crim.P. 32.1(a)(2). One rule simply paraphrases these factors and is unnecessary. D.D.C. 309.

Rule 33. New Trial

There are no local criminal rules directly relating to this Federal Rule.

Rule 34. Arrest of Judgment

Similarly, there are no local rules relating to this Rule.

Rule 35. Correction or Reduction of Sentence

Six jurisdictions have local rules concerning the procedure for seeking a correction or modification of the sentence. Rules in each of these courts should remain as local rules. In addition, two courts have rules that repeat existing law, and four courts have rules that are inconsistent with the Federal Rules.

The local rules that supplement Rule 35 are, generally, those that explain the procedure for submitting, or responding to, a motion. For

example, two court have rules that indicate that no response to a Rule 35 motion is required, unless requested by the court; they further state that the court will not usually grant such a motion unless it asks, first, for a response. D.Haw. 350; D.N.Mar.Isl. 350-1. Another court relieves the government from filing a responsive pleading when the defendant files a motion for modification of the sentence. D.Nev. 330. One court indicates that applications may be made under seal. W.D.Pa. 35.1. One rule indicates that oral argument is permitted if directed by the court. D.Conn. 6(a). Lastly, one court requires that a request for oral argument be made in order to address the court. E.D.Cal. 480.

Two courts have local rules that simply repeat that motions shall be in writing and state the grounds therefor. W.D.Pa. 35.1; D.Conn. 6(a). This requirement is already set forth in Rule 49(b) of the Federal Rules of Criminal Procedure.

Three courts have rules that require service of Rule 35 motions to more persons than already required under the Federal Rules. Two local rules require that the defendant serve the United States attorney as well as the Probation Department. E.D.Cal. 480; D.Conn. 6(a). Another jurisdiction requires that the application be served upon the defendant and counsel for the parties. W.D.Pa. 35.1. All of these directives are inconsistent with Rule 49(b) which states :

> Whenever under these rules or by an order of the court service is required or permitted to be made upon a party represented by an attorney, the service shall be made upon the attorney unless service upon the party personally is ordered by the court.
>
> Fed.R.Crim.P. 49(b).

The last portion of this Federal Rule allows the court to order that service be made upon the party personally. This order must be made

in an individual case and not by local rule, applicable to all cases. To determine otherwise would thwart the intent of this Federal Rule, that service is made upon the attorney representing a party in the ordinary case.

Even if it were determined that this Federal Rule authorized a local rule which routinely required service upon a party, these local rules are still problematic. Two of the rules require that service be on the Probation Department, who is neither a party nor a party's legal representative. *See* E.D.Cal. 480; D.Conn. 6(a). The other rule requires that service be made on the defendant and, again, on the defendant's legal representative. *See* W.D.Pa. 35.1.

One local rule requires that Rule 35 motions be made on forms supplied by the court and completed in full. D.Nev. 330. A subsection of the rule warns that, if the motion does not comply with the local rule, it may be returned by the clerk. D.Nev. 330(j). This rule is inconsistent with Federal Rules of both civil and criminal practice which regulate filing of documents. *See* Fed.R.Crim.P. 49; Fed.R.Civ.P. 5(e).

Rule 49 of the Federal Rules of Criminal Procedure indicates that "[p]apers shall be filed in the manner provided in civil actions." Fed.R.Crim.P. 49(d).

At the time the Local Rules Project Report on Civil Rules was circulated, in the spring of 1989, there were many civil local rules that permitted the clerk to refuse to accept documents for filing which, in the clerk's opinion, were not in compliance with the then-existing local rules. For example, there were thirty-eight jurisdictions with local rules that stated that a failure to comply with a respective local rule on the form of a document presented for filing might result in nonfiling of that document by the clerk.

Important statute of limitations issues might arise if the clerk refuses to accept the document for filing.

The Advisory Committee on Civil Rules suggested an amendment to Rule 5 to prevent potential abuse. The following sentence was added to Rule 5(e), effective December 1, 1991:

> 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.
>
> Fed.R.Civ.P. 5(e).

This sentence applies to filing of documents in criminal proceedings pursuant to Rule 49(d). Accordingly, the local rule is inconsistent with these Federal Rules.

Rule 36. Clerical Mistakes

There are no local criminal rules directly relating to this Federal Rule.

VIII. Appeal (Abrogated)

Rule 37. Taking Appeal; and Petition for Writ of Certiorari (Abrogated).

Similarly, there are no local rules relating to this topic.

Rule 38. Stay of Execution

Three courts have local rules concerning stays of execution pursuant to Rule 38. Rules in each of these jurisdictions should remain subject to local variation. In addition, a rule in one court repeats existing law and is inconsistent with existing law.

A local directive in one court sets forth the procedure followed in the district court when the judge and sentence of conviction has been

affirmed in the appeals court and the defendant must surrender or must arrange for probation or a fine. W.D.Ark. GO 1. Another rule sets forth the form for the application for a stay of execution. D.Conn. 6. Rules in two other jurisdictions provide that, after appeals have been exhausted, stays will not be allowed except in extraordinary circumstances. C.D.Cal. 12; D.Conn. 6.

One rule requires that applications for a stay of execution be in writing. D.Conn. 6. This requirement repeats Rule 47 of the Federal Rules of Criminal Procedure. The same local rule requires that the application for a stay of execution be served on the United States attorney and on the Probation Office. D.Conn. 6. This directive is inconsistent with Rule 49(b) which states :

> Whenever under these rules or by an order of the court service is required or permitted to be made upon a party represented by an attorney, the service shall be made upon the attorney unless service upon the party personally is ordered by the court.
>
> Fed.R.Crim.P. 49(b).

The last portion of this Federal Rule allows the court to order that service be made upon the party personally. This order must be made in an individual case and not by local rule, applicable to all cases. The intent of this Federal Rule is that service be made upon the attorney representing a party in the ordinary case.

Even if it were determined that this Federal Rule authorized a local rule which routinely required service upon a party, this local rule is still problematic. It requires that service be on the Probation Department, who is neither a party nor a party's legal representative. *See* D.Conn. 6.

Rule 39. Supervision of Appeal (Abrogated)

Again, there are no local rules relating to this topic.

IX. Supplementary and Special Proceedings

Rule 40. Commitment to Another District

Three jurisdictions have local rules concerning the procedure to remove a case. N.D.Ga. 505-1(a); N.D.Ohio 3:10.1; E.D.Pa. 5. One of the rules explains the procedure a magistrate judge follows to issue the warrant of removal and the content of the copy of the order of removal which is provided to the defendant. E.D.Pa. 5. This rule is appropriate as a local directive.

Two other courts have rules that repeat existing law. One rule repeats that Rule 40 of the Federal Rules of Criminal Procedure applies to proceedings affecting those persons arrested in a district other than that in which the offense was allegedly committed. N.D.Ga. 505-1(a). The other court has a rule that repeats that Rule 40(f) applies, which permits a magistrate judge to amend or modify any conditions of release imposed by the district where the complaint or warrant originated.

Rule 41. Search and Seizure

Six courts have local rules concerning search and seizure. Rules in each of these jurisdictions are appropriate as local rules. In addition, one of the local rules repeats existing law.

Two courts have local rules that supplement Rule 41(e) of the Federal Rules of Criminal Procedure which explains that a motion for the return of property can be made by an aggrieved person. D.N.J. 12(F); N.D.W.Va. 3.06(b); *see* Fed.R.Crim.P. 41(e). These local rules explain the

procedure used to file such a motion. Two other rules explain the procedure used to secure a search warrant by telephone and are appropriate supplements to subsection (c)(2) of Rule 41. W.D.Okla. 36; W.D.Wash. 41. One rule supplements subsection (g) of Rule 41 concerning the filing of warrants and other papers with the clerk by requiring that the clerk maintain a confidential file for these papers pending the opening of a case file. W.D.Ark. GO 7. Another rules explains the required procedure for obtaining a wire tap. E.D.Pa. 16. All of these rules are appropriate as local directives.

A rule in the Western District of Oklahoma repeats, in large part, the language of Rule 41(c)(2), the general procedure to obtain a warrant by telephone. W.D.Okla. 36. The repetitious language is simply unnecessary.

Rule 42. Criminal Contempt

There are no local criminal rules directly relating to this Federal Rule.

X. General Provisions

Rule 43. Presence of the Defendant

Seven courts have local rules regarding the presence of the defendant during various portions of the criminal proceeding. Rules in three of these jurisdictions are appropriate as local rules. Rules in four of the courts repeat existing law. Lastly, three jurisdictions have local rules that are inconsistent with Rule 43 of the Federal Rules of Criminal Procedure.

There are three rules that should remain subject to local variation. One of them sets forth the form of a waiver of appearance, as permitted pursuant to Rule 43(c)(2). E.D.N.Car. 41.00; *see* Fed.R.Crim.P. 43(c)(2).

Another rule indicates that any motion requesting that the prisoner be brought to the courthouse for a particular proceeding be made at least fifteen days before the date of the proceeding unless a shorter time is permitted by the court upon good cause shown. D.Mont. 327-1. Another rule presumes the presence of the defendant unless otherwise indicated on the record. S.D.Ga. 243.1.

There are four rules that repeat Rule 43(a) which sets forth those circumstances under which the defendant must be present. D.Conn. 3; E.D.N.Y. 2; S.D.N.Y. 2; D.Vt. Sample Waiver. These rules are simply unnecessary.

Rule 43(a) states that the presence of the defendant is required at certain enumerated proceedings "except as otherwise provided by this rule." Fed.R.Crim.P. 43(a). Three courts have local rules that require the presence of the defendant in additional circumstances. D.Conn. 3 ("and at any time required by the Court"); E.D.N.Y. 2 ("and at any time upon notice from the United States attorney"); S.D.N.Y. 2 ("and at any time upon notice from the United States attorney"). To the extent these rules require the presence of the defendant when the defendant is absent, as permitted by the other sections of Rule 43, these local rules are inconsistent with Rule 43.

Rule 44. Right to and Assignment of Counsel

Forty courts have local rules that supplement Rule 44 of the Federal Rules of Criminal Procedure. All of these directives should remain subject to local variation.

Rule 44 states that defendants unable to obtain counsel shall have counsel appointed. Fed.R.Crim.P. 44(a). It explains that the procedure for such appointment shall be "those provided by law and by local rules of court

established pursuant thereto." *Id.* at (b). Lastly, the rule provides that, when there is joint representation, the court must inquire and advise each defendant of the right to effective assistance of counsel. *Id.* at (c).

The procedure for the appointment of counsel is set forth in local rules or plans of each district court, as required by Rule 44(b). The Criminal Justice Act requires that each district court develop a plan to provide representation to those financially unable to do so or to certain enumerated defendants who may be financially able to secure counsel:

> Each United States district court, with the approval of the judicial council of the circuit, shall place in operation throughout the district a plan for furnishing representation for any person financially unable to obtain adequate representation in accordance with this section. Representation under each plan shall include counsel and investigative, expert, and other services necessary for adequate representation
>
> 18 U.S.C. §3006A(a).

Twenty-five of the jurisdictions submitted Criminal Justice Act Plans approved by the judicial council of the respective circuit. *E.g.*, D.Colo. Plan; S.D.Ohio Plan; W.D.N.Y. Plan.

Twenty-six district courts have local rules supplementing other aspects of Rule 44. For example, fifteen jurisdictions have local rules that explain the required procedure for making an appearance in behalf of a party. *E.g.*, D.Conn. 2; D.N.Mar.Isl. 320; D.P.R. 402. Nine districts have rules that explain the procedure to withdraw from representation. *E.g.*, D.Wyo. 217; D.D.C. 301; E.D.Mich. 244.1. Six courts have directives that set forth the procedure for submitting vouchers for payment. *E.g.*, D.Haw. 304-7; D.Utah 301; N.D.Tex. MO 9. All of these rules are appropriate as local rules.

Rule 45. Time

Ten jurisdictions have local rules concerning time. Rules in nine of these courts should remain subject to local variation. Rules in two jurisdictions repeat portions of Rule 45. Lastly, one court has a rule that is inconsistent with that Federal Rule.

The rules in nine district courts are appropriate supplements to existing law. Six courts have local rules that supplement Rule 45 of the Federal Rules of Criminal Procedure on time. For example, Rule 45(d) permits the court by rule or order to change certain time constraints. Fed.R.Crim.P. 45(d). Some courts set forth different time periods. *E.g.*, E.D.Cal. 430(i). Other courts set forth the required form for motions for enlargements pursuant to Rule 45(b). *E.g.*, N.D.Ind. 105.1; S.D.Ind. 7. Five jurisdictions have local rules that discuss the Speedy Trial Act (18 U.S.C. §3161). *E.g.*, D.Mont. 340; N.D.Cal. 340-2. The Speedy Trial Act requires that any continuance granted by a judge be based on findings that "the ends of justice served by taking such action outweigh the best interest of the public and the defendant in a speedy trial." 18 U.S.C. §3161(h)(8). The statute further requires that the record contain specific findings establishing this result:

> No such period of delay resulting from a continuance granted by the court in accordance with this paragraph shall be excludable under this subsection unless the court sets forth, in the record of the case, either orally or in writing, its reasons for finding that the ends of justice served by the granting of such continuance outweigh the best interests of the public and the defendant in a speedy trial.
>
> *Id.*

Five of the jurisdictions have local rules that require the parties to explain why a particular request for a continuance is excludable delay under the statute. *E.g.*, N.D.Cal. 340-2; N.D.N.Y. 45.1; D.Mont. 340-2.

Two courts have local rules that repeat existing law. One of the rules repeats, in substance, the first sentence of Rule 45(a), that "the day of the act from which the designated period of time begins to run shall not be included." Fed.R.Crim.P. 45(a). S.D.Cal. GO 155. Another rule repeats a portion of Rule 45(b), that a request for extension of time made after the period has expired must be by motion and show excusable neglect. D.Nev. 150. These rules are unnecessary.

A directive in one jurisdiction is inconsistent with the second sentence of Rule 45(a) which indicates that "[t]he last day of the period so computed shall be included, unless it is a Saturday, a Sunday ..., in which event the period runs until the end of the next day which is not one of the aforementioned days." Fed.R.Crim.P. 45(a); *see* S.D.Cal. GO 155. The local rule indicates that "[t]he last day of the period so computed including Saturday, Sunday or legal holiday shall be included." S.D.Cal. GO 155.

Rule 46. Release from Custody

Forty jurisdictions have local rules supplementing Rule 46 of the Federal Rules of Criminal Procedure. Rules in all of these courts should remain local. In addition, rules in four of the jurisdictions repeat existing law and should be rescinded.

Rule 46 covers several broad topics. It provides for pretrial release pursuant to the Bail Reform Act (18 U.S.C. §§3141 *et seq.*). Fed.R.Crim.P. 46(a). It also discusses release during trial and pending sentence and appeal. *Id.* at (b) and (c). It explains, generally, the procedure for securing bail and for exoneration of the bond. *Id.* at (d), (e), and (f). It explains that the detention of persons pending trial will be supervised. *Id.* at (g). Lastly, it permits forfeiture of property in certain circumstances, and it requires

adherence to Federal Rule 26.2, concerning production of statements, at revocation hearings. *Id.* at (h) and (i).

The local rules appropriately supplement many of these topics. For example, eight courts have rules that explain who within the district will supervise and provide the pretrial services. *E.g.*, M.D.Fla. 4.19; M.D.Ala. 29; W.D.Ark. GO 10. Twenty-nine of the courts have local rules discussing bonds. Several courts have rules explaining what the bond can be. *E.g.*, E.D.Tex. GO 92-25 (real or personal property debts cannot be collateral); E.D.N.Car. 10.00 (real property can be security); E.D.Tenn. 83.10 (real property can be bond). Other rules explain who can be a surety. *E.g.*, M.D.La. 5.11 (court officers not sureties); D.Mont. 305 (no officers of court, member of bar, nor office associates or employees thereof as surety); E.D.Pa. 46 no attorney or officer of court as surety). Another court has a rule discussing how to file an appearance bond when a deed of trust is used to secure it. E.D.N.Car. 42.02. Lastly, many courts have rules explaining the procedure to obtain approval of a bond. *E.g.*, D.N.Dak. 24; E.D.N.Y. 5; S.D.N.Y. 5. Rules in seven courts set forth conditions of release. *E.g.*, D.D.C. 303; E.D.Tex. GO 88-5.

Four courts have local rules that repeat various portions of Rule 46. C.D.Cal. 5.1 (repeats 46(a)), 5.6 (repeats 46(f)); N.D.Ga. 505-5 (repeats 46(a)); E.D.Mich. 246,1 (repeats 46(a)); D.Ariz. 4.6 (repeats 46(d)), 4.7 (repeats 46(e)). These rules are simply unnecessary.

Rule 47. Motions

Twenty-three courts have local rules discussing the content of and procedure for motions in a criminal action. Rules in all of these jurisdictions should remain. In addition, three of the courts have a rule that the Advisory

Committee on Criminal Rules may want to consider for incorporation into the Federal Rules. Lastly, two courts have rules that repeat existing law and should be rescinded.

Rule 47 regulates motion practice in the district courts. *See* Fed.R.Crim.P. 47. All of the jurisdictions have local rules that supplement this Federal Rule. Many of the rules set forth the form that the motions should take. *E.g.*, D.P.R. 406; N.D.W.Va. 3.09; D.Colo. 7.1G. Other rules explain the method to secure an oral argument. *E.g.*, E.D.La. 2.14; W.D.N.Y. 27; D.Utah 317. Many of the rules also explain the time limits within which memoranda, both in support and in opposition, to motions must be filed. *E.g.*, D.Mont. 320-2; E.D.Pa. 20(g); N.D.W.Va. 3.09. All of these rules are appropriate supplements to Rule 47.

Three courts have rules that require the parties to confer, or attempt to confer, before any motion is filed in an effort to reach an agreement. N.D.Tex. 5.1; D.Mont. 320-2; M.D.Pa. Sample Order. Such a conference is also mandated in some jurisdictions prior to filing discovery motions. *See* discussion at Rule 16, *supra*. The Advisory Committee on Criminal Rules may want to consider whether such an amendment to the Federal Rules would be helpful.

Two district courts have local rules that repeat either portions of Rule 47 or Rule 49 of the Federal Rules of Criminal Procedure on service and filing of papers. Fed.R.Crim.P. 47, 49; *see* W.D.Tenn. 12 (repeats Rule 47, that a motion must state the grounds); D.Utah 317 (repeats Rule 47 that the motion contain the grounds and Rule 49(a) that motions must be served on the opposing party). These rules are simply unnecessary.

Rule 48. Dismissal

Five courts have local rules addressing the dismissal of an indictment, information, or complaint. Rules in three jurisdictions are appropriate supplements to Rule 48 of the Federal Rules of Criminal Procedure. Rules in two courts repeat existing law. A rule in one of the jurisdictions is inconsistent with Rule 48 and should be rescinded.

The local rules in three courts discuss dismissal and sanctions, generally. D.Ariz. 4.15; N.D.Ga. 530-1; W.D.N.Y. 17(a). One of the rules indicates that the court will issue a notice for hearing on the appropriateness of a dismissal of a criminal proceeding where no action has been taken for six or more months. D.Ariz. 4.15. Another rule indicates that the government must notify the clerk and United States marshal in writing of its intent to abandon the prosecution of any criminal proceeding. N.D.Ga. 530-1. Another rule indicates that sanctions, short of dismissal, are available for failure to prosecute or for abandonment of the case. W.D.N.Y. 17(a).

Rules in two of the courts repeat Rule 49(a) of the Federal Rules of Criminal Procedure, that motions to dismiss must be served. Fed.R.Crim.P. 49(a); *see* N.D.W.Va. 3.05; S.D.W.Va. 1.02. These rules are simply unnecessary.

One rule indicates that an appropriate order for sanctions may be entered if the court determines there has been an abandonment of the case or a failure to prosecute. W.D.N.Y. 17(a). To the extent this directive relates to a criminal proceeding and "an appropriate order" is a dismissal of the criminal proceeding, the rule is inconsistent with Rule 48(a) which requires that a dismissal not be filed during the trial "without the consent of the defendant." Fed.R.Crim.P. 48(a).

Rule 49. Service and Filing of Papers

Fourteen jurisdictions have local rules concerning the service and filing of papers. Rules in nine of these courts should remain local. Rules in seven jurisdictions repeat existing law and should be rescinded. Rules in two courts are inconsistent with existing law. In addition, it is recommended that the Advisory Committee on Criminal Rules consider amending Rule 49 of the Federal Rules of Criminal Procedure to conform with other statutory amendments.

Rule 49 explains when and how service and notice are made upon parties and how documents are filed with the court. Fed.R.Crim.P. 49. The rules in nine of the district courts, generally, explain the form such documents must take and are appropriate supplements to this Federal Rule. *E.g.*, S.D.Ga. 249.1; E.D.N.Car. 3.06; D.N.J. 8.

Rule 49 (d) requires that papers be filed with the court "in the manner provided in civil actions." Fed.R.Crim.P. 49(d). Rule 5(d) of the Federal Rules of Civil Procedure requires that "[a]ll papers after the complaint required to be served upon a party, together with a certificate of service, shall be filed with the court ...." Fed.R.Civ.P. 5(d). Six of the repeating rules in the seven courts repeat Rule 5(d), that a certificate of service is required. *E.g.*, E.D.Ky. 7; M.D.La. 1.09. Another rule repeats Rule 9 of the Federal Rules of Criminal Procedure, concerning the information, and Rule 49(d), by requiring that informations be filed. C.D.Cal. 3.2.

Two courts have local rules that indicate that "the clerk may refuse to accept pleadings and other documents not conforming to the provisions of these rules or the Federal Rules of Civil or Criminal Procedure." E.D.La. 1.08; W.D.La. 1.08; W.D.La. 2.16. Rule 5(e) of the Federal Rules of Civil Procedure reads, in relevant part:

> The clerk shall not refuse to accept for filing an 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.
>
> Fed.R.Civ.P. 5(e).

To the extent the three local rules intend to permit the clerk to refuse to accept documents for filing that do not conform with existing local rules on form, they are inconsistent with Rule 5(e) and should be rescinded.

Rule 49(e) concerns the filing of a dangerous offender notice. Fed.R.Crim.P. 49(e). It makes specific reference to two statutes: "A filing with the court pursuant to 18 U.S.C. §3575(a) or 21 U.S.C. §849(a) shall be made by filing the notice with the clerk of the court." *Id.* Subsection 3575(a) of Title 18 referred to dangerous special offenders and subsection 849(a) of Title 21 referred to dangerous special drug offenders. 18 U.S.C. §3575(a); 21 U.S.C. §849(a). Both of these statutes were repealed effective November 1, 1987 in connection with the Sentencing Reform Act (18 U.S.C. §§3551 *et seq.)*. The two statutes that have, in essence, replaced these repealed provisions are 28 U.S.C. §994(i)(2) and 21 U.S.C. §851(a)(1). Rule 49(e) requires that this dangerous offender notice only be disclosed to the presiding judge pursuant to certain guidelines in the Rule and the named statutes. Subsection (a)(1) of section 851, however, does not require nondisclosure to the judge:

> No person who stands convicted of an offense under this part shall be sentenced to increased punishment by reason of one or more prior convictions, unless before trial, or before entry of a plea of guilty, the United States attorney files an information with the court (and serves a copy of such information on the person or counsel for the person) stating in writing the previous convictions to be relied upon.

The Advisory Committee on Criminal Rules may want to examine Rule 49 and determine whether it is appropriate to amend Rule 49 to conform to these statutes.

Rule 50. Calendars; Plans for Prompt Disposition

Fifty-two courts have rules supplementing Rule 50 of the Federal Rules of Criminal Procedure. All of these rules are appropriate as local directives.

Rule 50 indicates that courts may place criminal proceedings on a calendar, with preference for criminal proceedings. Fed.R.Crim.P. 50(a). The Rule also requires each district court to submit a plan for the prompt disposition of criminal cases in accordance with the Speedy Trial Act (18 U.S.C. §§3161-3174). Fed.R.Crim.P. 50(b).

The Speedy Trial Act requires that the plan

> be submitted for approval to a reviewing panel consisting of the members of the judicial council of the circuit and either the chief judge of the district court whose plan is being reviewed or such other active judge of that court as the chief judge of that district court may designate.
>
> 28 U.S.C. §3165(c).

Thirty-seven district courts submitted Speedy Trial Act Plans. *E.g.*, D.Ariz. Plan; S.D.Iowa Plan; E.D.La. Plan.

Thirty-three jurisdictions have local rules that explain how cases are assigned and placed on a calendar. *E.g.*, E.D.Mich. 100.2; D.N.J. 11; D.Conn. 11. These rules are appropriate supplements to Rule 50.

Rule 51. Exceptions Unnecessary

There are no local criminal rules directly relating to this Federal Rule.

Rule 52. Harmless Error and Plain Error

Again, there are no local criminal rules directly relating to this Federal Rule.

Rule 53. Regulation of Conduct in the Court Room

Forty-eight courts have rules that supplement Rule 53 concerning the regulation of conduct in the courtroom. All of these rules should remain subject to local variation.

The rules address several topics. Twenty-seven of the courts have rules seeking to find a balance between free press and fair trial concerns. *E.g.*, D. Minn. 83.2; S.D.N.Y. 7; W.D.N.Car. 11; D.N.Dak. 29. Another eleven courts have rules that specifically regulate cameras and broadcasting. *E.g.*, E.D.N.Car. 8.00; D.Wyo. 77; D.Haw. 130-1. Four of the jurisdictions have local rules regulating security in the courtroom (*e.g.*, E.D.La. 21; D.Colo. 83.4) while another three courts specifically regulate the use of weapons in the courtroom or the courthouse (*e.g.*, W.D.Ark. GO 6; N.D.Ga. 125). Twenty of the courts have local directives that regulate courtroom decorum. *E.g.*, W.D.Ky. 11; D.Nev. 125; S.D.Tex. 19. All of these rules are appropriate as local directives.

Rule 54. Application and Exception

There are no local criminal rules directly relating to this Federal Rule.

Rule 55. Records

Again, there are not local rules supplementing or addressing this Federal Rule.

Rule 56. Courts and Clerks

Twenty-two courts have local rules relating, in some manner, to Rule 56. Rules in all of the courts should remain local. In addition, three jurisdictions have local rules that repeat existing law and should be rescinded.

Twenty-two jurisdictions have rules that should remain subject to local variation. Rules in eighteen courts discuss the method used to maintain custody and dispose of exhibits in cases. *E.g.*, W.D.Ky. 13; D.Nev. 170; D.N.J. 26. Most of them discuss who maintains control over the exhibits both before and after trial, how and under what circumstances exhibits may be removed from the court, and the disposition of sensitive exhibits such as monies, drugs, and weapons. Other rules are supplement Rule 56 by explaining the hours of the court and the procedure for filing when the courthouse is not physically open. *E.g.*, D.Haw. 370; E.D.N.Car. 3.04. All of these rules are appropriate supplements to the Federal Rules.

Three courts have local rules that repeat portions of the Federal Rules. E.D.La. 15; W.D.La. 15; E.D.N.Car. 3.04. For example, all three of the district courts have rules that repeat, in substance, the first sentence of Rule 56, that the court is deemed always open. *Id.*; *see* Fed.R.Crim.P. 56. In addition, two courts have rules that repeat a portion of Rule 6(a), that a grand jury will be summoned as needed. E.D.La. 15; W.D.La. 15; *see* Fed.R.Crim.P. 6(a). These rules are unnecessary.

Rule 57. Rules by District Courts

There are no local criminal rules directly relating to this Federal Rule.

Rule 58. Procedure for Misdemeanors and Other Petty Offenses

Thirty-six jurisdictions have local rules concerning the procedure of criminal actions involving misdemeanors and other petty offenses pursuant to Rule 48 of the Federal Rules of Criminal Procedure. Rules in all of these courts should remain local. In addition, portions of rules in nine district courts are inconsistent with existing law and should be stricken.

Rule 58 explains in some detail how proceedings involving misdemeanors are conducted either before magistrate judges or district court judges. *See* Fed.R.Crim.P. 58. It was amended in 1990 to incorporate rules that, prior to that time, had been entitled "Rules of Procedure for the Trial of Misdemeanors before United States Magistrates" and had been physically located apart from the Federal Rules of Criminal Procedure. The Advisory Committee Notes to this Rule indicate:

> This new rule is largely a restatement of the Rules of Procedure for the Trial of Misdemeanors before United States Magistrates which were promulgated in 1980 to replace the Rules for the Trial of Minor Offenses before United States Magistrates (1970). The Committee believed that a new single rule should be incorporated into the rules of Criminal Procedure where those charged with its execution could readily locate it and realize its relationship with the other Rules. A number of technical changes have been made throughout the rule and unless otherwise noted, no substantive changes were intended in those amendments.
>
> Fed.R.Crim.P. 58 Advisory Committee Notes to 1990 Amendments.

All of the jurisdictions have local rules that appropriately supplement this Federal Rule. Most of these rules authorized magistrate judges to exercise jurisdiction over misdemeanors and other petty offenses. *E.g.*, M.D.Ala. 32; N.D.Cal. 405; W.D.N.Y. 29(a). Some of the courts have rules that explain the procedure to appeal a conviction by a magistrate judge. *E.g.*, E.D.Cal. 422; D.Haw. 303-2; D.Utah 316. Fifteen courts have local rules

that authorize the payment of a fixed sum in lieu of appearance pursuant to subsection (d). Fed.R.Crim.P. 58(d); *see e.g.*, W.D.N.Car. 12; W.D.N.Y. 41; E.D.Tex. GO 94-21.

Nine courts have local rules that refer to the Rules of Procedure for the Trial of Misdemeanors before United States Magistrates for the correct practice before magistrate judges. *E.g.*, E.D.Pa. 17; N.D.Ga. 540-1; D.Haw. 303-2. Because these Rules are now obsolete, the local rule references should be abolished.

Rule 59. Effective Date

There are no local criminal rules directly relating to this Federal Rule.

Rule 60. Title

There are no local criminal rules directly relating to this Federal Rule.

Other—Duties of Magistrates

Thirty-two courts have local rules that authorize the magistrate judges in the courts to exercise jurisdiction over certain types of cases. *E.g.*, D.Utah 316; S.D.Tex. 14; D.N.Dak. 28. All of these rules are appropriate supplements to the Magistrates' Act (28 U.S.C. §§631-636).

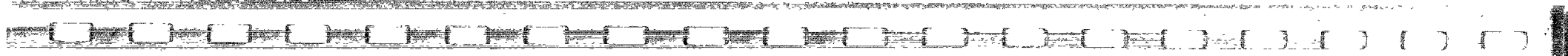
Other—Activities of the Clerk

One court has a local rule explaining the responsibility of the clerk to provide for service upon the United States attorney, the defendant, and all counsel of the notice of appeal and to send copies of the notice, along with the docket entries, to the court of appeals. D.Conn. 7. This directive only explains the duties of the clerk; such information is not necessary for the

litigants and, therefore, is not needed in a local rule. This information may be better placed in an internal operating procedure or other handbook for the clerk.

Other—Juvenile Delinquency Proceedings

A rule in one jurisdiction simply repeats the applicability of 18 U.S.C. §§5031-5038, the Federal Rules of Criminal Procedure, and other rules, statutes, and courts decisions in proceedings involving juveniles. This rule is unnecessary.



M.D. Ala.

Rule	Location in Report	Project Result
12	Rule 56. Courts and Clerks	Local Variation
26	Rule 44. Right to and ...	Local Variation
27	Rule 44. Right to and ...	Local Variation
28	Rule 32. Sentence and ...	Local Variation
30	Rule 12. Pleadings and ...	To Advisory Committee
30	Rule 12. Pleadings and ...	Local Variation
30	Rule 12. Pleadings and ...	Possible Inconsistency
31	Rule 11. Pleas	Local Variation
31	Rule 11. Pleas	Possible Inconsistency
32	Rule 58. Procedure for ...	Local Variation
33	Rule 32. Sentence and ...	Local Variation
33	Rule 32. Sentence and ...	Possible Repetition
33	Rule 32. Sentence and ...	Possible Inconsistency

Rule	Location in Report	Project Result
SO	Rule 32. Sentence and ...	Local Variation
SO	Rule 32. Sentence and ...	Possible Inconsistency
SO	Rule 32. Sentence and ...	Possible Repetition

D. Ariz.

	Rule	Location in Report	Project Result
	4.10	Rule 24. Trial Jurors	Local Variation
	4.1	Rule 50. Calendars; Plans...	Local Variation
	4.11	Rule 16. Discovery and ...	Local Variation
	4.12	Rule 12.2. Notice of ...	Local Variation
	4.13	Rule 53. Regulation of ...	Local Variation
	4.15	Rule 48. Dismissal	Local Variation
	4.16	Rule 50. Calendars; Plans...	Local Variation
	4.17	Rule 30. Instructions	Local Variation
	4.17	Rule 30. Instructions	To Advisory Committee
	4.17	Rule 30. Instructions	Possible Inconsistency
	4.2	Rule 9. Warrant/Summons	Possible Repetition
	4.3	Rule 10. Arraignment	Local Variation
	4.4	Rule 10. Arraignment	Local Variation
	4.5	Rule 46. Release from ...	Local Variation
	4.6	Rule 46. Release from ...	Local Variation
	4.6	Rule 46. Release from ...	Possible Repetition
	4.7	Rule 46. Release from ...	Local Variation
	4.7	Rule 46. Release from ...	Possible Repetition
	4.8	Rule 32. Sentence and ...	Local Variation
	4.8	Rule 32. Sentence and ...	Possible Repetition
	4.9	Rule 32.1. Revocation or ...	Local Variation
GO	190	Rule 5. Initial Appearance..	Local Variation
GO	190	Rule 10. Arraignment	Possible Inconsistency
GO	194	Rule 32. Sentence and ...	Local Variation
GO	194	Rule 32. Sentence and ...	Possible Inconsistency

	Rule	Location in Report	Project Result
GO	195	Rule 32.1. Revocation or ...	Local Variation
GO	195	Rule 46. Release from ...	Local Variation
GO	201	Rule 32.1. Revocation or ...	Local Variation
GO	221	Rule 32. Sentence and ...	Local Variation
GO	226	Rule 4. Arrest Warrant ...	Local Variation
Plan		Rule 24. Trial Jurors	Local Variation
Plan		Rule 50. Calendars; Plans...	Local Variation

	Rule	Location in Report	Project Result
GO	1	Rule 38. Stay of Execution	Local Variation
GO	4	Rule 32. Sentence and ...	Local Variation
GO	6	Rule 53. Regulation of ...	Local Variation
GO	7	Rule 41. Search and Seizure	Local Variation
GO	10	Rule 46. Release from ...	Local Variation
GO	18	Rule 32.1. Revocation or ...	Local Variation
GO	19	Rule 4. Arrest Warrant ...	Local Variation
GO	20	Rule 32. Sentence and ...	Local Variation
GO	22	Other-Duties of Magistrates	Local Variation
Order		Rule 30. Instructions	Local Variation
Order		Rule 30. Instructions	To Advisory Committee
Order		Rule 30. Instructions	Possible Inconsistency
Order	(12/2/93)	Rule 50. Calendars; Plans...	Local Variation
Plan		Rule 24. Trial Jurors	Local Variation
Plan		Rule 44. Right to and ...	Local Variation

Rule	Location in Report	Project Result
1.0	Rule 1. Scope	Model Local Rule
1.1	Rule 1. Scope	Model Local Rule
1.2	Rule 1. Scope	Possible Repetition
1.3	Rule 1. Scope	Model Local Rule
1.4	Rule 1. Scope	Model Local Rule
1.5	Rule 6. The Grand Jury	Local Variation
2.1	Rule 50. Calendars; Plans...	Local Variation
2.2	Rule 50. Calendars; Plans...	Local Variation
2.3	Rule 8. Joinder ...	Local Variation
3.1	Rule 9. Warrant/Summons	Possible Repetition
3.2	Rule 49. Service and ...	Possible Repetition
3.3	Rule 49. Service and ...	Local Variation
3.4	Rule 49. Service and ...	Local Variation
4.1	Rule 10. Arraignment	Local Variation
4.2	Rule 10. Arraignment	Local Variation
4.3	Rule 10. Arraignment	Local Variation
4.4	Rule 9. Warrant/Summons	Possible Inconsistency
4.4.1	Rule 9. Warrant/Summons	Possible Repetition
4.5	Rule 9. Warrant/Summons	Possible Inconsistency
4.6	Rule 9. Warrant/Summons	Possible Repetition
5.1	Rule 46. Release from ...	Local Variation
5.1	Rule 46. Release from ...	Possible Repetition
5.2	Rule 46. Release from ...	Local Variation
5.3	Rule 46. Release from ...	Local Variation
5.4	Rule 46. Release from ...	Local Variation

Rule	Location in Report	Project Result
5.5	Rule 46. Release from ...	Local Variation
5.6	Rule 46. Release from ...	Possible Repetition
6.1	Rule 32. Sentence and ...	Local Variation
6.2	Rule 32. Sentence and ...	Local Variation
6.3	Rule 32. Sentence and ...	Local Variation
6.4	Rule 32. Sentence and ...	Local Variation
7.1	Rule 17. Subpoena	Local Variation
7.2	Rule 17. Subpoena	Local Variation
7.3	Rule 17. Subpoena	Local Variation
7.4	Rule 17. Subpoena	Local Variation
7.5	Rule 17. Subpoena	Local Variation
8.1	Rule 6. The Grand Jury	Local Variation
8.1.4	Rule 6. The Grand Jury	Possible Repetition
8.2	Rule 6. The Grand Jury	Local Variation
8.2.2	Rule 6. The Grand Jury	Possible Repetition
8.3	Rule 6. The Grand Jury	Possible Repetition
8.4	Rule 6. The Grand Jury	Local Variation
8.4	Rule 24. Trial Jurors	Local Variation
8.5	Rule 24. Trial Jurors	Local Variation
9.1	Rule 12. Pleadings and ...	Local Variation
9.2	Rule 12. Pleadings and ...	Local Variation
9.3	Rule 12. Pleadings and ...	Local Variation
9.4	Rule 12. Pleadings and ...	Local Variation
10.1	Rule 32.1. Revocation or ...	Local Variation
10.2	Rule 32.1. Revocation or ...	Local Variation

	Rule	Location in Report	Project Result
	10.3	Rule 32.1. Revocation or ...	Local Variation
	10.4	Rule 32.1. Revocation or ...	Local Variation
	10.5	Rule 32.1. Revocation or ...	Local Variation
	10.6	Rule 32.1. Revocation or ...	Local Variation
	10.7	Rule 32.1. Revocation or ...	Local Variation
	10.8	Rule 32.1. Revocation or ...	Local Variation
	11.1	Rule 4. Arrest Warrant ...	Possible Inconsistency
	11.1	Rule 4. Arrest Warrant ...	To Advisory Committee
	12	Rule 38. Stay of Execution	Local Variation
	13	Rule 47. Motions	Local Variation
	14	Rule 17.1. Pretrial Conf.	Local Variation
	113	Rule 46. Release from ...	Local Variation
GO	224	Rule 50. Calendars; Plans...	Local Variation
Order		Rule 30. Instructions	Local Variation
Order		Rule 30. Instructions	To Advisory Committee
Order		Rule 30. Instructions	Possible Inconsistency
Plan		Rule 24. Trial Jurors	Local Variation
Samp.		Rule 16. Discovery and ...	Possible Repetition
Samp.		Rule 16. Discovery and ...	Local Variation
Samp.		Rule 53. Regulation of ...	Local Variation

E.D. Cal.

Rule	Location in Report	Project Result
162(a)	Rule 23. Trial by Jury ...	Possible Inconsistency
162	Rule 24. Trial Jurors	Local Variation
300	Other-Duties of Magistrates	Local Variation
306	Rule 58. Procedure for ...	Local Variation
400	Rule 50. Calendars; Plans...	Local Variation
401	Rule 8. Joinder ...	Local Variation
402	Rule 18. Place of Pros...	Local Variation
410	Rule 58. Procedure for ...	Local Variation
420	Rule 58. Procedure for ...	Local Variation
421	Rule 58. Procedure for ...	Local Variation
422	Rule 58. Procedure for ...	Local Variation
423	Rule 58. Procedure for ...	Local Variation
430	Rule 47. Motions	Local Variation
430(i)	Rule 45. Time	Local Variation
430	Rule 50. Calendars; Plans...	Local Variation
440	Rule 16. Discovery and ...	Local Variation
440	Rule 16. Discovery and ...	Possible Repetition
450	Rule 17.1. Pretrial Conf.	Local Variation
451	Rule 24. Trial Jurors	Local Variation
451	Rule 24. Trial Jurors	Possible Repetition
451	Rule 30. Instructions	Local Variation
460	Rule 32. Sentence and ...	Local Variation
461	Rule 46. Release from ...	Local Variation
470	Rule 56. Courts and Clerks	Local Variation
480	Rule 35. Correction or ...	Possible Inconsistency

	Rule	Location in Report	Project Result
	480	Rule 35. Correction or ...	Local Variation
AppA		Rule 50. Calendars; Plans...	Local Variation
GO	93	Rule 50. Calendars; Plans...	Local Variation
PA		Rule 11. Pleas	Local Variation
Plan		Rule 24. Trial Jurors	Local Variation
SO		Rule 30. Instructions	To Advisory Committee
SO		Rule 30. Instructions	Possible Inconsistency
SO		Rule 53. Regulation of ...	Local Variation

Rule	Location in Report	Project Result
300-1	Rule 58. Procedure for ...	Local Variation
300-2	Rule 58. Procedure for ...	Local Variation
300-3	Rule 58. Procedure for ...	Local Variation
305-1	Rule 46. Release from ...	Local Variation
305-2	Rule 46. Release from ...	Local Variation
305-3	Rule 46. Release from ...	Local Variation
310-1	Rule 50. Calendars; Plans...	Local Variation
310-2	Rule 50. Calendars; Plans...	Local Variation
310-3	Rule 50. Calendars; Plans...	Local Variation
315-1	Rule 11. Pleas	Local Variation
315-2	Rule 11. Pleas	Local Variation
320-1	Rule 8. Joinder ...	Local Variation
320-2	Rule 8. Joinder ...	Local Variation
320-3	Rule 12. Pleadings and ...	Local Variation
325-1	Rule 17.1. Pretrial Conf.	Local Variation
326-1	Rule 24. Trial Jurors	Local Variation
330-1	Rule 32. Sentence and ...	Local Variation
330-2	Rule 32. Sentence and ...	Local Variation
330-3	Rule 32.1. Revocation or ...	Local Variation
330-4	Rule 32.1. Revocation or ...	Local Variation
335-1	Rule 44. Right to and ...	Local Variation
335-2	Rule 44. Right to and ...	Local Variation
340-1	Rule 45. Time	Local Variation
340-2	Rule 45. Time	Local Variation
405	Rule 58. Procedure for ...	Local Variation

	Rule	Location in Report	Project Result
	405	Other-Duties of Magistrates	Local Variation
	410	Other-Duties of Magistrates	Local Variation
GO	6	Rule 24. Trial Jurors	Local Variation
PA		Rule 11. Pleas	Local Variation
Samp.		Rule 17.1. Pretrial Conf.	Local Variation
Samp.		Rule 53. Regulation of ...	Local Variation

	Rule	Location in Report	Project Result
GO	147-F	Rule 24. Trial Jurors	Local Variation
GO	155	Rule 47. Motions	Local Variation
GO	155	Rule 45. Time	Possible Repetition
GO	155	Rule 45. Time	Possible Inconsistency
GO	155	Rule 50. Calendars; Plans...	Local Variation
GO	168-E	Rule 50. Calendars; Plans...	Local Variation
GO	172	Rule 24. Trial Jurors	Local Variation
GO	262-D	Rule 50. Calendars; Plans...	Local Variation
GO	266	Rule 47. Motions	Local Variation
GO	344	Rule 32. Sentence and ...	Local Variation
GO	345	Rule 32. Sentence and ...	Local Variation
GO	350	Rule 32. Sentence and ...	Local Variation
GO	366-A	Rule 44. Right to and ...	Local Variation
GO	370	Rule 44. Right to and ...	Local Variation
GO	390	Rule 17.1. Pretrial Conf.	Local Variation
GO	400	Rule 17.1. Pretrial Conf.	Local Variation
GO	405	Rule 44. Right to and ...	Local Variation
PA		Rule 11. Pleas	Local Variation

	Rule	Location in Report	Project Result
	7.1(D)	Rule 13. Trial Together...	Local Variation
	7.1G	Rule 47. Motions	Local Variation
	40.1	Rule 11. Pleas	Local Variation
	40.1	Rule 50. Calendars; Plans...	Local Variation
	47.2	Rule 24. Trial Jurors	Local Variation
	72.2	Rule 58. Procedure for ...	Local Variation
	72.2	Other-Duties of Magistrates	Local Variation
	72.5	Rule 58. Procedure for ...	Local Variation
	83.3	Rule 53. Regulation of ...	Local Variation
	83.4	Rule 53. Regulation of ...	Local Variation
GO	1987-5	Rule 32. Sentence and ...	Local Variation
GO	1987-5	Rule 32. Sentence and ...	Possible Inconsistency
GO	1993-5	Rule 13. Trial Together...	Local Variation
Memo		Rule 46. Release from ...	Local Variation
Orders		Rule 32. Sentence and ...	Local Variation
PA		Rule 11. Pleas	Local Variation
Plan		Rule 24. Trial Jurors	Local Variation
Plan		Rule 44. Right to and ...	Local Variation
Plan		Rule 50. Calendars; Plans...	Local Variation
Samp.		Rule 53. Regulation of ...	Local Variation

D. Conn.

Rule	Location in Report	Project Result
2	Rule 44. Right to and ...	Local Variation
3	Rule 43. Presence of the ...	Possible Repetition
3	Rule 43. Presence of the ...	Possible Inconsistency
4	Rule 16. Discovery and ...	Local Variation
4	Rule 17.1. Pretrial Conf.	Local Variation
5	Rule 17. Subpoena	Local Variation
6(a)	Rule 35. Correction or ...	Local Variation
6(a)	Rule 35. Correction or ...	Possible Repetition
6(a)	Rule 35. Correction or ...	Possible Inconsistency
6	Rule 38. Stay of Execution	Local Variation
6	Rule 38. Stay of Execution	Possible Repetition
6	Rule 38. Stay of Execution	Possible Inconsistency
7	Other-Duties of the Clerk	Unnecessary
8	Rule 50. Calendars; Plans...	Local Variation
9	Rule 32. Sentence and ...	Local Variation
9	Rule 32. Sentence and ...	Possible Inconsistency
10	Rule 11. Pleas	Local Variation
11	Rule 50. Calendars; Plans...	Local Variation
12	Rule 50. Calendars; Plans...	Local Variation
13	Rule 53. Regulation of ...	Local Variation
App	Rule 16. Discovery and ...	Local Variation
App	Rule 16. Discovery and ...	Possible Repetition
PA	Rule 11. Pleas	Local Variation
Plan	Rule 50. Calendars; Plans...	Local Variation

Rule	Location in Report	Project Result
301	Rule 44. Right to and ...	Local Variation
302	Rule 6. The Grand Jury	Possible Repetition
303	Rule 46. Release from ...	Local Variation
304	Rule 16. Discovery and ...	Local Variation
305	Rule 17. Subpoena	Local Variation
306	Rule 50. Calendars; Plans...	Local Variation
307	Rule 53. Regulation of ...	Local Variation
307.1	Rule 53. Regulation of ...	Local Variation
308	Rule 53. Regulation of ...	Local Variation
309	Rule 32.1. Revocation or ...	Local Variation
309	Rule 32.1. Revocation or ...	Possible Repetition
310	Rule 56. Courts and Clerks	Local Variation
311	Rule 32. Sentence and ...	Local Variation
311	Rule 32. Sentence and ...	Possible Inconsistency
Plan	Rule 24. Trial Jurors	Local Variation

D. Del.

	Rule	Location in Report	Project Result
	2	Rule 58. Procedure for ...	Local Variation
MRs		Other-Duties of Magistrates	Local Variation
Plan		Rule 24. Trial Jurors	Local Variation
Plan		Rule 50. Calendars; Plans...	Local Variation

Rule	Location in Report	Project Result
4.10	Rule 53. Regulation of ...	Local Variation
4.12	Rule 32. Sentence and ...	Local Variation
4.12	Rule 32. Sentence and ...	Possible Inconsistency
4.19	Rule 46. Release from ...	Local Variation
6.01	Other-Duties of Magistrates	Local Variation
6.03	Rule 58. Procedure for ...	Local Variation
6.04	Other-Duties of Magistrates	Local Variation
Plan	Rule 24. Trial Jurors	Local Variation
Plan	Rule 44. Right to and ...	Local Variation
Plan	Rule 50. Calendars; Plans...	Local Variation

Rule	Location in Report	Project Result
105-3	Rule 18. Place of Pros...	Local Variation
115	Rule 53. Regulation of ...	Local Variation
120	Rule 24. Trial Jurors	Local Variation
125	Rule 53. Regulation of ...	Local Variation
255-2	Rule 30. Instructions	Local Variation
400-1	Rule 6. The Grand Jury	Local Variation
400-2	Rule 6. The Grand Jury	Possible Repetition
400-2	Rule 6. The Grand Jury	Possible Repetition
400-3	Rule 6. The Grand Jury	Local Variation
400-4	Rule 6. The Grand Jury	Possible Repetition
500-1	Rule 58. Procedure for ...	Local Variation
505-1(a)	Rule 40. Commitment to ...	Possible Repetition
505-1(b)	Rule 20. Transfer from...	Possible Repetition
505-2	Rule 5.1. Preliminary Exam	Possible Repetition
505-3	Rule 10. Arraignment	Local Variation
505-3(c)	Rule 10. Arraignment	Possible Repetition
505-4	Rule 11. Pleas	Local Variation
505-5	Rule 46. Release from ...	Local Variation
505-5	Rule 46. Release from ...	Possible Repetition
505-6	Rule 46. Release from ...	Local Variation
510-1	Rule 44. Right to and ...	Local Variation
515-1	Rule 12. Pleadings and ...	Local Variation
515-2	Rule 12. Pleadings and ...	Local Variation
515-2	Rule 12. Pleadings and ...	Possible Repetition
515-3	Rule 12. Pleadings and ...	Local Variation

Rule		Location in Report	Project Result
	515-4	Rule 12. Pleadings and ...	Local Variation
	515-5	Rule 12. Pleadings and ...	Local Variation
	520-1	Rule 16. Discovery and ...	Local Variation
	520-2	Rule 17.1. Pretrial Conf.	Local Variation
	525-1	Rule 50. Calendars; Plans...	Local Variation
	525-2	Rule 23. Trial by Jury ...	Possible Repetition
	525-2	Rule 24. Trial Jurors	Possible Repetition
	525-3	Rule 53. Regulation of ...	Local Variation
	525-4	Rule 53. Regulation of ...	Local Variation
	525-5	Rule 53. Regulation of ...	Local Variation
	525-6	Rule 30. Instructions	Local Variation
	526	Rule 46. Release from ...	Local Variation
	530-1	Rule 48. Dismissal	Local Variation
	535	Rule 32. Sentence and ...	Local Variation
	535	Rule 32. Sentence and ...	Possible Inconsistency
	540-1	Rule 58. Procedure for ...	Possible Inconsistency
	540-2	Rule 58. Procedure for ...	Possible Inconsistency
	905-5	Other-Duties of Magistrates	Local Variation
	910-1	Rule 50. Calendars; Plans...	Local Variation
	990-1	Rule 56. Courts and Clerks	Local Variation
AppA		Rule 24. Trial Jurors	Local Variation
AppC		Rule 50. Calendars; Plans...	Local Variation
AppD		Rule 44. Right to and ...	Local Variation
Order	(4/17/89)	Rule 32. Sentence and ...	Local Variation
PA		Rule 11. Pleas	Local Variation

S.D. Ga.

Rule	Location in Report	Project Result
201.1	Rule 1. Scope	Possible Repetition
212.1	Rule 12. Pleadings and ...	Local Variation
212.2	Rule 12. Pleadings and ...	Local Variation
212.2	Rule 12. Pleadings and ...	To Advisory Committee
212.3	Rule 16. Discovery and ...	Local Variation
212.4	Rule 16. Discovery and ...	Possible Repetition
212.5	Rule 16. Discovery and ...	Possible Repetition
212.6	Rule 16. Discovery and ...	Local Variation
212.7	Rule 12. Pleadings and ...	Local Variation
212.7	Rule 12. Pleadings and ...	To Advisory Committee
216.1	Rule 16. Discovery and ...	Local Variation
216.1	Rule 16. Discovery and ...	Possible Repetition
230.1	Rule 24. Trial Jurors	Local Variation
230.1	Rule 30. Instructions	To Advisory Committee
230.1	Rule 30. Instructions	Possible Inconsistency
232.1	Rule 32.1. Revocation or ...	Local Variation
232.2	Rule 32. Sentence and ...	Local Variation
232.2	Rule 32. Sentence and ...	Possible Inconsistency
232.3	Rule 32. Sentence and ...	Local Variation
232.4	Rule 32. Sentence and ...	Local Variation
232.5	Rule 32. Sentence and ...	Local Variation
232.6	Rule 32. Sentence and ...	Local Variation
243.1	Rule 43. Presence of the ...	Local Variation
244.1	Rule 44. Right to and ...	Local Variation
246.1	Rule 46. Release from ...	Local Variation

Rule	Location in Report	Project Result
249.1	Rule 49. Service and ...	Local Variation
250.1	Rule 50. Calendars; Plans...	Local Variation
250.2	Rule 50. Calendars; Plans...	Local Variation
253.1	Rule 53. Regulation of ...	Local Variation
253.2	Rule 53. Regulation of ...	Local Variation
258	Rule 58. Procedure for ...	Local Variation

D. Haw.

Rule	Location in Report	Project Result
130-1	Rule 53. Regulation of ...	Local Variation
130-2	Rule 53. Regulation of ...	Local Variation
300	Other-Duties of Magistrates	Local Variation
301	Other-Duties of Magistrates	Local Variation
303-1	Rule 58. Procedure for ...	Local Variation
303-2	Rule 58. Procedure for ...	Local Variation
303-2	Rule 58. Procedure for ...	Possible Inconsistency
304	Other-Duties of Magistrates	Local Variation
304-7	Rule 44. Right to and ...	Local Variation
305	Rule 46. Release from ...	Local Variation
310	Rule 4. Arrest Warrant ...	Possible Inconsistency
310	Rule 4. Arrest Warrant ...	To Advisory Committee
312	Rule 44. Right to and ...	Local Variation
313	Rule 44. Right to and ...	Local Variation
320-1	Rule 16. Discovery and ...	Local Variation
320-1	Rule 16. Discovery and ...	Possible Repetition
320-1(e)	Rule 26.2 Production of ...	Local Variation
325-1	Rule 12. Pleadings and ...	Local Variation
325-2	Rule 12. Pleadings and ...	Local Variation
325-3	Rule 12. Pleadings and ...	Local Variation
330	Rule 30. Instructions	Local Variation
330	Rule 30. Instructions	To Advisory Committee
330	Rule 30. Instructions	Possible Inconsistency
340	Rule 17.1. Pretrial Conf.	Local Variation
350	Rule 35. Correction or ...	Local Variation

Rule	Location in Report	Project Result
360	Rule 11. Pleas	Local Variation
360	Rule 32. Sentence and ...	Local Variation
360	Rule 32. Sentence and ...	Possible Inconsistency
370	Rule 56. Courts and Clerks	Local Variation
Order	Rule 30. Instructions	Local Variation
Plan	Rule 24. Trial Jurors	Local Variation
Plan	Rule 44. Right to and ...	Local Variation
Plan	Rule 50. Calendars; Plans...	Local Variation

	Rule	Location in Report	Project Result
	3.1	Rule 32. Sentence and ...	Local Variation
	3.2	Rule 16. Discovery and ...	Local Variation
	3.3	Rule 32. Sentence and ...	Local Variation
	3.3	Rule 32. Sentence and ...	Possible Inconsistency
	3.4	Rule 44. Right to and ...	Local Variation
Plan		Rule 24. Trial Jurors	Local Variation
Plan		Rule 50. Calendars; Plans...	Local Variation
Samp.		Rule 17.1. Pretrial Conf.	Local Variation

Rule	Location in Report	Project Result
21	Rule 50. Calendars; Plans...	Local Variation
24	Rule 32. Sentence and ...	Local Variation
24	Rule 32. Sentence and ...	Possible Inconsistency

Rule	Location in Report	Project Result
100.1	Rule 46. Release from ...	Local Variation
101.1	Rule 17.1. Pretrial Conf.	Local Variation
102.1	Rule 53. Regulation of ...	Local Variation
103.1	Rule 53. Regulation of ...	Local Variation
105.1	Rule 45. Time	Local Variation
106.1	Rule 50. Calendars; Plans...	Local Variation
107.1	Rule 50. Calendars; Plans...	Local Variation
108.1	Rule 6. The Grand Jury	Local Variation
109.1	Rule 16. Discovery and ...	Local Variation
109.1(b)	Rule 12. Pleadings and ...	Local Variation
110.1	Rule 30. Instructions	Local Variation
110.1	Rule 30. Instructions	To Advisory Committee
110.1	Rule 30. Instructions	Possible Inconsistency

S.D. Ind.

	Rule	Location in Report	Project Result
	1	Rule 46. Release from ...	Local Variation
	2	Rule 17.1. Pretrial Conf.	Local Variation
	3	Rule 53. Regulation of ...	Local Variation
	4	Rule 53. Regulation of ...	Local Variation
	5	Rule 53. Regulation of ...	Local Variation
	7	Rule 45. Time	Local Variation
	9	Rule 50. Calendars; Plans...	Local Variation
	10	Rule 6. The Grand Jury	Local Variation
	10(c)	Rule 6. The Grand Jury	Possible Repetition
	11	Rule 32. Sentence and ...	Local Variation
Form.		Rule 50. Calendars; Plans...	Local Variation
PA		Rule 11. Pleas	Local Variation
Plan		Rule 24. Trial Jurors	Local Variation
Plan		Rule 50. Calendars; Plans...	Local Variation
Samp.		Rule 16. Discovery and ...	Local Variation
Samp.		Rule 16. Discovery and ...	Possible Repetition
Samp.		Rule 45. Time	Local Variation

S.D. Iowa

	Rule	Location in Report	Project Result
	24	Rule 50. Calendars; Plans...	Local Variation
	25	Rule 47. Motions	Local Variation
	26	Rule 44. Right to and ...	Local Variation
	27	Rule 32. Sentence and ...	Possible Repetition
	28	Rule 53. Regulation of ...	Local Variation
	29	Rule 53. Regulation of ...	Local Variation
	30	Rule 5.1. Preliminary Exam	Local Variation
	31	Rule 56. Courts and Clerks	Local Variation
Plan		Rule 24. Trial Jurors	Local Variation
Plan		Rule 44. Right to and ...	Local Variation
Plan		Rule 50. Calendars; Plans...	Local Variation
Samp.		Rule 17.1. Pretrial Conf.	Local Variation

Rule	Location in Report	Project Result
105(b)	Rule 50. Calendars; Plans...	Local Variation
125	Rule 24. Trial Jurors	Local Variation
301	Rule 44. Right to and ...	Local Variation
301.1	Rule 56. Courts and Clerks	Local Variation
302	Rule 44. Right to and ...	Local Variation
303	Rule 50. Calendars; Plans...	Local Variation
304	Rule 53. Regulation of ...	Local Variation
305	Rule 32. Sentence and ...	Local Variation
306	Rule 58. Procedure for ...	Local Variation
PA	Rule 11. Pleas	Local Variation

E.D. Ky.

Rule	Location in Report	Project Result
4	Rule 50. Calendars; Plans...	Local Variation
6	Rule 12. Pleadings and ...	Local Variation
7	Rule 49. Service and ...	Possible Repetition
9	Rule 46. Release from ...	Local Variation
11	Rule 53. Regulation of ...	Local Variation
12	Rule 24. Trial Jurors	Local Variation
13	Rule 56. Courts and Clerks	Local Variation
19	Rule 58. Procedure for ...	Local Variation
19	Rule 58. Procedure for ...	Possible Inconsistency
Emer. Order	Rule 24. Trial Jurors	Local Variation

Rule	Location in Report	Project Result
4	Rule 50. Calendars; Plans...	Local Variation
6	Rule 12. Pleadings and ...	Local Variation
7	Rule 49. Service and ...	Possible Repetition
9	Rule 46. Release from ...	Local Variation
11	Rule 53. Regulation of ...	Local Variation
12	Rule 24. Trial Jurors	Local Variation
13	Rule 56. Courts and Clerks	Local Variation
19	Rule 58. Procedure for ...	Local Variation
19	Rule 58. Procedure for ...	Possible Inconsistency

E.D. La.

Rule	Location in Report	Project Result
1.08	Rule 49. Service and ...	Possible Inconsistency
1.09	Rule 49. Service and ...	Possible Repetition
2.01	Rule 47. Motions	Local Variation
2.02	Rule 47. Motions	Local Variation
2.03	Rule 47. Motions	Local Variation
2.04	Rule 47. Motions	Local Variation
2.05	Rule 47. Motions	Local Variation
2.06	Rule 47. Motions	Local Variation
2.07	Rule 47. Motions	Local Variation
2.11	Rule 16. Discovery and ...	To Advisory Committee
2.11	Rule 16. Discovery and ...	Local Variation
2.14	Rule 47. Motions	Local Variation
3	Rule 50. Calendars; Plans...	Local Variation
4	Rule 47. Motions	Local Variation
5.08	Rule 46. Release from ...	Local Variation
5.11	Rule 46. Release from ...	Local Variation
5.12	Rule 17. Subpoena	Possible Repetition
5.12	Rule 17. Subpoena	Possible Inconsistency
5.13	Rule 17. Subpoena	Local Variation
7	Rule 56. Courts and Clerks	Local Variation
9	Rule 53. Regulation of ...	Local Variation
12	Rule 53. Regulation of ...	Local Variation
13.01	Rule 23. Trial by Jury ...	Possible Inconsistency
13.02	Rule 24. Trial Jurors	Local Variation
13.03	Rule 29.1. Closing Arg.	Local Variation

	Rule	Location in Report	Project Result
	13.04	Rule 24. Trial Jurors	Local Variation
	13.05	Rule 24. Trial Jurors	Local Variation
	15	Rule 24. Trial Jurors	Local Variation
	15	Rule 56. Courts and Clerks	Possible Repetition
	16	Rule 32. Sentence and ...	Local Variation
	16	Rule 32. Sentence and ...	Possible Repetition
	16	Rule 32. Sentence and ...	Possible Inconsistency
	19	Other-Duties of Magistrates	Local Variation
	19.01	Rule 58. Procedure for ...	Local Variation
	19.08	Rule 58. Procedure for ...	Local Variation
	21	Rule 53. Regulation of ...	Local Variation
GO	90-1	Rule 44. Right to and ...	Local Variation
Plan		Rule 50. Calendars; Plans...	Local Variation

M.D. La.

Rule	Location in Report	Project Result
1.09	Rule 49. Service and ...	Possible Repetition
2.01	Rule 47. Motions	Local Variation
2.04	Rule 47. Motions	Local Variation
2.05	Rule 47. Motions	Local Variation
2.06	Rule 47. Motions	Local Variation
2.07	Rule 47. Motions	Local Variation
2.11	Rule 16. Discovery and ...	To Advisory Committee
2.11	Rule 16. Discovery and ...	Local Variation
2.14	Rule 47. Motions	Local Variation
3	Rule 50. Calendars; Plans...	Local Variation
4	Rule 47. Motions	Local Variation
5.11	Rule 46. Release from ...	Local Variation
5.12	Rule 17. Subpoena	Possible Repetition
5.12	Rule 17. Subpoena	Possible Inconsistency
5.13	Rule 17. Subpoena	Local Variation
7	Rule 56. Courts and Clerks	Local Variation
9	Rule 53. Regulation of ...	Local Variation
12	Rule 53. Regulation of ...	Local Variation
13.02	Rule 24. Trial Jurors	Local Variation
13.03	Rule 29.1. Closing Arg.	Local Variation
13.04	Rule 24. Trial Jurors	Local Variation
13.05	Rule 24. Trial Jurors	Local Variation
16	Rule 32. Sentence and ...	Local Variation
16	Rule 32. Sentence and ...	Possible Repetition
16	Rule 32. Sentence and ...	Possible Inconsistency

Rule	Location in Report	Project Result
19	Other-Duties of Magistrates	Local Variation
19.06	Rule 58. Procedure for ...	Local Variation
19.06	Rule 58. Procedure for ...	Possible Inconsistency
21	Rule 53. Regulation of ...	Local Variation

W.D. La.

Rule	Location in Report	Project Result
1.08	Rule 49. Service and ...	Possible Inconsistency
1.09	Rule 49. Service and ...	Possible Repetition
2.01	Rule 47. Motions	Local Variation
2.05	Rule 47. Motions	Local Variation
2.06	Rule 47. Motions	Local Variation
2.07	Rule 47. Motions	Local Variation
2.11	Rule 16. Discovery and ...	To Advisory Committee
2.11	Rule 16. Discovery and ...	Local Variation
2.16	Rule 49. Service and ...	Possible Inconsistency
3	Rule 50. Calendars; Plans...	Local Variation
4	Rule 47. Motions	Local Variation
5.11	Rule 46. Release from ...	Local Variation
5.12	Rule 17. Subpoena	Possible Repetition
5.12	Rule 17. Subpoena	Possible Inconsistency
5.13	Rule 17. Subpoena	Local Variation
7	Rule 56. Courts and Clerks	Local Variation
9	Rule 53. Regulation of ...	Local Variation
12	Rule 53. Regulation of ...	Local Variation
13.01	Rule 23. Trial by Jury ...	Possible Inconsistency
13.02	Rule 24. Trial Jurors	Local Variation
13.03	Rule 29.1. Closing Arg.	Local Variation
13.04	Rule 24. Trial Jurors	Local Variation
13.05	Rule 24. Trial Jurors	Local Variation
15	Rule 24. Trial Jurors	Local Variation
15	Rule 56. Courts and Clerks	Possible Repetition

Rule	Location in Report	Project Result
16	Rule 32. Sentence and ...	Local Variation
16	Rule 32. Sentence and ...	Possible Repetition
16	Rule 32. Sentence and ...	Possible Inconsistency
19	Other-Duties of Magistrates	Local Variation
19.06	Rule 58. Procedure for ...	Local Variation
19.06	Rule 58. Procedure for ...	Possible Inconsistency
21	Rule 53. Regulation of ...	Local Variation

E.D. Mich.

Rule	Location in Report	Project Result
100.1	Rule 50. Calendars; Plans...	Local Variation
100.2	Rule 50. Calendars; Plans...	Local Variation
200.1	Rule 50. Calendars; Plans...	Local Variation
205.1	Rule 5. Initial Appearance..	Local Variation
205.1	Rule 5. Initial Appearance..	Possible Repetition
205.2	Other-Duties of Magistrates	Local Variation
206.1(c)	Rule 6. The Grand Jury	Local Variation
206.1(b)	Rule 6. The Grand Jury	Possible Repetition
206.1(a)	Rule 6. The Grand Jury	Local Variation
210.1	Rule 10. Arraignment	Local Variation
210.1	Rule 10. Arraignment	Possible Repetition
217.1	Rule 17. Subpoena	Local Variation
217.1(c)	Rule 17. Subpoena	Possible Repetition
232.1	Rule 32. Sentence and ...	Local Variation
232.1	Rule 32. Sentence and ...	Possible Repetition
232.1	Rule 32. Sentence and ...	Possible Inconsistency
244.1	Rule 44. Right to and ...	Local Variation
244.2	Rule 44. Right to and ...	Local Variation
246.1	Rule 46. Release from ...	Local Variation
246.1	Rule 46. Release from ...	Possible Repetition
247.1(b)	Rule 12. Pleadings and ...	Local Variation
247.1	Rule 47. Motions	Local Variation
250.1	Rule 50. Calendars; Plans...	Local Variation
255.1	Rule 10. Arraignment	Possible Repetition
258.1	Rule 58. Procedure for ...	Local Variation

	Rule	Location in Report	Project Result
PA		Rule 11. Pleas	Local Variation
Plan		Rule 44. Right to and ...	Local Variation
Plan		Rule 50. Calendars; Plans...	Local Variation
Samp.		Rule 8. Joinder ...	Local Variation
Samp.		Rule 14. Relief from ...	Local Variation
Samp.		Rule 17.1. Pretrial Conf.	Local Variation
SO	90-010	Rule 16. Discovery and ...	Possible Repetition
SO	90-010	Rule 16. Discovery and ...	Local Variation
SO	90-010	Rule 12. Pleadings and ...	Local Variation
SO	90-010	Rule 53. Regulation of ...	Local Variation

D. Minn.

	Rule	Location in Report	Project Result
	83.10	Rule 32. Sentence and ...	Local Variation
	83.10	Rule 32. Sentence and ...	Possible Inconsistency
	83.2	Rule 53. Regulation of ...	Local Variation
	83.9	Rule 58. Procedure for ...	Local Variation
Order		Rule 50. Calendars; Plans...	Local Variation
Plan		Rule 50. Calendars; Plans...	Local Variation

Rule		Location in Report	Project Result
	300-1	Other-Duties of Magistrates	Local Variation
	305	Rule 46. Release from ...	Local Variation
	320-1	Rule 47. Motions	Local Variation
	320-2	Rule 47. Motions	Local Variation
	320-2	Rule 47. Motions	To Advisory Committee
	325	Rule 17.1. Pretrial Conf.	Local Variation
	326-1	Rule 24. Trial Jurors	Local Variation
	326-1	Rule 24. Trial Jurors	Possible Repetition
	326-2	Rule 30. Instructions	Local Variation
	326-3	Rule 53. Regulation of ...	Local Variation
	327-1	Rule 43. Presence of the ...	Local Variation
	327-2	Rule 17. Subpoena	Local Variation
	327-2	Rule 49. Service and ...	Local Variation
	340-1	Rule 45. Time	Local Variation
	340-2	Rule 45. Time	Local Variation
	345-1	Rule 6. The Grand Jury	Possible Inconsistency
Plan		Rule 24. Trial Jurors	Local Variation
Plan		Rule 44. Right to and ...	Local Variation
Plan		Rule 50. Calendars; Plans...	Local Variation
SO	6	Rule 17.1. Pretrial Conf.	Local Variation
SO	7	Rule 24. Trial Jurors	Local Variation

D. Nev.

Rule	Location in Report	Project Result
110-2	Rule 18. Place of Pros...	Local Variation
125	Rule 53. Regulation of ...	Local Variation
150	Rule 45. Time	Local Variation
150	Rule 45. Time	Possible Repetition
170	Rule 56. Courts and Clerks	Local Variation
175	Rule 46. Release from ...	Local Variation
200	Rule 30. Instructions	Local Variation
300	Rule 1. Scope	Model Local Rule
305	Rule 44. Right to and ...	Local Variation
310	Rule 16. Discovery and ...	Local Variation
315	Rule 16. Discovery and ...	Local Variation
315(e)	Rule 12.1. Notice of Alibi	Possible Inconsistency
315(e)	Rule 12.2. Notice of	Possible Inconsistency
315(e)	Rule 12.2. Notice of ...	Local Variation
320	Rule 12. Pleadings and ...	Local Variation
320	Rule 12. Pleadings and ...	Possible Repetition
325	Rule 17. Subpoena	Local Variation
330	Rule 35. Correction or ...	Local Variation
330	Rule 35. Correction or ...	Possible Inconsistency
500	Other-Duties of Magistrates	Local Variation
500-2	Rule 58. Procedure for ...	Local Variation
510	Other-Duties of Magistrates	Local Variation

	Rule	Location in Report	Project Result
	31	Rule 24. Trial Jurors	Local Variation
	31(a)	Rule 23. Trial by Jury ...	Possible Repetition
	35	Rule 53. Regulation of ...	Local Variation
	36	Rule 53. Regulation of ...	Local Variation
	37	Rule 53. Regulation of ...	Local Variation
MRs		Other-Duties of Magistrates	Local Variation
Plan		Rule 24. Trial Jurors	Local Variation
Samp.		Rule 17.1. Pretrial Conf.	Local Variation
Samp.		Rule 32. Sentence and ...	Local Variation
Samp.		Rule 32. Sentence and ...	Possible Inconsistency

D. N.J.

	Rule	Location in Report	Project Result
	8	Rule 49. Service and ...	Local Variation
	11	Rule 50. Calendars; Plans...	Local Variation
	12(F)	Rule 12. Pleadings and ...	Local Variation
	12(F)	Rule 41. Search and Seizure	Local Variation
	17	Rule 44. Right to and ...	Local Variation
	18	Rule 44. Right to and ...	Local Variation
	19	Rule 24. Trial Jurors	Local Variation
	20	Rule 24. Trial Jurors	Local Variation
	26	Rule 56. Courts and Clerks	Local Variation
	35	Rule 46. Release from ...	Local Variation
	36	Rule 53. Regulation of ...	Local Variation
	38	Rule 32. Sentence and ...	Local Variation
	40(B)	Rule 58. Procedure for ...	Local Variation
	40(B)	Rule 58. Procedure for ...	Possible Inconsistency
	40	Other-Duties of Magistrates	Local Variation
	44	Rule 1. Scope	Possible Repetition
PA		Rule 11. Pleas	Local Variation
Plan		Rule 50. Calendars; Plans...	Local Variation
Samp.		Rule 16. Discovery and ...	Possible Repetition
Samp.		Rule 16. Discovery and ...	Local Variation

	Rule	Location in Report	Project Result
	1	Rule 44. Right to and ...	Local Variation
	2	Rule 43. Presence of the ...	Possible Repetition
	2	Rule 43. Presence of the ...	Possible Inconsistency
	3	Rule 16. Discovery and ...	To Advisory Committee
	3	Rule 16. Discovery and ...	Local Variation
	3	Rule 47. Motions	Local Variation
	4	Rule 46. Release from ...	Local Variation
	5	Rule 46. Release from ...	Local Variation
	6	Rule 32. Sentence and ...	Local Variation
	7	Rule 53. Regulation of ...	Local Variation
DOB	50.1	Rule 50. Calendars; Plans...	Local Variation
DOB	50.2	Rule 50. Calendars; Plans...	Local Variation
DOB	50.3	Rule 13. Trial Together...	Local Variation
DOB	50.4	Rule 50. Calendars; Plans...	Local Variation
DOB	50.6	Rule 50. Calendars; Plans...	Local Variation
DOB	50.7	Rule 17.1. Pretrial Conf.	Local Variation
MR	2	Rule 58. Procedure for ...	Local Variation
MRs		Other-Duties of Magistrates	Local Variation
Plan		Rule 24. Trial Jurors	Local Variation
Plan		Rule 44. Right to and ...	Local Variation
Samp.		Rule 45. Time	Local Variation

N.D. N.Y

Rule	Location in Report	Project Result
1.1	Rule 1. Scope	Model Local Rule
5.1	Rule 4. Arrest Warrant ...	Possible Inconsistency
5.1	Rule 4. Arrest Warrant ...	To Advisory Committee
11.1	Rule 11. Pleas	Local Variation
12.1	Rule 47. Motions	Local Variation
17.1	Rule 17. Subpoena	Local Variation
17.1	Rule 17. Subpoena	Possible Repetition
17.1.1	Rule 17.1. Pretrial Conf.	Local Variation
20.1	Rule 20. Transfer from...	Possible Repetition
30.1	Rule 30. Instructions	Local Variation
32.1	Rule 32. Sentence and ...	Local Variation
32.1	Rule 32. Sentence and ...	Possible Inconsistency
44.1	Rule 44. Right to and ...	Local Variation
44.2	Rule 44. Right to and ...	Local Variation
45.1	Rule 45. Time	Local Variation
46.1	Rule 46. Release from ...	Local Variation
57.1	Rule 7. Indictment and...	Local Variation
57.2	Rule 46. Release from ...	Local Variation
58.1(c)	Rule 58. Procedure for ...	Local Variation
58.1	Other-Duties of Magistrates	Local Variation

	Rule	Location in Report	Project Result
	1	Rule 44. Right to and ...	Local Variation
	2	Rule 43. Presence of the ...	Possible Repetition
	2	Rule 43. Presence of the ...	Possible Inconsistency
	3	Rule 16. Discovery and ...	To Advisory Committee
	3	Rule 16. Discovery and ...	Local Variation
	3	Rule 47. Motions	Local Variation
	4	Rule 46. Release from ...	Local Variation
	5	Rule 46. Release from ...	Local Variation
	6	Rule 32. Sentence and ...	Local Variation
	7	Rule 53. Regulation of ...	Local Variation
DOB	10(b)	Rule 12. Pleadings and ...	Local Variation
DOB	10	Rule 47. Motions	Local Variation
DOB	15	Rule 8. Joinder ...	Local Variation
DOB	15	Rule 8. Joinder ...	Possible Repetition
DOB	27	Rule 8. Joinder ...	Local Variation
DOB	8,9,12,	Rule 50. Calendars; Plans...	Local Variation
DOB	1,2,3,6,7	Rule 50. Calendars; Plans...	Local Variation
DOB	13,14,17	Rule 50. Calendars; Plans...	Local Variation
DOB	18,19,20	Rule 50. Calendars; Plans...	Local Variation
DOB	21,22,24	Rule 50. Calendars; Plans...	Local Variation
DOB	25,26,28	Rule 50. Calendars; Plans...	Local Variation
MR	2	Rule 58. Procedure for ...	Local Variation
MRs		Other-Duties of Magistrates	Local Variation
Plan		Rule 44. Right to and ...	Local Variation

W.D. N.Y.

Rule	Location in Report	Project Result
6	Rule 50. Calendars; Plans...	Local Variation
7	Rule 49. Service and ...	Local Variation
17(a)	Rule 48. Dismissal	Local Variation
17(a)	Rule 48. Dismissal	Possible Inconsistency
20	Rule 24. Trial Jurors	Local Variation
27	Rule 47. Motions	Local Variation
27	Rule 47. Motions	Local Variation
28	Other-Duties of Magistrates	Local Variation
29	Rule 50. Calendars; Plans...	Local Variation
29(a)	Rule 58. Procedure for ...	Local Variation
29	Other-Duties of Magistrates	Local Variation
30	Other-Duties of Magistrates	Local Variation
33	Rule 10. Arraignment	Local Variation
33	Rule 17.1. Pretrial Conf.	Local Variation
34	Rule 44. Right to and ...	Local Variation
34	Rule 50. Calendars; Plans...	Local Variation
35(a)	Rule 6. The Grand Jury	Possible Repetition
35(b)	Rule 6. The Grand Jury	Possible Repetition
35	Rule 6. The Grand Jury	Local Variation
35A	Rule 23. Trial by Jury ...	Possible Repetition
35A	Rule 24. Trial Jurors	Possible Repetition
36	Rule 56. Courts and Clerks	Local Variation
37	Rule 50. Calendars; Plans...	Local Variation
38	Rule 32. Sentence and ...	Local Variation
41	Rule 58. Procedure for ...	Local Variation

Rule	Location in Report	Project Result
43	Rule 53. Regulation of ...	Local Variation
Plan	Rule 44. Right to and ...	Local Variation
Samp.	Rule 17.1. Pretrial Conf.	Local Variation

M.D. N.Car.

	Rule	Location in Report	Project Result
	301	Rule 50. Calendars; Plans...	Local Variation
	302(d)	Rule 16. Discovery and ...	Local Variation
	302	Rule 12. Pleadings and ...	Local Variation
	303	Rule 44. Right to and ...	Local Variation
	304	Rule 58. Procedure for ...	Local Variation
	305	Rule 53. Regulation of ...	Local Variation
Order		Rule 24. Trial Jurors	Local Variation
Plan		Rule 50. Calendars; Plans...	Local Variation
SO	4	Rule 56. Courts and Clerks	Local Variation
SO	8	Rule 24. Trial Jurors	Local Variation
SO	11	Rule 6. The Grand Jury	Local Variation
SO	20	Rule 32. Sentence and ...	Local Variation
SO	20	Rule 32. Sentence and ...	Possible Repetition
SO	20	Rule 32. Sentence and ...	Possible Inconsistency
SO	89	Rule 44. Right to and ...	Local Variation

	Rule	Location in Report	Project Result
	5	Rule 53. Regulation of ...	Local Variation
	11	Rule 53. Regulation of ...	Local Variation
	12	Rule 58. Procedure for ...	Local Variation
	12	Rule 58. Procedure for ...	Possible Inconsistency
Order	(9/24/76)	Other-Duties of Magistrates	Local Variation
Order	10/31/75	Rule 6. The Grand Jury	Local Variation
Order	10/31/75	Other-Duties of Magistrates	Local Variation
Samp.		Rule 17.1. Pretrial Conf.	Local Variation

D. N.Dak.

	Rule	Location in Report	Project Result
	7(B)	Rule 18. Place of Pros...	Local Variation
	7(B)	Rule 18. Place of Pros...	Possible Repetition
	8(B)	Rule 6. The Grand Jury	Local Variation
	8(A)	Rule 24. Trial Jurors	Local Variation
	8(B)	Rule 24. Trial Jurors	Local Variation
	8(D)	Rule 24. Trial Jurors	Local Variation
	8(E)	Rule 24. Trial Jurors	Local Variation
	8(G)	Rule 30. Instructions	Local Variation
	8(G)	Rule 30. Instructions	To Advisory Committee
	8(G)	Rule 30. Instructions	Possible Inconsistency
	8(F)	Rule 53. Regulation of ...	Local Variation
	15	Rule 56. Courts and Clerks	Local Variation
	24	Rule 46. Release from ...	Local Variation
	27	Rule 32. Sentence and ...	Local Variation
	27	Rule 32. Sentence and ...	Possible Inconsistency
	28(A)	Rule 58. Procedure for ...	Local Variation
	28	Other-Duties of Magistrates	Local Variation
	29	Rule 53. Regulation of ...	Local Variation
Memo		Rule 16. Discovery and ...	Local Variation
Memo		Rule 12. Pleadings and ...	Local Variation
Plan		Rule 24. Trial Jurors	Local Variation
Plan		Rule 44. Right to and ...	Local Variation

Rule	Location in Report	Project Result
300-1	Rule 46. Release from ...	Local Variation
300-2	Rule 46. Release from ...	Local Variation
300-3	Rule 46. Release from ...	Local Variation
310	Rule 17.1. Pretrial Conf.	Local Variation
320	Rule 44. Right to and ...	Local Variation
330-1	Rule 4. Arrest Warrant ...	Possible Inconsistency
330-1	Rule 4. Arrest Warrant ...	To Advisory Committee
340-1	Rule 12. Pleadings and ...	Local Variation
340-2	Rule 12. Pleadings and ...	Local Variation
340-3	Rule 12. Pleadings and ...	Local Variation
350-1	Rule 35. Correction or ...	Local Variation

N.D. Ohio

	Rule	Location in Report	Project Result
	3:2.1	Rule 6. The Grand Jury	Local Variation
	3:2.2	Rule 6. The Grand Jury	Local Variation
	3:2.3	Rule 7. Indictment and...	Local Variation
	3:3.1	Rule 10. Arraignment	Local Variation
	3:3.2	Rule 10. Arraignment	Possible Repetition
	3:3.3	Rule 17.1. Pretrial Conf.	Local Variation
	3:4.1	Rule 53. Regulation of ...	Local Variation
	3:5.1	Rule 16. Discovery and ...	Local Variation
	3:7.1	Rule 12. Pleadings and ...	Local Variation
	3:7.1	Rule 30. Instructions	Local Variation
	3:8.1	Rule 32. Sentence and ...	Local Variation
	3:8.2	Rule 32. Sentence and ...	Local Variation
	3:8.3	Rule 32. Sentence and ...	Local Variation
	3:8.4	Rule 32.1. Revocation or ...	Local Variation
	3:8.5	Rule 32.1. Revocation or ...	Local Variation
	3:10.1	Rule 40. Commitment to ...	Possible Repetition
	3:10.1	Rule 46. Release from ...	Local Variation
	3:10.2	Rule 46. Release from ...	Local Variation
Plan		Rule 24. Trial Jurors	Local Variation

Rule	Location in Report	Project Result
100	Rule 1. Scope	Model Local Rule
101	Rule 1. Scope	Model Local Rule
102	Rule 32. Sentence and ...	Local Variation
103	Rule 32. Sentence and ...	Local Variation
104	Rule 53. Regulation of ...	Local Variation
105	Rule 58. Procedure for ...	Local Variation
Plan	Rule 24. Trial Jurors	Local Variation
Plan	Rule 44. Right to and ...	Local Variation

	Rule	Location in Report	Project Result
	8	Rule 13. Trial Together...	Local Variation
	8	Rule 50. Calendars; Plans...	Local Variation
	17(H)	Rule 17.1. Pretrial Conf.	Local Variation
	17(G)	Rule 17.1. Pretrial Conf.	Possible Repetition
	36	Rule 41. Search and Seizure	Local Variation
	36	Rule 41. Search and Seizure	Possible Repetition
	38	Rule 50. Calendars; Plans...	Local Variation
	40	Rule 44. Right to and ...	Local Variation
	41	Rule 11. Pleas	Possible Repetition
PA		Rule 11. Pleas	Local Variation
Plan		Rule 24. Trial Jurors	Local Variation
Samp.		Rule 17.1. Pretrial Conf.	Local Variation

D. Or.

Rule	Location in Report	Project Result
PA	Rule 11. Pleas	Local Variation
Plan	Rule 50. Calendars; Plans...	Local Variation

E.D. Pa.

Rule	Location in Report	Project Result
1	Rule 1. Scope	Model Local Rule
2	Rule 1. Scope	Model Local Rule
3	Rule 50. Calendars; Plans...	Local Variation
4(a)	Rule 6. The Grand Jury	Local Variation
4(b)	Rule 6. The Grand Jury	Local Variation
4(c)	Rule 6. The Grand Jury	Possible Inconsistency
4(c)	Rule 6. The Grand Jury	Possible Repetition
4(e)	Rule 6. The Grand Jury	Local Variation
4	Rule 50. Calendars; Plans...	Local Variation
5	Rule 40. Commitment to ...	Local Variation
5	Rule 50. Calendars; Plans...	Local Variation
6	Rule 46. Release from ...	Local Variation
6	Rule 50. Calendars; Plans...	Local Variation
7	Rule 44. Right to and ...	Local Variation
7	Rule 58. Procedure for ...	Local Variation
7	Rule 58. Procedure for ...	Possible Inconsistency
7	Other-Duties of Magistrates	Local Variation
8	Rule 10. Arraignment	Local Variation
9	Rule 16. Discovery and ...	Possible Repetition
9	Rule 16. Discovery and ...	To Advisory Committee
9	Rule 16. Discovery and ...	Local Variation
9	Rule 17. Subpoena	Local Variation
10	Rule 17.1. Pretrial Conf.	Local Variation
11	Rule 12. Pleadings and ...	Local Variation
14	Rule 29. Motion for ...	Local Variation

	Rule	Location in Report	Project Result
	14	Rule 47. Motions	Local Variation
	15	Rule 24. Trial Jurors	Local Variation
	16	Rule 41. Search and Seizure	Local Variation
	17	Rule 49. Service and ...	Local Variation
	17	Rule 58. Procedure for ...	Local Variation
	18	Other Duties of Magistrates	Local Variation
	19	Rule 32. Sentence and ...	Local Variation
	20(g)	Rule 47. Motions	Local Variation
	34(a)	Rule 24. Trial Jurors	Local Variation
	35	Rule 17. Subpoena	Local Variation
	36	Rule 17. Subpoena	Local Variation
	46	Rule 46. Release from ...	Local Variation
Plan		Rule 24. Trial Jurors	Local Variation
SO		Rule 32. Sentence and ...	Local Variation
SO		Rule 32. Sentence and ...	Possible Inconsistency

Rule	Location in Report	Project Result
Plan	Rule 24. Trial Jurors	Local Variation
Plan	Rule 50. Calendars; Plans...	Local Variation
Samp.	Rule 16. Discovery and ...	Local Variation
Samp.	Rule 16. Discovery and ...	Possible Repetition

Rule	Location in Report	Project Result
10.1	Rule 10. Arraignment	Local Variation
12.1	Rule 12. Pleadings and ...	Local Variation
16.1	Rule 16. Discovery and ...	Local Variation
23.1	Rule 23. Trial by Jury ...	Local Variation
24.1	Rule 24. Trial Jurors	Local Variation
24.2	Rule 24. Trial Jurors	Local Variation
32.1	Rule 32. Sentence and ...	Local Variation
32.1	Rule 32. Sentence and ...	Possible Repetition
32.1	Rule 32. Sentence and ...	Possible Inconsistency
35.1	Rule 35. Correction or ...	Local Variation
35.1	Rule 35. Correction or ...	Possible Inconsistency
35.1	Rule 35. Correction or ...	Possible Repetition
46.1	Rule 46. Release from ...	Local Variation
57.1	Rule 50. Calendars; Plans...	Local Variation
57.1.3	Rule 53. Regulation of ...	Local Variation
58.1	Rule 58. Procedure for ...	Local Variation
72.1	Other-Duties of Magistrates	Local Variation
72.1.2	Rule 58. Procedure for ...	Local Variation
Plan	Rule 24. Trial Jurors	Local Variation
Plan	Rule 44. Right to and ...	Local Variation
Plan	Rule 50. Calendars; Plans...	Local Variation

D. P.R.

	Rule	Location in Report	Project Result
	401	Rule 46. Release from ...	Local Variation
	402	Rule 44. Right to and ...	Local Variation
	406	Rule 47. Motions	Local Variation
	406(2)	Rule 12. Pleadings and ...	Local Variation
	407	Rule 46. Release from ...	Local Variation
	408	Rule 17. Discovery and ...	Local Variation
	409	Rule 16. Discovery and ...	To Advisory Committee
	409	Rule 16. Discovery and ...	Local Variation
	410	Rule 17.1. Pretrial Conf.	Local Variation
	411	Rule 17.1. Pretrial Conf.	Local Variation
	412	Rule 24. Trial Jurors	Local Variation
	412	Rule 30. Instructions	Local Variation
	412	Rule 30. Instructions	To Advisory Committee
	412	Rule 30. Instructions	Possible Inconsistency
	413	Rule 17.1. Pretrial Conf.	Local Variation
	414	Rule 11. Pleas	Local Variation
	417	Other-Duties of Magistrates	Local Variation
	418	Rule 32. Sentence and ...	Local Variation
	418	Rule 32. Sentence and ...	Possible Inconsistency
	427	Rule 32. Sentence and ...	Local Variation
PA		Rule 11. Pleas	Local Variation
Plan		Rule 24. Trial Jurors	Local Variation
Plan		Rule 50. Calendars; Plans...	Local Variation
Samp.		Rule 17.1. Pretrial Conf.	Local Variation
Samp.		Rule 53. Regulation of ...	Local Variation

Rule	Location in Report	Project Result
SO	Rule 53. Regulation of ...	Local Variation

E.D. Tenn.

	Rule	Location in Report	Project Result
	72.4	Other-Duties of Magistrates	Local Variation
	72.4(a)	Rule 58. Procedure for ...	Local Variation
	83.10	Rule 46. Release from ...	Local Variation
	83.11	Rule 46. Release from ...	Local Variation
	83.2(b)	Rule 53. Regulation of ...	Local Variation
	83.2(c)	Rule 53. Regulation of ...	Local Variation
	83.2(e)	Rule 53. Regulation of ...	Local Variation
	83.9	Rule 32. Sentence and ...	Local Variation
	83.9	Rule 32. Sentence and ...	Possible Repetition
	83.9	Rule 32. Sentence and ...	Possible Inconsistency
Samp.		Rule 16. Discovery and ...	Possible Repetition
Samp.		Rule 16. Discovery and ...	Local Variation
Samp.		Rule 17.1. Pretrial Conf.	Local Variation

Rule	Location in Report	Project Result
5	Rule 53. Regulation of ...	Local Variation
6	Rule 53. Regulation of ...	Local Variation
12	Rule 47. Motions	Local Variation
12	Rule 47. Motions	Possible Repetition
14	Rule 16. Discovery and ...	Local Variation
17	Rule 47. Motions	Local Variation
19(b)	Rule 53. Regulation of ...	Local Variation
20(a)	Rule 58. Procedure for ...	Local Variation
20	Other-Duties of Magistrates	Local Variation
21	Rule 32. Sentence and ...	Local Variation
21	Rule 32. Sentence and ...	Possible Inconsistency
22	Rule 32. Sentence and ...	Local Variation
24	Rule 56. Courts and Clerks	Local Variation
Plan	Rule 24. Trial Jurors	Local Variation
Plan	Rule 50. Calendars; Plans...	Local Variation

	Rule	Location in Report	Project Result
GO	88-5	Rule 46. Release from ...	Local Variation
GO	88-7	Rule 32. Sentence and ...	Local Variation
GO	88-7	Rule 32. Sentence and ...	Possible Inconsistency
GO	90-8	Rule 50. Calendars; Plans...	Local Variation
GO	90-9	Rule 50. Calendars; Plans...	Local Variation
GO	91-5	Rule 6. The Grand Jury	Local Variation
GO	91-9	Other-Duties of Magistrates	Local Variation
GO	92-5	Rule 6. The Grand Jury	Local Variation
GO	92-6	Other-Duties of Magistrates	Local Variation
GO	93-1	Rule 49. Service and ...	Local Variation
GO	93-2	Rule 24. Trial Jurors	Local Variation
GO	93-3	Rule 6. The Grand Jury	Local Variation
GO	93-4	Rule 4. Arrest Warrant ...	Local Variation
GO	93-5	Rule 32.1. Revocation or ...	Local Variation
GO	93-6	Rule 50. Calendars; Plans...	Local Variation
GO	94-3	Other-Duties of Magistrates	Local Variation
GO	94-9	Rule 6. The Grand Jury	Local Variation
GO	91-10	Other-Duties of Magistrates	Local Variation
GO	92-10	Rule 50. Calendars; Plans...	Local Variation
GO	92-11	Rule 5. Initial Appearance..	Local Variation
GO	92-14	Rule 50. Calendars; Plans...	Local Variation
GO	92-15	Rule 50. Calendars; Plans...	Local Variation
GO	92-20	Rule 44. Right to and ...	Local Variation
GO	92-25	Rule 46. Release from ...	Local Variation
GO	93-17	Rule 50. Calendars; Plans...	Local Variation

	Rule	Location in Report	Project Result
GO	94-18	Rule 32. Sentence and ...	Local Variation
GO	94-18	Rule 32. Sentence and ...	Possible Inconsistency
GO	94-21	Rule 58. Procedure for ...	Local Variation
MR	1(B)	Rule 58. Procedure for ...	Local Variation
Plan		Rule 24. Trial Jurors	Local Variation
Plan		Rule 50. Calendars; Plans...	Local Variation
Samp.		Rule 16. Discovery and ...	Possible Repetition
Samp.		Rule 16. Discovery and ...	Local Variation
Samp.		Rule 17.1. Pretrial Conf.	Local Variation

N.D. Tex.

Rule		Location in Report	Project Result
	1.1	Rule 1. Scope	Model Local Rule
	1.1	Rule 1. Scope	Possible Inconsistency
	5.1	Rule 47. Motions	Local Variation
	5.1	Rule 47. Motions	To Advisory Committee
	6.1	Rule 15. Depositions	Possible Inconsistency
	7.2	Rule 50. Calendars; Plans...	Local Variation
	8.2(b)	Rule 24. Trial Jurors	Possible Repetition
	8.2(d)	Rule 24. Trial Jurors	Local Variation
	8.2(e)	Rule 24. Trial Jurors	Local Variation
	8.2(c)	Rule 30. Instructions	Local Variation
	8.2(c)	Rule 30. Instructions	To Advisory Committee
	8.2(c)	Rule 30. Instructions	Possible Inconsistency
	8.29d)	Rule 23. Trial by Jury ...	Possible Repetition
	9.3	Rule 11. Pleas	Possible Repetition
	10.5	Rule 58. Procedure for ...	Local Variation
	10.6	Rule 46. Release from ...	Local Variation
	10.9	Rule 32. Sentence and ...	Local Variation
	10.9	Rule 32. Sentence and ...	Possible Repetition
	10.9	Rule 32. Sentence and ...	Possible Inconsistency
	14.1	Rule 53. Regulation of ...	Local Variation
	14.2	Rule 53. Regulation of ...	Local Variation
	14.3	Rule 53. Regulation of ...	Local Variation
AppVI		Other-Duties of Magistrates	Local Variation
MO	9	Rule 44. Right to and ...	Local Variation
MO	12	Rule 46. Release from ...	Local Variation

	Rule	Location in Report	Project Result
MO	26	Rule 32. Sentence and ...	Local Variation
MR	1(p)	Rule 58. Procedure for ...	Local Variation
Plan		Rule 24. Trial Jurors	Local Variation
Plan		Rule 44. Right to and ...	Local Variation
Plan		Rule 50. Calendars; Plans...	Local Variation
Samp.		Rule 17.1. Pretrial Conf.	Local Variation

S.D. Tex.

	Rule	Location in Report	Project Result
	7	Rule 12. Pleadings and ...	Local Variation
	7	Rule 12. Pleadings and ...	Possible Repetition
	11	Rule 56. Courts and Clerks	Local Variation
	12	Rule 24. Trial Jurors	Local Variation
	13	Rule 53. Regulation of ...	Local Variation
	14	Other-Duties of Magistrates	Local Variation
	15	Rule 46. Release from ...	Local Variation
	16	Rule 32. Sentence and ...	Local Variation
	19	Rule 53. Regulation of ...	Local Variation
App	C	Rule 53. Regulation of ...	Local Variation
Order	91-9	Rule 32.1. Revocation or ...	Local Variation
Order	94-4	Rule 50. Calendars; Plans...	Local Variation
Order	91-26	Rule 4. Arrest Warrant ...	Possible Inconsistency
Order	91-26	Rule 4. Arrest Warrant ...	To Advisory Committee
PA		Rule 11. Pleas	Local Variation
Plan		Rule 24. Trial Jurors	Local Variation
Plan		Rule 44. Right to and ...	Local Variation
Plan		Rule 50. Calendars; Plans...	Local Variation
Samp.		Rule 17.1. Pretrial Conf.	Local Variation

Rule		Location in Report	Project Result
	1	Rule 1. Scope	Model Local Rule
	1	Rule 1. Scope	Possible Repetition
	6	Rule 6. The Grand Jury	Local Variation
	12	Rule 12. Pleadings and ...	Local Variation
	12	Rule 12. Pleadings and ...	Possible Repetition
	15	Rule 15. Depositions	Possible Inconsistency
	24	Rule 24. Trial Jurors	Local Variation
	32	Rule 32. Sentence and ...	Local Variation
	49	Rule 15. Depositions	Possible Inconsistency
	49	Rule 49. Service and ...	Local Variation
	49	Rule 49. Service and ...	Possible Repetition
	55	Rule 56. Courts and Clerks	Local Variation
	61	Rule 58. Procedure for ...	Local Variation
AppD		Rule 24. Trial Jurors	Local Variation
AppF		Rule 44. Right to and ...	Local Variation
AppK		Rule 50. Calendars; Plans...	Local Variation
AT	8	Rule 44. Right to and ...	Local Variation
Order	(7/1/94)	Rule 50. Calendars; Plans...	Local Variation

D. Utah

Rule	Location in Report	Project Result
107(b)	Rule 13. Trial Together...	Local Variation
107(a)	Rule 50. Calendars; Plans...	Local Variation
111	Rule 53. Regulation of ...	Local Variation
112	Rule 53. Regulation of ...	Local Variation
113	Rule 23. Trial by Jury ...	Possible Repetition
113	Rule 24. Trial Jurors	Local Variation
114	Rule 30. Instructions	Local Variation
114	Rule 30. Instructions	To Advisory Committee
114	Rule 30. Instructions	Possible Inconsistency
123(b)	Rule 53. Regulation of ...	Local Variation
301	Rule 44. Right to and ...	Local Variation
302	Rule 44. Right to and ...	Local Variation
303	Rule 6. The Grand Jury	Local Variation
304	Rule 4. Arrest Warrant ...	Local Variation
304(a)	Rule 9. Warrant/Summons	Possible Repetition
304(a)	Rule 9. Warrant/Summons	Possible Inconsistency
306	Rule 46. Release from ...	Local Variation
307	Rule 12. Pleadings and ...	Local Variation
308	Rule 16. Discovery and ...	Local Variation
309	Rule 16. Discovery and ...	Local Variation
310(a)	Rule 11. Pleas	Local Variation
310	Rule 32. Sentence and ...	Local Variation
310	Rule 32. Sentence and ...	Possible Repetition
310	Rule 32. Sentence and ...	Possible Inconsistency
311	Rule 20. Transfer from...	Local Variation

D. Utah

	Rule	Location in Report	Project Result
	312	Rule 21. Transfer from...	Local Variation
	313	Rule 53. Regulation of ...	Local Variation
	314	Rule 53. Regulation of ...	Local Variation
	315	Rule 24. Trial Jurors	Local Variation
	316	Rule 58. Procedure for ...	Local Variation
	316	Other-Duties of Magistrates	Local Variation
	317	Rule 47. Motions	Local Variation
	317	Rule 47. Motions	Possible Repetition
	318	Rule 50. Calendars; Plans...	Local Variation
GO	(5/28/93)	Rule 50. Calendars; Plans...	Local Variation
PA		Rule 11. Pleas	Local Variation
Plan		Rule 44. Right to and ...	Local Variation
Samp.		Rule 17.1. Pretrial Conf.	Local Variation

	Rule	Location in Report	Project Result
	1	Rule 1. Scope	Model Local Rule
	1	Rule 1. Scope	Possible Repetition
	2	Rule 16. Discovery and ...	Possible Repetition
	2	Rule 16. Discovery and ...	To Advisory Committee
	2	Rule 16. Discovery and ...	Local Variation
	3	Rule 32. Sentence and ...	Local Variation
	4	Rule 32. Sentence and ...	Local Variation
Plan		Rule 24. Trial Jurors	Local Variation
Plan		Rule 50. Calendars; Plans...	Local Variation
Samp.		Rule 43. Presence of the ...	Possible Repetition
Samp.		Rule 17.1. Pretrial Conf.	Local Variation

Rule	Location in Report	Project Result
20	Rule 6. The Grand Jury	Local Variation
27	Rule 16. Discovery and ...	Local Variation
27	Rule 12. Pleadings and ...	Local Variation
27	Rule 12. Pleadings and ...	Possible Repetition

E.D. Wash.

	Rule	Location in Report	Project Result
	1.4	Rule 53. Regulation of ...	Local Variation
	7	Rule 47. Motions	Local Variation
	40	Rule 50. Calendars; Plans...	Local Variation
	43	Rule 53. Regulation of ...	Local Variation
	47	Rule 24. Trial Jurors	Local Variation
	51	Rule 30. Instructions	Local Variation
	51	Rule 30. Instructions	To Advisory Committee
	51	Rule 30. Instructions	Possible Inconsistency
	79	Rule 56. Courts and Clerks	Local Variation
	100	Rule 53. Regulation of ...	Local Variation
Order		Rule 32. Sentence and ...	Possible Inconsistency
Order	(5/22/81)	Rule 32. Sentence and ...	Local Variation
PDP		Rule 46. Release from ...	Local Variation
Plan		Rule 50. Calendars; Plans...	Local Variation
Samp.		Rule 16. Discovery and ...	Possible Repetition
Samp.		Rule 16. Discovery and ...	Local Variation
Samp.		Rule 12. Pleadings and ...	Local Variation
Samp.		Rule 17.1. Pretrial Conf.	Local Variation
Samp.		Rule 46. Release from ...	Local Variation

	Rule	Location in Report	Project Result
	5	Rule 4. Arrest Warrant ...	Possible Inconsistency
	5	Rule 4. Arrest Warrant ...	To Advisory Committee
	5.1(c)	Rule 5.1. Preliminary Exam	Local Variation
	6	Rule 6. The Grand Jury	Possible Repetition
	12	Rule 12. Pleadings and ...	Local Variation
	16	Rule 16. Discovery and ...	Local Variation
	17	Rule 17. Subpoena	Local Variation
	18	Rule 18. Place of Pros...	Local Variation
	22	Rule 22. Time of Motion ...	Possible Inconsistency
	24	Rule 24. Trial Jurors	Local Variation
	26	Rule 26. Taking of ...	Local Variation
	26(a)	Rule 29.1. Closing Arg.	Possible Repetition
	30	Rule 30. Instructions	Local Variation
	30	Rule 30. Instructions	To Advisory Committee
	30	Rule 30. Instructions	Possible Inconsistency
	32	Rule 32. Sentence and ...	Local Variation
	32	Rule 32. Sentence and ...	Possible Repetition
	41	Rule 41. Search and Seizure	Local Variation
	44	Rule 44. Right to and ...	Local Variation
	45	Rule 45. Time	Local Variation
	46	Rule 46. Release from ...	Local Variation
	48	Rule 16. Discovery and ...	Possible Repetition
	48	Rule 16. Discovery and ...	Local Variation
	53	Rule 53. Regulation of ...	Local Variation
GO	(7/1/93)	Rule 32. Sentence and ...	Local Variation

	Rule	Location in Report	Project Result
GO	(7/1/93)	Rule 32. Sentence and ...	Possible Inconsistency
GO	(12/2/93)	Other-Duties of Magistrates	Local Variation
Man.		Rule 50. Calendars; Plans...	Local Variation
Order	(5/4/92)	Rule 24. Trial Jurors	Local Variation
Plan		Rule 50. Calendars; Plans...	Local Variation
Samp.		Rule 17.1. Pretrial Conf.	Local Variation

	Rule	Location in Report	Project Result
	3.01	Rule 1. Scope	Model Local Rule
	3.02	Rule 44. Right to and ...	Local Variation
	3.04	Other-Juvenile Delin...	Possible Repetition
	3.05	Rule 10. Arraignment	Local Variation
	3.05	Rule 48. Dismissal	Possible Repetition
	3.06(d)	Rule 16. Discovery and ...	Possible Repetition
	3.06(d)	Rule 16. Discovery and ...	Local Variation
	3.06(b)	Rule 12. Pleadings and ...	Local Variation
	3.06(b)	Rule 12. Pleadings and ...	Possible Repetition
	3.06(b)	Rule 41. Search and Seizure	Local Variation
	3.06(c)	Rule 32. Sentence and ...	Local Variation
	3.06(a)	Rule 50. Calendars; Plans...	Local Variation
	3.07	Rule 53. Regulation of ...	Local Variation
	3.08	Rule 32. Sentence and ...	Local Variation
	3.09	Rule 29. Motion for ...	Local Variation
	3.09	Rule 47. Motions	Local Variation
	3.10	Rule 32. Sentence and ...	Local Variation
	3.10	Rule 32. Sentence and ...	Possible Inconsistency
	3.30	Rule 58. Procedure for ...	Local Variation
Order	50	Rule 44. Right to and ...	Local Variation
Order	97	Rule 24. Trial Jurors	Local Variation
SO	(9/9/94)	Rule 24. Trial Jurors	Local Variation

S.D. W.Va.

Rule	Location in Report	Project Result
1.01	Rule 16. Discovery and ...	Possible Repetition
1.01	Rule 16. Discovery and ...	Local Variation
1.02	Rule 10. Arraignment	Local Variation
1.02	Rule 48. Dismissal	Possible Repetition
2.01	Rule 30. Instructions	To Advisory Committee
2.01	Rule 30. Instructions	Possible Inconsistency
2.02	Rule 53. Regulation of ...	Local Variation
3.01	Rule 32. Sentence and ...	Local Variation
3.02	Rule 32. Sentence and ...	Local Variation
3.02	Rule 32. Sentence and ...	Possible Inconsistency
3.03	Rule 32. Sentence and ...	Local Variation

	Rule	Location in Report	Project Result
	2	Other-Duties of Magistrates	Local Variation
	4	Rule 24. Trial Jurors	Local Variation
Order		Rule 17.1. Pretrial Conf.	Local Variation
Order	(1/17/86)	Rule 50. Calendars; Plans...	Local Variation
Order	(2/20/87)	Rule 9. Warrant/Summons	Local Variation
Plan		Rule 24. Trial Jurors	Local Variation
Samp.		Rule 17.1. Pretrial Conf.	Local Variation

D. Wyo.

	Rule	Location in Report	Project Result
	40	Rule 50. Calendars; Plans...	Local Variation
	77	Rule 53. Regulation of ...	Local Variation
	103	Rule 16. Discovery and ...	Local Variation
	105	Rule 32. Sentence and ...	Local Variation
	105	Rule 32. Sentence and ...	Possible Inconsistency
	217	Rule 44. Right to and ...	Local Variation
	310	Rule 53. Regulation of ...	Local Variation
	312	Rule 53. Regulation of ...	Local Variation
Order	(4/8/93)	Rule 4. Arrest Warrant ...	Local Variation
Plan		Rule 24. Trial Jurors	Local Variation
Plan		Rule 44. Right to and ...	Local Variation
Plan		Rule 50. Calendars; Plans...	Local Variation

Agenda Item II E

ORAL REPORTS

Agenda Item III - IV

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

FROM: **Professor Dave Schlueter, Reporter**

RE: **Restyling Rules of Criminal Procedure**

DATE: **September 11, 1995**

Over the last several years, Mr. Bryan Garner, a consultant to the Standing Committee has worked with the Civil Rules and Appellate Rules Committees to streamline, modernize, etc. the language in the rules of procedure. As I understand, in some instances Bryan has prepared a first draft of the changes and then the Committee over the course of several meetings determines whether the new language makes any substantive changes. In other situations, a subcommittee has proposed restyling drafts which Bryan then reviews.

Although I was under the impression that the Criminal Rules Committee was next in line for the restyling, there has been some indication that the Evidence Advisory Committee may be moving toward some restyling. Just where we stand in the process is not clear. What seems clear is that eventually, the Criminal Rules will be restyled. In fact, some restyling has already occurred. For example, when Rule 32 was completely rewritten several years ago, Mr. Garner and the Standing Committee were actively involved in modernizing the language and structure. In other instances, e.g., Rule 40(a) although the rules have been amended, they are still difficult to read -- and understand.

In any event, it would probably be worth some Committee discussion on the project and the best way to proceed. For example, the experience of the other committees has been that they either add a day to each of their meetings or hold separate meetings for the limited purpose of restyling the rules. Given the breadth of such global changes, it could be expected that extra days and/or meetings might be required. To that end, the Committee should probably make some advanced plans and consider the following issues:

First, would the Committee prefer to start on its own in restyling the rules? Mr. Garner's schedule is generally full and it might be some time before he was able to even start on the Criminal Rules.

Second, if the Committee decides to wait for Mr. Garner to prepare draft changes, the Committee should probably decide how it wishes to review his drafts. For example, it might be appropriate to refer his drafts first to the Reporter and/or a subcommittee for initial comments.

Third, assuming the Committee decided to begin drafting global changes, should the initial draft be prepared by the Reporter or a Subcommittee especially tasked for that

purpose?. Perhaps a combination of that system would work, i.e. the Reporter prepares an initial draft and then circulates the drafts to the subcommittee for comments and changes before circulating it to the Committee as a whole.

Fourth, should the Committee shedule extra days for each of its two meetings or schedule additional meetings for the express purpose of discussing the global changes.

It is important to keep in mind that restyling the rules is really a separate, long-range, project which will be in addition to any on-going consideration of proposed amendments to the rules.

L. 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

September 14, 1995

MEMORANDUM TO ADVISORY COMMITTEE ON CRIMINAL RULES

SUBJECT: *Format of Style Revisions*

At Professor Schlueter's request I am attaching an example of the format used by the Appellate and Civil Rules Committees in their restylizing projects. It consists of a side-by-side comparison of a current rule with a restyled rule. I am also attaching the table of contents of Bryan Garner's Guidelines for Drafting and Editing Court Rules. The Guidelines will be available in print sometime later this fall.

John K. Rabiej

Attachments

Federal Rules of Appellate Procedure

Revised for Style by
The Style Subcommittee of the Standing Committee on Rules of Practice and Procedure

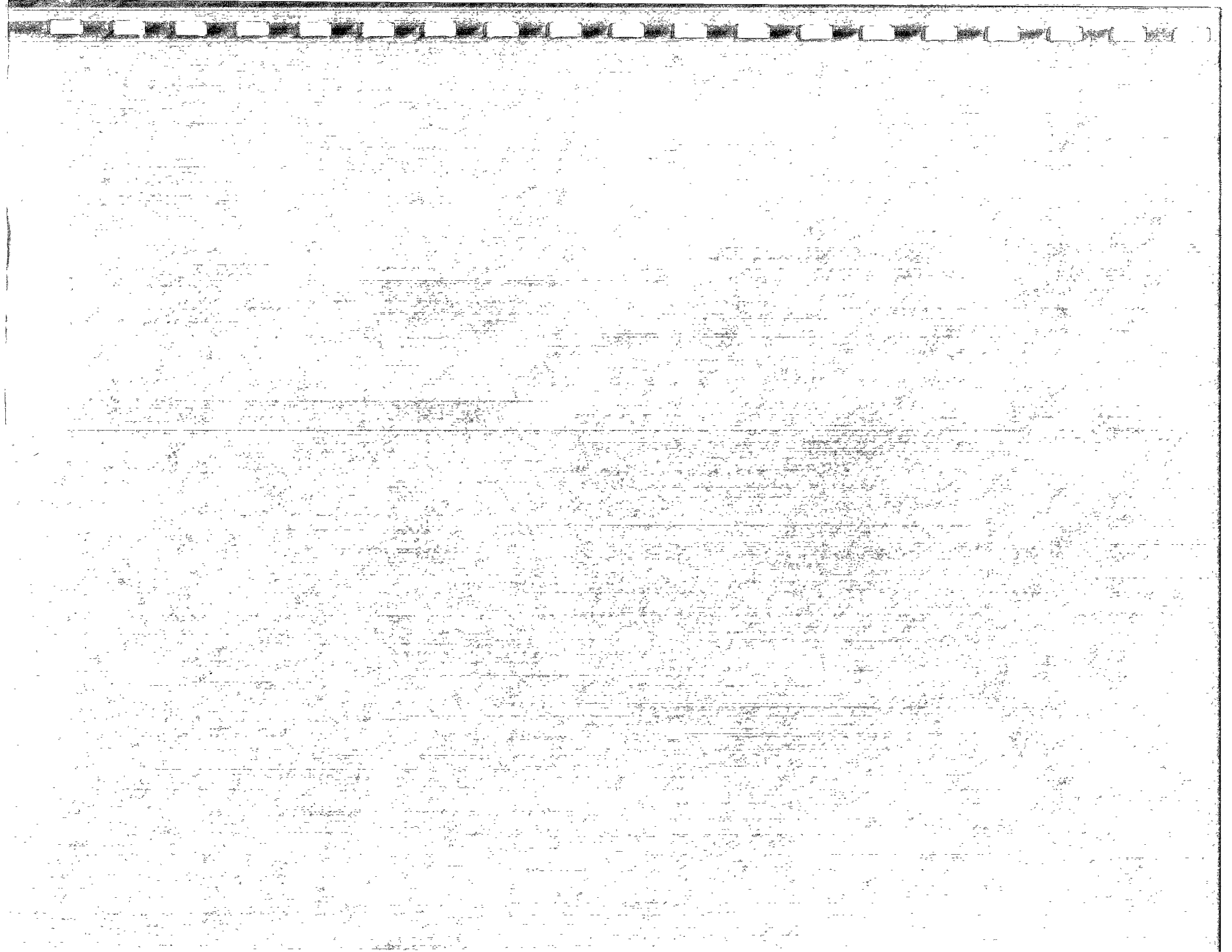
Draft of December 1994
(Rules 24–End)

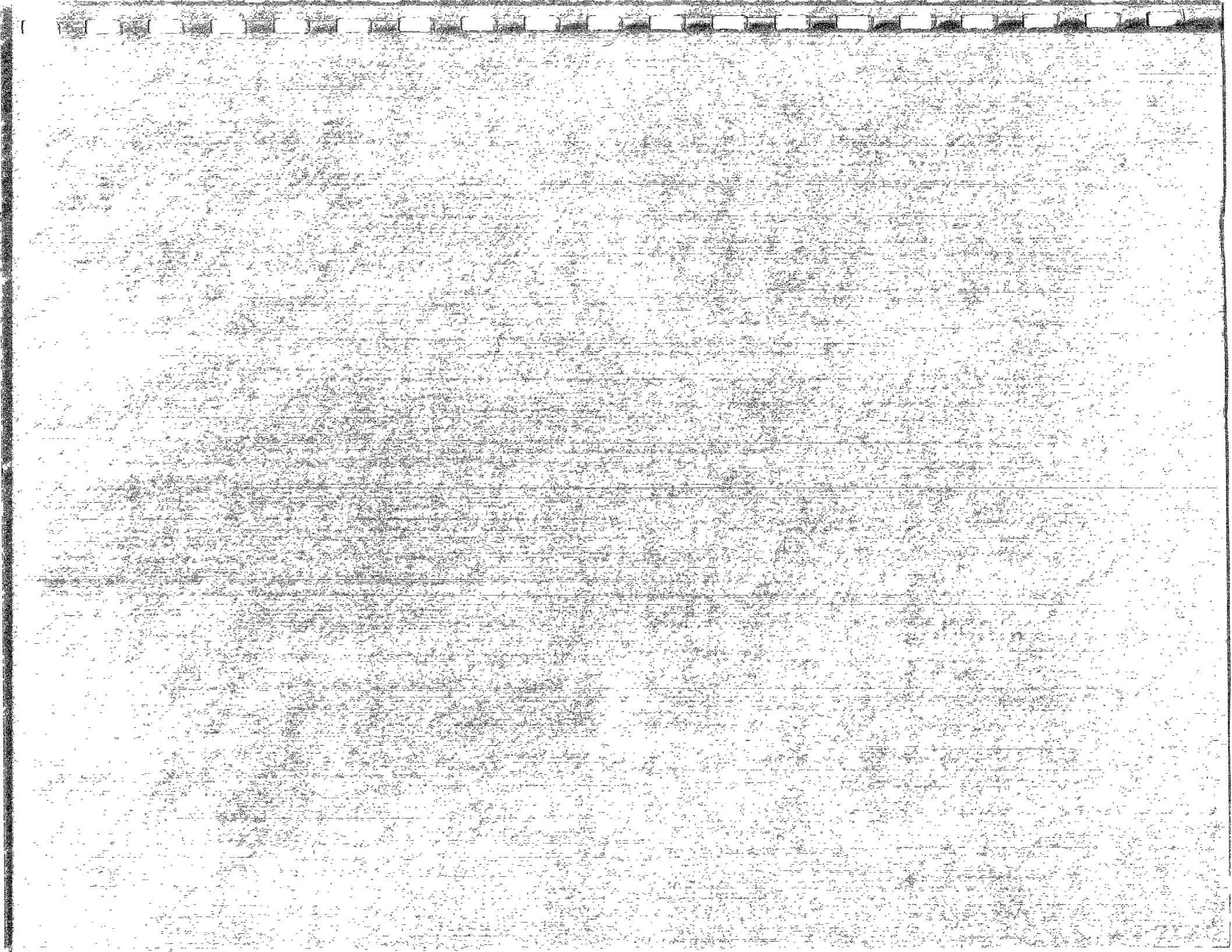
AS REVISED BY
JUDGE KOZINSKI AND MICHAEL MEEHAN (RULES 24-35)
AND
JUDGE LOGAN AND JUSTICE THOMAS (RULES 36-48)
MARCH 24, 1995

Rule 24. Proceedings in Forma Pauperis	Rule 24. Proceedings in Forma Pauperis
(a) Leave to proceed on appeal in forma pauperis from district court to court of appeals. — A party to an action in a district court who desires to proceed on appeal in forma pauperis shall file in the district court a motion for leave so to proceed, together with an affidavit, showing, in the detail prescribed by Form 4 of the Appendix of Forms, the party's inability to pay fees and costs or to give security therefor, the party's belief that that party is entitled to redress, and a statement of the issues which that party intends to present on appeal. If the motion is granted, the party may proceed without further application to the court of appeals and without prepayment of fees or costs in either court or the giving of security therefor. If the motion is denied, the district court shall state in writing the reasons for the denial. Notwithstanding the provisions of the preceding paragraph, a party who has been permitted to proceed in an action in the district court in forma pauperis, or who has been permitted to proceed there as one who is financially unable to obtain adequate defense in a criminal case, may proceed on appeal in forma pauperis without further authorization unless, before or after the notice of appeal is filed, the district court shall certify that the appeal is not taken in good faith or shall find that the party is otherwise not entitled so to proceed, in which event the district court shall state in writing the reasons for such certification or finding. If a motion for leave to proceed on appeal in forma pauperis is denied by the district court, or if the district court shall certify that the appeal is not taken in good faith or shall find that the party is otherwise not entitled to proceed in forma pauperis, the clerk shall forthwith serve notice of such action. A motion for leave so to proceed may be filed in the court of appeals within 30 days after service of notice of the action of the district court. The motion shall be accompanied by a copy of the affidavit filed in the district court, or by the affidavit prescribed by the first paragraph of this subdivision if no affidavit has been filed in the district court, and by a copy of the statement of reasons given by the district court for its action.	**(a) Leave to Proceed in Forma Pauperis** (1) ***Motion to District Court.*** Except as stated in (2), a party in a district-court action who desires to appeal in forma pauperis must file a motion for leave in the district court. The party must attach an affidavit showing, in the detail prescribed by Form 4 of the Appendix of Forms, the party's inability to pay or give security for fees and costs, claiming an entitlement to redress, and stating the issues that the party intends to present on appeal. If the district court grants the motion, ~~is granted,~~ the party may proceed on appeal without prepaying or giving security for fees and costs. If the ~~A~~ district court ~~that~~ denies the motion, it shall ~~must~~ state the reasons in writing. (2) ***Prior Approval.*** A party who has been permitted to proceed in a district-court action in forma pauperis, or who was considered financially unable to obtain an adequate defense in a criminal case, may proceed on appeal in forma pauperis without further authorization, unless the district court ~~certifies~~ — before or after the notice of appeal is filed — certifies that the appeal is not taken in good faith or finds that the party is not otherwise entitled to proceed in forma pauperis. In that event, the district court ~~must~~ shall state in writing the reasons for the certification or finding. (3) ***Notice of District Court's Denial.*** The district clerk must immediately serve notice on the applicant and any ~~opposing~~ other party when the district court does any of the following: (A) denies a motion for leave to proceed on appeal in forma pauperis; (B) certifies that the appeal is not taken in good faith; or (C) finds that the party is not otherwise entitled to proceed in forma pauperis. (4) ***Motion in Court of Appeals.*** A party may file a motion for leave to proceed on appeal in forma pauperis in the court of appeals within 30 days after service of the notice described in (a)(3). The party must include in the motion a copy of the affidavit filed in the district court and a copy of the district court's statement of reasons for its action. If no affidavit was filed in the district court, the party must include the affidavit prescribed in (1).
(b) Leave to proceed on appeal or review in forma pauperis in administrative agency proceedings. — A party to a proceeding before an administrative agency, board, commission or officer (including, for the purpose of this rule, the United States Tax Court) who desires to proceed on appeal or review in a court of appeals in forma pauperis, when such appeal or review may be had directly in a court of appeals, shall file in the court of appeals a motion for leave so to proceed, together with the affidavit prescribed by the first paragraph of (a) of this Rule 24.	**(b) Leave to Proceed in Forma Pauperis on Appeal or Review in Administrative-Agency Proceedings.** When an appeal or review of a proceeding before an administrative agency, board, commission, or officer (including for the purpose of this rule, the United States Tax Court) proceeds directly in a court of appeals, a party may file in the court of appeals a motion for leave to proceed on appeal in forma pauperis with an affidavit prescribed by (a)(1).

(c) Form of briefs, appendices and other papers. — Parties allowed to proceed in forma pauperis may file briefs, appendices and other papers in typewritten form, and may request that the appeal be heard on the original record without the necessity of reproducing parts thereof in any form.	(c) **Form of a Brief, Appendix, or Other Paper.** A party allowed to proceed in forma pauperis may file a brief, appendix, or other paper in typewritten form, and may request that the appeal be heard on the original record without having any part of the record reproduced.

Table of Contents





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

FROM: **Professor Dave Schlueter, Reporter**

RE: **Long-Range Planning Subcommitee (Self-Study)**

DATE: **September 11, 1995**

At is last meeting the Committee briefly discussed the Standing Committee's self study which focused on long-range planning. The Committee has been asked again to review that report and focus on the following specific topics:

First, the Committee has been asked to address the issue of the role of the Committee Notes. Some question has been raised (I must bear partial blame for this) over the last several years about the role of the Committee Notes accompanying each proposed amendment. Are they "Advisory Committee Notes" or are they the "Standing Committee Notes" or both, or does it make a difference? The subject really blends into the issue of the respective roles of the committees which in turn depends on how the individual members of the Standing Committee view the work of the Advisory Committees. Although the notes accompanying the rules are normally viewed as Advisory Committee Notes by the publishers. the Standing Committee has voted in the past to amend the Notes to reflect its changes. In other cases, the Chair and Reporter have been asked, or directed, to change the Notes before forwarding them to the Judicial Conference. At this point, it does not appear likely that there will be separate sets of notes, or historical sequencing of notes, or purposes of establishing a sort of "legislative history" on a particular amendment.

Second, the Committee should again review the self-study about the respective roles of the committees and determine if there are any methods or procedures which might be implemented to insure that the amendment process proceeds smoothly and efficiently. Specifically, the Committee might consider offering some guidance on what, if any, guidelines should be used by the Chair and/or Reporter in agreeing to amendments, etc. being offered by the Standing Committee. While each case is unique, in recent years, there have been members of the Standing Committee who take an active role in re-drafting proposed amendments in what is sometimes heated discussion. In the past, the Chair has generally been vested with discretion to decide whether to withdraw a rule or permit it to go forward in those cases where it is reasonably clear whether the Advisory Committee would concur. While that system has seemed to work well, it does raise the question about whether the Advisory Committee might have come up with a better draft on further consideration. Would the Committee prefer in those instances to have the rule remanded for further consideration and reflection? Because such remands generally mean lengthy delays, the tendency has been to let the rules go forward as amended by the Standing Committee.

A Self-Study of Federal Judicial Rulemaking

A Report from the Subcommittee on Long Range Planning to the Committee on Rules of Practice, Procedure and Evidence of the Judicial Conference of the United States

July 1995

Introduction

At the June 1993 meeting, the Standing Committee directed the Subcommittee on Long Range Planning to undertake a thorough study of the federal judicial rulemaking procedures, including: (1) a description of existing procedures; (2) a summary of criticisms and concerns; (3) an assessment of how existing procedures might be improved; and (4) appropriate proposed recommendations.

The self-study was deferred in anticipation of the January 1994 Executive Session and related discussion. At that meeting, the Standing Committee decided to solicit public comments. Appendix A to this Report contains a Summary of the Comments Received. In addition, the Subcommittee canvassed the secondary literature. Appendix B to this Report is an Annotated Bibliography. An Interim Report was circulated in anticipation of the June 1994 meeting of the Standing Committee. The Interim Report raised several issues for preliminary discussion at that meeting and solicited further written comments from those in attendance. A draft was circulated to the Standing Committee in January 1995, and now this semi-final draft has been completed. The Chair of the Standing Committee wants to solicit comments from the Advisory Committees, so the Subcommittee's work will be back on the agenda for the winter 1995–96 meeting of the Standing Committee.

The following sections organize this Self-Study Report on the federal judicial rulemaking procedures: a **History** of the origins of modern rulemaking; a description of **Current Procedures**; a discussion of **Evaluative Norms**; the **Issues and Recommendations** for reforms; and a brief **Conclusion**.

History[1]

Modern federal judicial rulemaking dates from 1958. A few paragraphs of history inform our understanding of current practice.

The Judiciary Act of 1789 first authorized federal courts to fashion necessary rules of practice.[2] A lesser known statute enacted a few days later provided that in actions at law the federal procedure should be the same as in the state courts.[3] This created a system that seems odd to us today: a distinctly national procedure for equity and admiralty, coupled with a static procedure, conforming to the procedure in each state as of September 1789, for actions at law; the procedure for actions at law remained the same while state courts altered their procedures. The system became more odd, or at least more uneven, in 1828 when a statute required federal courts in subsequently admitted states to conform to 1828 state procedures. The same statute provided that all federal courts were to follow 1828 state procedures, with some discretion, in proceedings for writs of execution and other enforcement procedures.[4] This unsatisfactory system prevented the federal courts from following state procedural reform such as the New York Code of 1848, which merged law and equity and simplified pleading.[5]

The next legislative change came in 1872 when Congress withdrew rulemaking authority from the federal courts and required that all actions in law conform to the corresponding state forum's rules and procedures.[6] Under the Conformity Act there were as many different sets of federal rules and procedures as there were states.[7]

This Report is not the place to retell the history of the Federal Rules of Civil Procedure, a story "told in large part in terms of dedicated individuals who worked and campaigned to bring them into existence."[8] What bears emphasis is that until 1938, that is, for the Nation's first 150 years, things were very different from what they are today.

Before 1938, the federal courts followed state procedural law, state substantive statutes, and federal substantive common law, even in diversity cases. Of course, the substantive common law of the forum state was recognized to be controlling in the famous 1938 Supreme Court diversity decision of *Erie Railroad Co. v. Tompkins*,[9] overruling *Swift v. Tyson*, which had stood since

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1 This portion of this Report is adapted from Thomas E. Baker, An Introduction to Federal Court Rulemaking Procedure, 22 Tex. Tech L. Rev. 323, 324-28 (1991).

2 Act of Sept. 24, 1789, ch. 20, §17, 1 Stat. 73, 83.

3 Act of Sept. 29, 1789, ch. 21, §2, 1 Stat. 93.

4 Act of May 19, 1828, ch. 68, 4 Stat. 278.

5 Charles E. Clark, The Challenge of a New Federal Judicial Procedure, 20 Cornell L.Q. 443, 499-50 (1935).

6 Act of June 1, 1872, ch. 255, 17 Stat. 197 (repealed 1934).

7 "[T]he procedural law continued to operate in an atmosphere of uncertainty and confusion, aggravated by the growing tendency of federal courts to develop their own rules of procedure under the licensing words of the 1872 Act that conformity was to be 'as near as may be.' " Charles Alan Wright & Arthur R. Miller, 4 Federal Practice and Procedure §1002 at 14 (2d ed. 1987).

8 Id. §1004 at 21.

9 304 U.S. 64 (1938).

1842.[10] And in the same year, after more than two decades of effort, national rules of procedure were drafted by an ad hoc Advisory Committee appointed by the Supreme Court under the provision of the Rules Enabling Act of 1934.[11] Thus 1938 marked an inversion in diversity cases: henceforth there would be federal procedural law and state substantive law. Those 1938 rules—still recognizable today despite numerous amendments—established a nationally-uniform set of federal procedures, abolished the distinction between law and equity, created one form of action, provided for liberal joinder of claims and parties, and authorized extensive discovery.

The Supreme Court's ad hoc Advisory Committee was comprised of distinguished lawyers and law professors. While the ad hoc Committee members have been lionized for their accomplishment of drafting the rules themselves, their more subtle but equally lasting achievement was to establish the basic traditions of federal procedural reform.[12] Two features of that experience have characterized federal judicial rulemaking ever since. First, the ad hoc Committee took care to elicit the thinking and the experience of the bench and bar by widely distributing drafts and soliciting comments, evincing willingness to reconsider and redraft its recommendations. Second, "the work of the Committee was viewed as intellectual, rather than a mere exercise in counting noses."[13] The ad hoc Committee recommended to the Supreme Court what it considered the best and most workable rules rather than rules that might be supported most widely or might appease special interests. Although the rulemaking process has been revised over the years since, these two traditions have endured.

This positive experience located rulemaking responsibility inside the judicial branch, but the modern rulemaking process took a few more years to evolve. A year after the new rules went into effect, the Supreme Court called upon the ad hoc Advisory Committee to submit amendments, which the Court accepted and sent to Congress, and which became effective in 1941.[14] The next year, the Supreme Court designated the ad hoc Committee as a continuing Advisory Committee, which thereafter periodically submitted rules amendments through the 1940s and early 1950s.[15] In 1955 the continuing Advisory Committee submitted an extensive report to the Supreme Court with numerous suggested amendments. The Court neither acted on the Report nor explained its inaction. Instead, the Justices ordered the Committee "discharged with thanks" and revoked the Committee's authority as a continuing body.[16]

The resulting void in rulemaking procedure was an object of concern expressed by the American Bar Association, the Judicial Conference, and other groups.[17] At the time, there was no small controversy over whether the Court should designate a new continuing committee and

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10 44 U.S. (16 Pet.) 11 (1842).

11 Act of June 19, 1934, ch. 651, §§1-2, 48 Stat. 1064; Order Appointing Committee to Draft Unified System of Equity and Law Rules, 295 U.S. 774 (1934).

12 Wright & Miller, supra note 7, §1005.

13 Ibid.

14 Order Requesting Amendments from the Advisory Committee, 308 U.S. 642 (1939).

15 Continuance of Advisory Committee, 314 U.S. 720 (1941); Charles E. Clark, "Clarifying" Amendments to the Federal Rules?, 14 Ohio St. L. J. 241 (1953).

16 Order Discharging the Advisory Committee, 352 U.S. 803 (1956).

17 The Rule-Making Function and the Judicial Conference of the United States, 44 A.B.A. J. 42 (1958) (panel discussion).

how the members might be selected. Dissatisfaction was expressed that the Supreme Court was merely rubber-stamping the recommendations from the previous Advisory Committee, and several of the Justices were heard to agree with that criticism, dissenting from orders, from time to time, to complain that the proposals were not actually the work of the Court.[18] Apparently, there were misgivings expressed behind the scenes about the tenure and influence of the members of the continuing Advisory Committee, who served indeterminate terms, remaining until resignation or death. This discrete Third Branch discussion took place alongside the perennial separation-of-powers debate between the Judiciary and Congress over which institution should make rules and how.

A consensus emerged that some ongoing rulemaking process was desirable, but that the process had to be reformed. The replacement rulemaking procedures were designed by Chief Justice Earl Warren, Justice Tom C. Clark, and Chief Judge John J. Parker of the Fourth Circuit, during their cruise to attend the 1957 American Bar Association Convention. Justice Clark recalled, "On our daily walks around the deck of the Queen Mary, we thrashed out the problem thoroughly, finally agreeing that the Chief Justice, as the Chair of the Judicial Conference, should appoint the committees which would give them the tag of 'Chief Justice Committees.' "[19] This "Queen Mary Compromise" led to a statutory amendment by which Congress assigned responsibility to the Judicial Conference for advising the Supreme Court regarding changes in the various sets of federal rules—admiralty, appellate, bankruptcy, civil and criminal—which only the Court had formal statutory authority to amend.[20] The rulemaking process today follows the basic 1958 design.[21] Only two developments in rulemaking since then are sufficiently noteworthy to deserve brief mention in this history.

First, there was a showdown over the Federal Rules of Evidence. An Advisory Committee on Rules of Evidence was created in 1965. Following standard rulemaking procedures, after extensive study, the Advisory Committee promulgated a set of proposed rules in 1972. Those proposed rules were highly controversial, especially the rules dealing with evidentiary privileges. Congress ended up mandating, by statute, that the evidence rules not take effect until approved by legislation. Then Congress reviewed the proposed rules and made substantial revisions before enacting rules of evidence into law, effective in 1975.[22] The legislative veto provision that attached to all rules of evidence has since been discarded, but the applicable statute still provides that any revision of the rules governing evidentiary privileges shall have no force unless approved

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18 E.g., Order Amending the Rules of Civil Procedure, 329 U.S. 843 (1946) (noting Justice Frankfurter's reliance on the judgment of the Advisory Committee); Order Amending the Rules of Civil Procedure, 308 U.S. 643 (1939) (noting Justice Black's disapproval); Order Adopting the Rules of Procedure for the District Courts of the United States, 302 U.S. 783 (1937) (noting Justice Brandeis' disapproval).

19 Tom C. Clark, Foreword to Wright & Miller, supra note 7, at ix.

20 Act of July 11, 1958, Pub. L. No. 93-12, 72 Stat. 356; Panel Discussion, The Rule-Making Function of the Judicial Conference of the United States, 44 A.B.A.J. 42 (1958).

21 The Justices continue to express their individual concerns about the Supreme Court's appropriate role in judicial rulemaking. Statement of Justice White, 113 S.Ct. 575 (Apr. 22, 1993); Dissenting Statement of Justice Scalia, joined by Justices Thomas and Souter, 113 S.Ct. 581 (Apr. 22, 1993); Order Amending the Rules of Civil Procedure, 374 U.S. 861 (1963) (opposing statements of Justices Black and Douglas).

22 Act of January 2, 1975, Pub. L. No. 93-595, 88 Stat. 1926; Edward W. Cleary, Preliminary Notes on Reading the Rules of Evidence, 57 Neb. L. Rev. 908 (1978).

by Congress.[23] After a 20-year hiatus the Chief Justice reestablished an Advisory Committee on the Rules of Evidence in 1993. This committee has embarked on a comprehensive review.

Second, Congress amended the Rules Enabling Act in 1988 to require the rules committees to hold open meetings, maintain public minutes, and afford wider notice and longer periods for public commentary on proposed rules.[24] These amendments were designed to increase attention to rules initiatives and public participation. Rulemaking today is more accessible to interested parties than ever before. It is also slower, and the exchange is not an unmixed blessing. In the wake of the 1988 changes, only Congress can change rules with dispatch. This means that any group with a perceived pressing need seeks its forum in the legislature rather than the judiciary, and today Congress regularly demonstrates its interest in federal rules matters by holding committee hearings and amending the rules themselves.

Current Procedures[25]

Congress has authorized the federal judiciary to prescribe the rules of practice, procedure, and evidence, subject to an expressly reserved legislative power to reject, modify, or defer any judicially-made rules. This statutory authorization is found in the Rules Enabling Act.[26] Pursuant to this statutory authorization and responsibility, the judicial branch has developed an elaborate committee structure with attendant rulemaking procedures. The *Procedures for the Conduct of Business by the Judicial Conference Committees on Rules of Practice and Procedure* describe the current procedures for judicial rulemaking.[27] These rulemaking procedures were adopted by the Judicial Conference of the United States. They govern the operations of the Standing Committee and the various Advisory Committees in drafting and recommending new rules or amendments to the present sets of federal rules of practice and procedure.

The Judicial Conference of the United States consists of the Chief Justice of the United States (Chair), the chief judges of the 13 United States courts of appeals, the Chief Judge of the Court of International Trade, and 12 district judges chosen for a term of 3 years by the judges of each circuit. The Judicial Conference holds plenary meetings twice every year to consider administrative problems and policy issues affecting the federal judiciary and to make recommendations to Congress concerning legislation affecting the federal judicial system.[28] It also acts through an Executive Committee on some matters.

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23 28 U.S.C. §2074(b).

24 Judicial Improvements and Access to Justice Act, Pub. L. No. 100-702, 102 Stat. 4642 (codified at 28 U.S.C. §2073(c)).

25 This portion of this Report is adapted from Baker, supra note 1, at 328-31, and Administrative Office of the U.S. Courts, The Federal Rules of Practice and Procedure—A Summary for Bench and Bar (Oct. 1993) (hereinafter A Summary for Bench and Bar). Thomas E. Baker, Recent Developments in the Federal Rules of Procedure: The 1993 Changes and Beyond, 11 Fifth Cir. Reptr. 531 (June 1994).

26 28 U.S.C. §§2071-2077.

27 Announcement, 54 Fed. Reg. 13,752 (Apr. 5, 1989) (publishing Procedures adopted by the Judicial Conference of the United States on Mar. 14, 1989).

28 28 U.S.C. §331.

By statute, the Judicial Conference is charged with carrying on a "continuous study of the operation and effect of the general rules of practice and procedure."[29] The Conference is empowered to recommend changes and additions in the federal rules "from time to time" to the Supreme Court, in order to "promote simplicity in procedure, fairness in administration, the just determination of litigation, and the elimination of unjustifiable expense and delay."[30]

To perform these responsibilities of study and drafting, the Judicial Conference has created the Committee on Rules of Practice, Procedure, and Evidence (Standing Committee)[31] and various Advisory Committees (currently one each on Appellate Rules, Bankruptcy Rules, Civil Rules, Criminal Rules and Evidence Rules). All appointments are made by the Chief Justice of the United States, for a three-year, once-renewable term. Members are federal and state judges, practicing attorneys, and scholars. On recommendation of the Advisory Committee's chair, the Chief Justice appoints a reporter, usually from the academy, to serve the committee as an expert advisor. The reporter coordinates the committee's agenda and drafts the rules amendments and the explanatory committee notes.

The Standing Committee coordinates the rulemaking responsibilities of the Judicial Conference. The Standing Committee reviews the recommendations of the various Advisory Committees and makes recommendations to the Judicial Conference for proposed rules changes "as may be necessary to maintain consistency and otherwise promote the interest of justice."[32] The Secretary to the Standing Committee, currently the Assistant Director for Judges Programs of the Administrative Office of the U.S. Courts, coordinates the operational aspects of the entire rulemaking process and maintains the official records of the rules committees. The Rules Committee Support Office of the Administrative Office provides day-to-day administrative and legal support for the Secretary and the various committees.[33]

Rulemaking procedures are elaborate:

> The pervasive and substantial impact of the rules on the practice of law in the federal courts demands exacting and meticulous care in drafting rule changes. The rulemaking process is time-consuming and involves a minimum of seven stages of formal comment and review. From beginning to end, it usually takes two to three years for a suggestion to be enacted.[34]

By delegation from the Judicial Conference, authorized by the relevant statute, each Advisory Committee is charged to carry out a "continuous study of the operation and effect of

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29 Ibid.

30 Ibid.

31 28 U.S.C. §2073(b). The convention has been to refer to this Committee as the "Standing Committee on Rules of Practice and Procedure" or simply the "Standing Committee."

32 8 U.S.C. §2073(b).

33 "Meetings of the rules committees are open to the public and are widely announced. All records of the committees, including minutes of committee meetings, suggestions and comments submitted by the public, statements of witnesses, transcripts of public hearings, and memoranda prepared by the reporters, are public and are maintained by the secretary. Copies of the rules and proposed amendments are available from the Rules Committee Support Office." A Summary for Bench and Bar, supra note 25.

34 A Summary for Bench and Bar, supra note 25.

the general rules of practice and procedure" in its particular field.[35] An Advisory Committee considers suggestions and recommendations received from any source, new statutes and court decisions affecting the rules, and other relevant legal commentary. In fact, "[p]roposed changes in the rules are suggested by judges, clerks of court, lawyers, professors, government agencies, or other individuals and organizations."[36] Copies or summations of all written recommendations and suggestions that are received are first acknowledged in writing and then forwarded to each member. The Advisory Committees meet at the call of the chair. Each meeting is preceded by notice of the time and place, including publication in the *Federal Register*, and meetings are open to the public.[37] Upon considering a suggestion for a rules change, the Advisory Committee has several options, including: (1) accepting the suggestion, either completely or with modifications or limitations; (2) deferring action on the suggestion or seeking additional information regarding its operation and impact; (3) rejecting the suggestion because it does not have merit or would be inconsistent with other rules or a statute; or (4) rejecting the suggestion because, while it may have some merit, it is not really necessary or sufficiently important to warrant a formal amendment.[38]

The Reporter to the Advisory Committee, under the direction of the Advisory Committee or its Chair, prepares the initial drafts of rules changes and "Committee Notes" explaining their purpose or intent. The Advisory Committee then meets to consider and revise these drafts and submits them, along with an Advisory Committee Report which includes any minority or separate views, to the Standing Committee. The reporters of all the Advisory Committees are encouraged to work together, with the reporter to the Standing Committee, to promote clarity and consistency among the various sets of federal rules; the Standing Committee has created a Style Subcommittee, with its own Consultant, that works with the Advisory Committees to help achieve clear and consistent drafts of proposed amendments.

Once the Standing Committee approves the drafts for publication, the proposed rules changes are printed and circulated to the bench and bar, and to the public generally. Every effort is made to publish the proposed rules widely. More than 10,000 persons and organizations are on the mailing list, including: federal judges and other federal court officials; United States Attorneys; other federal government agencies and officials; state chief justices; state attorneys general; law schools; bar associations; and interested lawyers, individuals and organizations who request to be included on the distribution list.[39] A notice is published in the *Federal Register* and the proposed rules changes also are reproduced with explanatory committee notes and supporting documents in the West Publishing Company's advance sheets of *Supreme Court Reporter*, *Federal Reporter–Third Series*, and *Federal Supplement*.[40] As a matter of routine, copies are provided to other legal publishing firms. Anyone who requests a copy of any particular set of proposed changes may obtain one.

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35 See 28 U.S.C. §2073(b).

36 A Summary for Bench and Bar, supra note 25.

37 Notice of Public Meeting, 59 Fed. Reg. 59,793 (Nov. 18, 1994).

38 A Summary for Bench and Bar, supra note 25.

39 A Summary for Bench and Bar, supra note 25.

40 E.g., 115 S.Ct. No. 1, at cxvi (Nov. 1, 1994).

The comment period runs six months from the *Federal Register* notice date. The Advisory Committee usually conducts public hearings on proposed rule changes, again preceded by widely-published notice. The hearings typically are held in several geographically diverse cities to allow for regional comment. Transcripts of the hearings are generally available. The six-month time period may be abbreviated, and the public hearing cut out, only if the Standing Committee or its Chair determines that the administration of justice requires that the process be expedited.

At the conclusion of the comment period, the reporter prepares a summary of the written comments received and the testimony presented at public hearing for the Advisory Committee, which may make additional changes in the proposed rules. If there are substantial new changes, there may be an additional period for public notice and comment. The Advisory Committee then submits the proposed rule changes and Committee Notes to the Standing Committee. Each submission is accompanied by a separate report of the comments received which explains any changes made subsequent to the original publication. The report also includes the minority views of Advisory Committee members who chose to have their separate views recorded.

The Standing Committee coordinates the work of the several Advisory Committees, individually and jointly. Although on occasion the Standing Committee suggests actual proposals to be studied, its chief function is to review the proposed rules changes recommended by the Advisory Committees. Meetings of the Standing Committee are open to the public and are preceded by public notice in the *Federal Register*.[41] Minutes of all meetings are maintained as public records and made available to interested parties.

The Chair and Reporter of each Advisory Committee attend the meetings of the Standing Committee to present the proposed rules changes and Committee Notes. The Standing Committee may accept, reject, or modify a proposal. If a Standing Committee modification effects a substantial change, the proposal may be returned to the Advisory Committee with appropriate instructions, including the possibility of a second publication for another period of public comment and public hearings. The Standing Committee transmits the proposed rule changes and Committee Notes approved by it, together with the Advisory Committee report, to the Judicial Conference. The Standing Committee's report to the Judicial Conference includes its recommendations and explanations of any changes it has made, along with the minority views of any members who wish to record their separate statements.

The Judicial Conference, in turn, transmits those recommendations it approves to the Supreme Court of the United States. Formally, the Supreme Court retains the ultimate responsibility for the adoption of changes in the rules, accomplished by an Order of the Court.[42] The Supreme Court has at times played an active part, refusing to adopt rules proposed to it and making changes in the text of rules.[43] In practice, however, the Advisory Committees and the Standing Committee are the main engines for procedural reform in the federal courts. Under the

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41 Notice of Meeting, 55 Fed. Reg. 25,384 (1990).

42 Order Amending the Federal Rules of Civil Procedure (Apr. 22, 1993), H.R. Doc. 103-74, 103d Cong., 1st Sess., reprinted at 113 S.Ct. 478 (1993).

43 The Supreme Court actually made changes in the original adoption of the civil and criminal rules. Wright & Miller, supra note 7, §§2 n.8 & 1004 n.18. Charles E. Clark, The Role of the Supreme Court in Federal Rulemaking, 46 J. Am. Jud. Soc. 250 (1963). And the Court continues to do so. Order, 129 F.R.D. 559 (May 1, 1990); Order of April 27, 1995 (not yet reported).

enabling statutes,[44] amendments to the rules may be reported by the Chief Justice to the Congress at or after the beginning of a regular session of Congress but not later than May 1st. The amendments become effective no earlier than December 1 of the year of transmittal, if Congress takes no adverse action.[45]

Since 1958 this rulemaking procedure has been followed regularly.[46] Spirited debates have been generated, from time to time, over particular proposals and sets of amendments. Some of these controversies have been resolved within the Third Branch. In recent years, these rulemaking procedures have been followed with the result that particular proposals have been rejected at each level of consideration—at the Advisory Committees, at the Standing Committee, at the Judicial Conference, and at the Supreme Court—often with attendant public debate and occasionally with high controversy. Debate likewise has attended proposals that have been approved. For example, the last package of wholesale changes to the discovery provisions in the Civil Rules drew a separate statement from one member of the Supreme Court and a dissenting statement from three others.

Other controversies have played out in the Congress. For example, the 1993 amendments were the subject of hearings in both the Senate and the House of Representatives. A bill to rescind some of the discovery rules changes in that package passed the House, but did not reach the floor of the Senate. Controversy akin to the separation of powers doctrine often surrounds exercises of the legislative prerogative to pass a statute to effectuate a change in the federal rules of procedure. Most recently, Congress included three new rules of evidence in the Violent Crime Control and Law Enforcement Act of 1994.[47] But over the years judges and the judiciary regularly have been heard to urge that Congress should feel obliged to exercise greater self-restraint in this regard and defer to the Rules Enabling Act process.

Evaluative Norms[48]

It is worth a few pages to consider rulemaking procedures from a normative vantage, to ask what are the explicit and implicit norms that overlay the entire enterprise of federal judicial rulemaking, beyond the more familiar first level of abstraction that would consider the policy underlying some specific rule change. This vantage includes rulemaking norms as they are currently understood as well as how they might be "reimagined." If rulemaking procedures are a meta-procedure, in the sense they are the procedures followed to promulgate new court proce-

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44 28 U.S.C. §§2071-77.

45 But see Act of March 30, 1973, Pub. L. 93-12, 87 Stat. 9 (providing that the proposed Rules of Evidence should have no effect until expressly approved by Act of Congress).

46 Order Amending the Rules of Civil Procedure, 480 U.S. 955 (1987); Order Amending the Rules of Civil Procedure, 471 U.S. 1155 (1985); Order Amending the Rules of Civil Procedure, 461 U.S. 1097 (1983).

47 Pub. L. No. 103-322, 108 Stat. 1796; H.R. Rep. No. 103-711, 103d Cong., 2nd Sess. (1994). On unanimous recommendation of the Advisory Committee on Evidence and of the Standing Committee, the Judicial Conference informed Congress that in its view this exercise was imprudent and had produced seriously flawed language. The Judicial Conference proposed an alternative text more in accord with the norms and drafting style of the other rules. See *Report of the Judicial Conference on the Admission of Character Evidence in Certain Sexual Misconduct Cases* (Feb. 1995).

48 This part of this Report is adapted, with permission, from a letter from Professor Oakley to the Chair of the Subcommittee. John B. Oakley, An Open Letter on Reforming the Process of Revising the Federal Rules, 55 Mont. L. Rev. 435 (1994).

dures, then this segment of this Report, for what it is worth, might be described as a meta-meta-procedure. To describe it this way is to admit that this part has the smell of the lamp about it.

Inadequacies. Some argue that the existing norms to be found in the federal rules are not adequate and do not contemplate all that must be taken into account in a meaningful assessment of rulemaking as a process. Rule 1's goal for the federal civil rules is the "just, speedy, and inexpensive determination of every action." Although the three specified norms of justice, speed, and economy in civil litigation are rooted in common sense, they beg some of the most important questions that face rulemakers.

In a world in which time is money, speed and economy are two sides of the same figurative coin—and the sides are indistinguishable. Standing alone, they would argue for deciding every case by the quickest (and therefore cheapest) means possible—such as the flip of a more conventional coin on which the head does not mirror the tail. Of course a "heads or tails" system of resolving civil disputes would be intolerable, because it would be unjust. But the norm of justice lends itself more easily to condemnation of offered measures, rather than to a constructive way to sort proffered reforms, because it conceals at least two competing conceptions of what justice requires.

On the one hand, justice has something to do with fairness to individuals. Civil cases ought to reach the "right" result—the outcome that would follow if every relevant fact were known with absolute accuracy, if all uncertainty in meaning or application were wrung out of every relevant proposition of law, and if society itself could by some extraordinary plebiscite resolve whether the application of the general law to the unique circumstances of a particular case should be tempered by overriding concerns of the situational equity.

On the other hand, justice also has something to do with concerns of equality and aggregate social efficiency. If we were to allocate all of our resources to attaining the Nth degree of accuracy and absolute equity in our determinations of legal liability in a particular case, there would be far less, if any, resources left to adjudicate other deserving cases, let alone to accomplish all of the other functions government performs besides deciding civil disputes. Moreover, if equity were given a standing veto over pre-existing legal rules as applied to the actual facts of any given case, we would subvert the system of reliance on protected expectations that permits a society to function amid a welter of conflicting interests without every such conflict becoming a contested dispute brought into court.

The fact that Rule 1 speaks of a just determination in *every* case, not only the one before a judge at any given moment, is more a reminder of the inevitable tension between concerns of fairness and efficiency than a criterion for resolving that tension. It should therefore be no surprise that the history of federal civil procedure under the Federal Rules has featured a continuous but seldom explicitly elaborated struggle between what might be labeled the "primacy of fairness" versus the "primacy of efficiency." The "primacy of fairness" argues for subordination of procedural rules in favor of reaching the merits of the parties' dispute under the substantive law, and conditioning the finality of determination on liberal opportunities for amendment of pleadings, reconsideration by the trial court, and appellate review. The "primacy of efficiency" argues for rigorous enforcement of procedural rules to narrow the range of the parties' dispute and to expedite decision, and limiting the opportunity for, and scope of, appellate review.

Alternatives. What alternative or additional norms might be imagined for federal judicial rulemaking, beyond the norms that might be considered for the particular rules and procedures

themselves? Federal rules of procedure should be adopted, construed, and administered to promote five related norms: efficiency, fairness, simplicity, consensus, and uniformity.

The application of the norm of efficiency to the rulemaking process requires an assessment of how costly it is to initiate consideration of a rule change and for that proposal to proceed to implementation by the federal courts. That assessment is itself rather complicated, requiring, for instance, consideration of the social cost of the rulemaking process in terms of how much more time the rulemakers would have spent adjudicating cases, representing clients, or teaching students and conducting research, had they not been involved in the rulemaking process.

The assessment of the efficiency of the rulemaking process is further complicated by being interactive with assessment of the efficiency of the actual rules the rulemaking process produces. A conservative and time-consuming process of rulemaking may be less costly than fast-track rulemaking that taxes the litigation system with a constant need for retraining and a high rate of error attributable to unfamiliarity with as-yet unconstrued new rules, unless it can be shown that the long-run efficiency gains of new rules are consistently high. The inefficiency of frequently changing the rules might argue either for keeping the rulemaking process inefficient and thus resistant to proposals for change, or for adopting some form of staging process by which rule changes are limited, absent exceptional circumstances, to a prescribed schedule of once every so many years. Moreover, since the Judicial Conference does not have monopoly power in rulemaking, the relative efficiency of either an inert or a volatile judicial rulemaking process will be determined, in part, by the efficiency or inefficiency of the rules likely to be produced by direct Congressional action, or by Congressional delegation of local rulemaking power to individual district courts, should centralized rulemaking by the Judicial Conference committee structure be deemed unduly torpid.

As applied to the rulemaking process, the norm of fairness calls not only for receptivity to proposals for change by those not directly vested with rulemaking power, but also for access to the process of implementing a proposed rule change by those whose interests are most likely to be affected by any proposed change. How seriously is public comment encouraged and facilitated, and is this a pro forma gesture or is there evidence that adverse public comment makes a difference in the progression of a proposal into a rule change? As applied to the rules that the process produces, the norm of fairness requires evaluation of whether changes in the rules promote or retard the likelihood that individual cases will come to the right result, whether by adjudication or pro tanto by settlement, in relation to the efficiency gains or losses that result from such changes. Is the rulemaking system biased in favor of ratcheting up efficiency at the expense of fairness, or vice versa?

The norm of simplicity, specified in 28 U.S.C. §331, serves the related interests of both efficiency and fairness. Unduly complex rules of procedure not only increase the cost of training, compliance, and enforcement, but also increase the likelihood of mistaken and hence unfair application. Any rulemaking process that regularly produces unduly complex rules of procedure or unduly complicates existing simple rules threatens the systemic goals of efficiency and fairness.

As applied to the rulemaking process, the norm of consensus overlaps, but does not duplicate, the norm of fairness. The norm of consensus demands, first, that the rulemaking process be sufficiently open to public input to be fairly representative of, or at least sensitive to, the interests of those who will be most affected by the rules it produces. But this norm demands more than mere notice and the opportunity to be heard. There must be some sharing of, or at least constraint upon, the power to make new rules, so that a lack of consensus about the wisdom

of problematic proposed rules will normally suffice to block the adoption of such rules. Consensus should not be too strong a norm, however, because it favors the status quo. At the same time, the expectation for consensus should render the rulemaking process sufficiently inert to resist utopian reform by policymakers who are so detached from the arena of litigation to which the rules are directed that they are indifferent to the practical impact of rule changes upon those most affected by them.

The norm of uniformity is fundamental to the rulemaking process first set in place by the 1934 Rules Enabling Act. The Act was intended to promote a system of federal procedure that was not only trans-substantive but, with minor local variations, uniform in application in all federal district courts. Geographical uniformity is more important than trans-substantive application of the federal rules. Deviations from trans-substantive uniformity can, where necessary and appropriate, be expressly specified within the rules. Current examples are the special rules for class actions brought derivatively by shareholders, and the entire set of discrete rules of procedure for bankruptcy cases. But geographical disuniformity, even when expressly permitted by local opt-out provisions inserted into the national rules, operates insidiously and often covertly to impair the norms of both efficiency and fairness.

The norm of uniformity demands that the procedure for litigating actions in federal courts remain essentially similar nationwide. If each district court's rules of civil procedure are allowed to become sufficiently distinct that venue may affect outcome and that a special aptitude in local procedure becomes essential to competent representation in that court, forum-shopping would be encouraged. Moreover, litigants must either risk the unfairness of inadvertent mistake in conforming to localized rules of procedure or incur inefficient costs of insuring against the idiosyncrasies of local practice by ad hoc procedural research or the prophylactic retention of local counsel.

Issues and Recommendations

In this section of this Report, we turn to issues, analyses, and recommendations. The organization to be followed will take up issues related to the five entities in rulemaking: Advisory Committees; Standing Committee; Judicial Conference; Supreme Court; and Congress.[49]

A. Advisory Committees

Memberships: Criticisms have been leveled at the composition of the various rules committees. First, there have been allegations of an under-representation of the bar, particularly active practitioners, and of other identifiable interest groups within the bar, such as public interest lawyers. The often implied but sometimes explicit objection is that the Advisory Committees are dominated by federal judges. Second, there have been allegations of a lack of diversity of members. The argument is that the diversity of the Advisory Committees ought to mirror the diversity of the federal bar, which includes more women and minorities than are currently found on the federal bench.

These are considerations for the attention of the appointing authority, the Chief Justice. In recent years, the Advisory Committees have been enlarged to include more non-judges. Whether they (and the Standing Committee) have already become too large for sustained exchanges and

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49 Professor Carl Tobias assisted in the compilation of issues for consideration in this part of this Report.

careful discussion is an interesting question; drafting by large committees is rarely successful. We doubt that they should be much larger; perhaps they should be smaller. At all events, the rules committees are committees of the Judicial Conference of the United States, the policy-making entity of the Third Branch. They are not "bar" committees. The notion of representativeness, i.e., that there ought to be a seat on the Advisory Committee for each identifiable faction of the bar, contravenes the tradition of federal rulemaking based on a disinterested expertise, as opposed to interest-group politics. Rulemaking ought not follow public opinion or bar polls.

Federal judges ought to remain a majority of the members of the Advisory Committees. They have the knowledge and time to act in the best interest of the public those courts serve. They are of course lawyers too, with substantial experience on both sides of the bench. The ability to compare these two experiences (not to mention the diverse backgrounds that brought still others to the bench) makes judges especially appropriate rulemakers. This is not to say that the appointing power ought to be exercised without regard to the concerns we have mentioned. It is enough to suggest that these considerations be given appropriate attention within the present appointment process and that efforts be made to identify well-qualified candidates with diverse personal and professional experiences. Some recognition may appropriately be given to enduring divisions in the practice of law. For example, the Advisory Committee on the Criminal Rules includes a representative of the Department of Justice and a Federal Public Defender. Analogously, the Civil Justice Reform Act of 1990 required that advisory groups be "balanced and include attorneys and other persons who are representative of major categories of litigants" in each district.[50]

To help achieve these goals, the Chief Justice now solicits advice widely from within the federal judiciary and the Administrative Office of the U.S. Courts. The Chief Justice could consider seeking suggestions from the American Bar Association and similar other organizations as well.[51]

[1] Recommendation to the Chief Justice: Appointments to the Advisory Committees should reflect the personal and professional diversity in the federal bench and bar.

Length of terms: Members' terms on the Advisory Committee should be long enough to maintain continuity and to allow a member to see a proposal through to adoption, but not so long as to create inflexibility and to render rulemaking an "insider's game." The present practice is to appoint members for an initial three-year term followed by a second three-year term. On balance, this seems a reasonable normal term of years for members, but the Chief Justice should make exceptions when appropriate to help committees follow through with extended rulemaking projects.

Members must master a potentially bewildering number of proposals within a complex process. The Chair, Reporter, and veteran members of the Advisory Committee can be of great assistance. The rotation on and off of the Advisory Committee affords new members a break-in

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50 28 U.S.C. §478(b).

51 See also Proposed Long Range Plan for the Federal Courts (May 1995) Recommendation 30, Implementation Strategy 30c: "In developing rules, the Judicial Conference and the individual courts should seek significant participation by the interested public and representatives of the bar, including members of the federal and state benches."

period. This by-product is reason to maintain the staggered terms. Still, more formal assistance might be appropriate. This might take the form of an orientation meeting scheduled the day before the regular meeting of the Advisory Committee, attended by the new members, the Chair, and the Reporter, and perhaps others. Additionally, the Standing Committee and the Advisory Committees should continue to invite members whose terms have expired to attend the meeting after their term ends, in order to promote continuity.

[2] Recommendation to the Advisory Committees: Chairs and Reporters of the Advisory Committees should schedule orientation meetings with new members.

Somewhat different considerations obtain for Chairs. Rulemaking projects take three years from beginning to end. A Chair with a three-year term therefore can see a project through only if it commences at the outset of his or her tenure. A leader ought to be granted some time to think through proposals, to make them, and still have time to see them through. Reporters now serve indefinitely. Making a non-member of the committee the only enduring voice is questionable. A Chair, too, ought to provide continuity within the Advisory Committee and the Standing Committee. It is not uncommon for the Chairs to represent the judicial branch before the Congress. The practice of elevating an experienced member to the Chair is appropriate. If a Chair is designated at the end of one three-year term, a term of five years as Chair would be appropriate, increasing total service to eight years. This duration is not out of line in a life time-tenured institution. The shorter terms of members preserve sufficient opportunity for widespread involvement in rulemaking.

[3] Recommendation to the Chief Justice: The term for Chairs of the Advisory Committees should be five years.

Resources and support: Members of the Advisory Committees need sufficient resources and support for their part-time but nonetheless important duties. The permanent staff from the Administrative Office provides necessary logistical support for attending meetings and related duties. The Reporters provide important expertise and drafting assistance. Members exchange information about new developments as a matter of routine. Liaison members of the Standing Committee also contribute to the smooth operation of the committee system. The paper-flow through the Advisory Committees is substantial. The relevant literature in each of these areas of the law is growing rapidly.

Because committee members are part-time rulemakers it might be useful to provide them with some regular entrée to the secondary literature, including law journals and social-science publications that have some bearing on their responsibilities. The Reporters are the most logical bibliographers.

Various Advisory Committees have planned in-house seminars, presentations by panels of experts in their field, to bring members up-to-date on recent developments. These "continuing education" events should be continued.

[4] Recommendation to the Advisory Committees: Each Advisory Committee ought to consider adding to the Reporter's duties two tasks: first, regularly circulating law journal articles, social-science publications, and other pertinent articles; second, arranging and organizing in-house seminars.

Outreach and intake: One frequently heard criticism of federal rulemaking is that it is a closed process dominated by insiders and elites. The twin complaints are that some worthy proposals go begging for lack of a sponsor and some equally unworthy proposals are pushed through the process by members with an agenda. In fact, anyone can suggest a rules amendment; the Committees' meetings are open to the public, periods for public comment and public hearings are routine steps; proposed rules changes are widely published and distributed;[52] and the official records of the various rulemaking entities are public documents. Unless a flood of comments prevents it, the Advisory Committee (through its Secretary) acknowledges correspondence and later advises every correspondent of the action taken on his or her proposal. But even inaccurate perceptions have a way of overtaking reality, and they cannot go unchallenged. The Administrative Office's brochure entitled *The Federal Rules of Practice and Procedure—A Summary for Bench and Bar* is a good example of the ongoing effort to correct misconceptions about federal rulemaking. In August 1994 the Chair of the Standing Committee wrote the presidents of all state bar associations, requesting them to designate persons to receive drafts and make comments; so far more than half of the state bars have done this.

To promote both the appearance and reality of openness, greater uses of technology should be explored. The extensive mailing list for requests for comments on proposed rules changes usually generates only a few dozen responses. Not infrequently, public hearings scheduled for proposals are canceled for lack of interest.

There are alternate ways to reach interested persons. For example, the public hearing before the April 1994 meeting of the Advisory Committee on the Criminal Rules was broadcast on C-SPAN. Other things might be tried. Public hearings might be conducted relying on closed-circuit television. Proposed rules changes, now appearing in print media and on commercial services, can be made available electronically on the Internet promptly. The judiciary could maintain a World Wide Web server at minimal cost.[53] If the committees operate their own server, persons should be permitted to lodge their comments online for collection and transmittal to the Advisory Committee. E-mail availability networked internally within the Advisory Committee might be feasible, once the judiciary-wide network is operational.

[5] Recommendation to the Administrative Office: Electronic technologies should be used to promote rapid dissemination of proposals and receipt of comments.

The need for research: It is frequently asserted, most often by academic critics,[54] that federal rulemaking today is too dependent on anecdotal information rather than empirical research. Rules changes more often than not depend on the legal research of the Reporters combined with the informed judgment of the members of the rules committees. To make this

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52 The memorandum from John K. Rabiej to the Standing Committee, dated December 6, 1994, details these procedures. The mailing list contains 2,500 names. Any given recipient who does not respond over the course of three years will be replaced with a new name.

53 The Administrative Office has established a home page at http://www.uscourts.gov, but the page is still "under construction," meaning that comprehensive links to major data sources have not been established. Other institutions have taken the lead. Cornell has put several sets of rules online at http://www.law.cornell.edu, and Professor Theodore Eisenberg has made the AO's entire database available, with search and computation abilities added, at http://teddy.law.cornell.edu:8090/questata.htm. Undoubtedly there are other sites.

54 Baker, supra note 1, at 334-35. See particularly Stephen B. Burbank, Ignorance and Procedural Law Reform: A Call for a Moratorium, 59 Brooklyn L. Rev. 841 (1993).

argument is not necessarily to find fault with the model of disinterested experts as rulemakers. Nor does the argument deny the not-infrequent, well-documented instances when rulemakers have relied on empirical research.[55] Yet not enough has been done to incorporate empirical research into rulemaking on a regular basis. The major difficulties: research is expensive, it takes a long time, and the results are of doubtful utility when they come from demonstration projects rather than controlled experiments—which are rare indeed—or sophisticated econometric analysis of variation (the subject of the next section below).

We cannot expect members of the rules committees to be experts in empirical research techniques, although over the years a few have been. We can expect the Reporters to be well-versed in the literature related to their expertise, including interdisciplinary writings and studies in other disciplines that have some bearing. Indeed, this ought to be a criterion for appointment of Reporters. It might also be prudent for the Reporters to recruit colleagues in other disciplines whose expertise complements their own, as a kind of informal group of advisors. Additionally, the Administrative Office and the Federal Judicial Center may be called on to gather, digest, and synthesize empirical work of other institutions. The Advisory Committees should be expected to notify these institutions about what data ought to be collected. The Federal Judicial Center, in particular, should engage in original rules-related empirical research to determine how procedures are working. Likewise, the Center is adept at field studies and pilot programs—although, as we have observed, these are not a source of reliable data. Advisory Committees must take advantage of these possibilities. Finally, a program might be developed for commissioning independent studies to be performed by outside experts under contract with the Advisory Committee.

In sum: the Standing Committee ought to be able to expect that the Advisory Committees will rely to the maximum possible extent on empirical data as a basis for proposing rules changes.

[6] Recommendation to all the Advisory Committees: Each Advisory Committee should ground its proposals on available data and develop mechanisms for gathering and evaluating data that are not otherwise available.

An empirical research project of national scope is taking place under the auspices of the Civil Justice Reform Act of 1990.[56] Indeed, some have suggested that the program of district-by-district plans for case management has effectively created a second track of federal rulemaking that threatens the policy goals of national uniformity and political neutrality behind the Rules Enabling Act process. The pilot programs and district plans present an unparalleled opportunity for empirical research into the effectiveness of reforms, within districts and comparing districts with other districts. The Judicial Conference delegated primary responsibility for oversight and evaluation under the Act to the Committee on Court Administration and Case Management. But, as members of the Standing Committee will recall, the Standing Committee has established a liaison with that Committee. Congress has extended the deadline for reporting to December 31, 1996.[57]

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55 Baker, supra note 1, at 335.

56 Pub. L. No. 101-650, 104 Stat. 5089 (1990).

57 Pub. L. No. 103-420, 103rd Cong., 2nd Sess. (Oct. 25, 1994).

The Advisory Committee on the Civil Rules has the most direct interest in the evaluation of the delay and cost reduction plans. That Advisory Committee will be obliged to conduct its own assessment of the final report to Congress with the expectation that some local innovations in practice and procedure will deserve to be incorporated into the Federal Rules of Civil Procedure—and that less successful innovations will be abandoned, if necessary by being forbidden in the national rules. (We return below to the subject of uniformity.) The final report of the RAND study will provide the Advisory Committee with data for assessing future proposals for rules changes. In the long run, the Advisory Committees and the Standing Committee ought to be expected to learn to better utilize empirical research during the evaluation and reporting cycle. To this end, the Standing Committee should request that the Advisory Committee on Civil Rules provide a written report generalizing from the experience with the 1990 Act.

[7] Recommendation to the Advisory Committee on the Civil Rules: The Advisory Committee should report on and make suggestions about how data gathered from the experience under the Civil Justice Reform Act of 1990 might effectively be used in rulemaking.

Finally, the Standing Committee ought to go about gathering information about the experiences with the phenomenon of local options in the national rules. As part of the 1993 amendments to the Federal Rules of Civil Procedure, districts were afforded the discretion to opt-in or opt-out of various discovery rules changes. The resulting patchwork provides the equivalent of field experiments in the effectiveness of the optioned rules changes. The Federal Judicial Center has begun to collect data on the experience with opting in and out. The Standing Committee should recommend that the Advisory Committee on Civil Rules, in conjunction with the Federal Judicial Center and scholars, seek to evaluate and compare the experiences between districts that opted-in and those that opted-out. This study ought to assess the particular measures involved and offer guidance to the Standing Committee on the future appropriateness of writing local options into the national rules. There should be no bias in this inquiry: although it has long been a belief of the Standing Committee that uniform rules would facilitate a national practice, this belief should be investigated rather than treated as a shibboleth.

[8] Recommendation to the Advisory Committee on the Civil Rules: The Advisory Committee should assess the effects of creating local options in the national rules.

B. Standing Committee

Membership: The discussion about the composition of membership on the Advisory Committees will not be rehearsed here. Much of it applies to the Standing Committee.

It has been suggested that the Standing Committee should be reconstituted to consist only of an independent chair plus the chairs of the various Advisory Committees—or perhaps to have overlapping membership with the Advisory Committees, comprising the Chair plus one or two members of each Advisory Committee. Such a change would reduce the effectiveness of the Standing Committee as an independent voice (and a check), but it would increase continuity and ensure that each member is more thoroughly versed in the subject. The Chief Justice should consider each side of this balance in selecting the composition of the Standing Committee. One middle position between constituting the Standing Committee wholly from members of the Advisory Committees would be to make the Chairs full members of the Standing Committee, giving then *de jure* the roles that many have assumed *de facto* in recent years, participating in the

discussion of subjects of Advisory Committees other than their own and exercising substantial influence (but not voting). We make no concrete suggestion here but again commend this possibility to the consideration of the Chief Justice.

The criticism that the committees do not "represent" the bar resonates more for the Advisory Committees, which have principal drafting responsibility, than for the Standing Committee. Therefore, we do not suggest enlarging the membership of the Standing Committee to include more attorneys. Nevertheless, it is altogether fitting and proper to take into account goals of diversity in membership.

[9] Recommendation to the Chief Justice: Appointments to the Standing Committees should reflect the personal and professional diversity in the federal bench and bar.

Assuring uniformity. The Rules Enabling Act process is supposed to achieve and maintain a uniform national system of federal practice and procedure. National uniformity has been undermined by three factors. First, the ADR movement has created a menu of "nouveaux procedures"[58] that present choices of different resolution procedures for different kinds of disputes. Second, the Civil Justice Reform Act of 1990 balkanized rulemaking authority. Third, the Standing Committee has followed something of a reverse King James Version of rulemaking that "taketh away" and then "giveth": the Standing Committee's Local Rules Project has harmonized local rules with the national rules, but in recent rules amendments, e.g., Fed. R. Civ. P. 26(a), the Standing Committee has authorized district courts to strike off on their own paths, even to reject the national rule. But the new Fed. R. Civ. P. 83, to become effective on December 1, 1995, unless legislation intervenes, insists that local rules be consistent with, and not duplicate, national rules.

To identify these three developments is not to pass judgment on them, although the worry often heard is that the federal courts are reverting to the pre-1938 era of local procedure. It would not be appropriate for our Subcommittee of the Standing Committee to recommend a once-and-for-all "solution" to these variables—though we have already suggested taking a good hard look at the consequences. The Judicial Conference's own Long Range Planning Committee was unable to suggest a concrete solution.[59] Our exercise in taking the long-range view would not be complete if we did not at least draw attention to a worry expressed by many on the bench and in the bar. The worry is that the national rules and rulemaking are well on their way to becoming merely the lounge act and not the main room attraction in federal practice and procedure.

[10] Recommendation to the Standing Committee: The Standing Committee ought to keep the goal of national uniformity prominent in its expectations and decisionmaking. The Local Rules Project initiatives should be understood as a part of the continuing duty of the Standing Committee. There ought to be a strong but rebuttable presumption against local options in the national rules.

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58 Baker, supra note 1, at 334.

59 Proposed Long Range Plan for the Federal Courts (Mar. 1995) Recommendation 30, Implementation Strategy 30b: "The national rules should strive for greater uniformity of practice and procedure, but individual courts should be permitted limited flexibility to account for differing local circumstances and to experiment with innovative procedures."

Redrafting proposals. The main task of drafting proposed rules belongs to the Advisory Committees. The Advisory Committees possess the requisite expertise and serve as the focal point for suggestions and public commentary on the present and proposed rules. Rulemaking procedures and tradition, however, recognize that the Standing Committee may revise drafts of proposed rules submitted by the Advisory Committees, before or after the public comment period. Those procedures and traditions likewise anticipate that the Standing Committee will exercise self-restraint. Members of the Standing Committee should communicate concerns about style and grammar to the Chairs of the Advisory Committees before the meeting of the Standing Committee begins, to permit these matters to be rectified off the floor (it is easier to draft in small, peaceful groups) and presented to the Standing Committee in writing to facilitate careful reflection. Meetings of the Standing Committee then can focus on substance. We recognize, of course, that style and substance may be inseparable. If in the considered opinion of the Standing Committee a proposal requires substantial changes for either style or substance, the proposal ought to be returned to the Advisory Committee. This division of the rulemaking labor obliges the Standing Committee to be aware of its function and respectful of the role of the Advisory Committees.

[11] Recommendation to the Standing Committee: The Standing Committee and its members must be mindful that the primary responsibility for drafting rules changes is assigned to the Advisory Committees. Members of the Standing Committee should facilitate careful changes in language. If in the opinion of the Standing Committee a proposal requires substantial changes, the Standing Committee should return the measure to the Advisory Committee for further consideration.

Reporter. The Reporter to the Standing Committee has duties different from the those of the Reporters to the Advisory Committees. The former serves as a drafter, but the limited drafting function of the Standing Committee likewise limits this responsibility of its Reporter. The Reporter facilitates communication between the Advisory Committees and the Standing Committee, especially between regular meetings of the Standing Committee, by attending the meetings of the Advisory Committees and by communicating with their Reporters. The Reporter advises the Chair, assists the Administrative Office rules committee staff, and cooperates with the Federal Judicial Center. The Reporter monitors Congressional activities that are related to rulemaking and rules proposals. The Reporter keeps the Standing Committee abreast of commentary and literature related to the rules and rulemaking. The Reporter performs outreach efforts such as appearing before bar groups to familiarize the profession and the public with the rulemaking process and particular proposals. The Reporter serves as a director for special projects, such as the Local Rules Project. The Reporter serves as an advisor to the Standing Committee, as for example with the pending challenge to the Ninth Circuit Rules jointly filed by several states' attorneys general. The Reporter, as the "scholar-in-residence" of the Standing Committee, pursues long range proposals for rulemaking.

If these duties continue to increase and become more time-consuming, the Standing Committee may eventually decide to appoint an Associate Reporter to assist the Reporter. The sense of the Subcommittee is that things have not yet reached that point. If the Standing Committee accepts the recommendation below to allow the Subcommittee on Long Range Planning to lapse as well as other recommendations made here that would add to the duties of the Reporter, then an Associate Reporter might be needed sooner rather than later. Therefore, our recommendation is open-ended.

[12] Recommendation to the Standing Committee: The Standing Committee should take cognizance of the growing demands being placed on its Reporter and eventually should consider whether to appoint an Associate Reporter.

Liaison members. Liaison members from the Standing Committee attend and have the privilege of the floor at meetings of the Advisory Committees. This innovation ought to be continued with some attention to developing a more definite role for the liaison members.

[13] Recommendation to the Chair and Liaison Members: The Standing Committee recommends the continuation of the practice of appointing liaison members from the Standing Committee to the various Advisory Committees.

Subcommittee on Style. The immediate past Chair of the Standing Committee established a Subcommittee on Style and charged it with undertaking a restyling of the various sets of federal rules. That Subcommittee appointed a Reporter who has written a manual on rules drafting. The Subcommittee regularly has contributed to the efforts of the Advisory Committees and the Standing Committee to achieve greater consistency and clarity in the language of the federal rules. The Supreme Court has shown some unease with this process, which produces differences in style across rules; the "restyled" rules use terminology in a different way from the older rules, and when sending a package to Congress on April 27, 1995, the Supreme Court changed "must" to "shall" to preserve consistent usage. The Court may prefer an all-at-once project, of the kind now under way, but thoroughgoing restyling creates risks of accidental change in meaning (even as other unintended implications in the existing rules are caught and squelched). The Federal Rules of Civil Procedure have gone through several drafts of complete restyling; the Appellate Rules are halfway through. What remains undetermined, however, is how to proceed with the sets of restyled rules. The Long Range Planning Subcommittee has no special perspective on this frequent topic of discussion.

[14] Recommendation to the Standing Committee: The Standing Committee should decide what is to become of the restyled sets of federal rules.

Subcommittee on Numerical and Substantive Integration: In 1992 the Standing Committee created a Subcommittee on Numerical and Substantive Integration. As its name suggests, the Subcommittee is charged with two tasks: (1) explore the feasibility of integrating subjects common to the different sets of rules and dealing with them in a single rule that would then be considered part of all the other sets of rules and (2) develop a single numbering system that includes all the different sets of federal rules. This Subcommittee has lapsed into desuetude. We do not make a recommendation concerning it—beyond wishing that our own Subcommittee suffer the same fate (on which see the next recommendation).

Subcommittee on Long Range Planning. The immediate past Chair of the Standing Committee established a Subcommittee for Long Range Planning. Since then, the Subcommittee has planned to find a role, without substantial long range success. The rulemaking process *is* a form of long-range planning, which suggests that there is no need for a separate long-range planning organ. The subcommittee has filed reports with the Standing Committee about long range proposals already in the rulemaking pipeline and recommended the introduction of other such proposals. It has recommended that Advisory Committees study comprehensive packages of procedural reforms proposed by scholars, committees, and bar groups. (In the 2½ years since the Standing Committee adopted this recommendation, no Advisory Committee has reported back to the Standing Committee on any of these proposals.)

The Subcommittee has attempted to monitor the work of the Judicial Conference's Committee on Long Range Planning. It recommended and performed this self-study of rulemaking procedures.

The term of one member of the Subcommittee as a member of the Standing Committee expired; his vacancy on the Subcommittee has not been filled. The two remaining members unanimously and enthusiastically recommend that with the completion of this Report the Standing Committee disband the Subcommittee on Long Range Planning. (Similarly, in June 1995 the Chief Justice discharged the Judicial Conference's own Committee on Long Range Planning.) Another option is to assign long range planning in rulemaking to the reportorial function, perhaps on the occasion of creating the position of Associate Reporter, as is anticipated in a previous recommendation.

[15] Recommendation to the Chair of the Standing Committee: The Subcommittee on Long Range Planning should be abolished. Any issues regarding long range planning in the rules process ought to be reassigned to the individual member of the Standing Committee who serves as liaison to the Committee on Long Range Planning of the Judicial Conference and to the Reporter.

C. Judicial Conference

The Judicial Conference performs a function somewhere between the Standing Committee's and the Supreme Court's. For the most part, the Judicial Conference evaluates proposals on the basis of the paper record compiled by the Advisory Committees and the Standing Committee, and it gives thumbs up or thumbs down (the latter rarely) without making changes. We do not make any recommendations concerning the way the Judicial Conference deals with proposals from the Standing Committee—except for the obvious implication that a change in the role of the Supreme Court (discussed below) would alter the role of the Judicial Conference, and vice versa.

D. Supreme Court

The main issue regarding the Supreme Court's participation in judicial rulemaking is whether the High Court should continue its role in the statutory scheme. Congress has designated the Supreme Court as the entity with power to promulgate rules for the federal courts, subject to the possibility of legislation during the seven months between proposal and effective date.

Historically, the Court's role has been justified on two levels. First, the Supreme Court, as the highest federal court, exercises supervisory powers over the lower federal courts. Second, the prestige of the Court lends legitimacy and authority to the rules.

Commentators and individual Justices have questioned these justifications and argued that the Court's role is, in the pejorative, to serve as a "rubber stamp." Others on and off the Court have answered that the historic rationales still apply. They draw attention to the occasions when the Supreme Court has disapproved or altered draft rules and to the dissenting statements from some of the Justices regarding particular rules. There is the further, but inevitable, complication that the Supreme Court frequently is called on to interpret the rules and to decide whether they are valid under the Rules Enabling Act and the Constitution.

Justice White's statement regarding the 1993 package of amendments summed up his 31 years of experience in judicial rulemaking.[60] He concluded that the Supreme Court's "promulgation" of rules functionally amounts to a certification to the Congress that the Rules Enabling Act procedures are in place and operating properly and that the particular proposals before the Court are the careful products of that rulemaking process. The transmittal letters from the Chief Justice since then have made the same point. Admittedly, over the years different Justices have had different views of their role in judicial rulemaking, but a majority of the Court has never questioned the appropriateness of its participation. We accordingly leave to the Justices themselves the question whether there should be any change in their role—and, correspondingly, whether if it is best to maintain the Court's current role whether it would be appropriate to reduce the role of the Judicial Conference. Whether it is necessary for *both* of these bodies to pass on rules that have already been fully ventilated is doubtful.

There is one other possible change worth mentioning. A few years ago, the British Embassy sent a diplomatic note to the Court concerning the implications of a proposal for service in foreign countries . The measure was returned to the Judicial Conference for further consideration. After the concerns of the foreign governments were addressed, the proposal went forward. In the aftermath of that round of rulemaking, the Justices informed the Standing Committee that they wanted to be alerted to any controversy or objections to particular proposals, as part of the written record forwarded with the rules packages. The Supreme Court may want to consider whether it wishes to invite public comments on the rules in the wake of these transmissions—for there is no other opportunity for public comment after the Advisory Committees hold hearings.

[16] Recommendation to the Judicial Conference and the Supreme Court: The Conference and the Justices should consider whether it is advisable to establish a procedure for a period of public notice and written comment during the Supreme Court's evaluation of proposed rules.

E. Congress

The separation of powers that is part of the structure of the Constitution is not designed for efficiency. By creating federal courts and defining their jurisdiction, Congress keeps the promise of the Preamble to "establish justice." Rulemaking is a legislative power delegated to the Third Branch. The line drawn in the statutory authorization allows rules dealing with "practice and procedure" but prohibits rules that "abridge, enlarge or modify any substantive rights."[61] On the judicial side, this distinction requires careful discernment.

Congress has the power to adopt rules and procedures for the federal courts.[62] "May" does not imply "should." The wisdom behind the Rules Enabling Act procedures is deep. The Third Branch has the expertise to write rules of practice and procedure. Respect for the independence of the coordinate judicial branch, and the overarching values that independence protects, also counsels moderation in legislative promulgation or amendment of rules. Similarly with respect to legislation regulating the rulemaking process. In his year-end report for 1994, the Chief Justice

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60 Statement of Justice White, 113 S.Ct. at 575 (Apr. 22, 1993).

61 28 U.S.C. §2072 (a) & (b).

62 U.S. Const. art. III, §1.

wrote: "I believe that this [Rules Enabling Act] system has worked well, and that Congress should not seek to regulate the composition of the Rules Committees any more than it already has." The Judicial Conference has reached the same conclusion. See also Recommendation 1 above. And the Judicial Conference's Committee on Long Range Planning shares this understanding. See *Proposed Long Range Plan for the Federal Courts* (Mar. 1995) Recommendation 30, Implementation Strategy 30a ("Rules should be developed exclusively in accordance with the time-tested and orderly process established by the Rules Enabling Act.").

The Judicial Conference has the responsibility to represent before Congress the interests of the federal courts and the citizens they serve. The Standing Committee has the responsibility to aid the Judicial Conference in performing this role. The Standing Committee should continue to monitor legislative activity and serve as a resource to the Judicial Conference to remind Congress of the values behind the Rules Enabling Act. Existing links between the Advisory Committees (and the AO) and Members of Congress and committee staffs should be maintained and, if possible, reinforced. It may be necessary to remind Congress, too, that the 1988 legislation increasing the time needed to amend a rule affects the relation between legislative and judicial branches in the way we discussed above.

[17] Recommendation to the Standing Committee: The Standing Committee must be vigilant and alert to rulemaking initiatives in Congress and must be prepared to assist the Judicial Conference in the Conference's efforts to protect the integrity of the Rules Enabling Act procedures.

F. Miscellaneous

The rulemaking calendar/cycle: Three changes in the rulemaking environment have occurred at roughly the same time. The period between initial proposal and ultimate rule was extended in 1988 by increased opportunities for comment and an increased length of report-and-wait periods, so that it is now difficult to see a proposal through in fewer than three years. Simultaneously, the national rulemaking process had become more frenetic, with multiple packages pending simultaneously. Instead of five or more years between amendment cycles (the old norm), it is now common to see multiple amendments to the same rule in different phases: one pending before Congress, another pending before the Judicial Conference, a third out for public comment, and a fourth under consideration by an Advisory Committee. Meanwhile local rulemaking has burgeoned, in part at the instance of Congress (the Civil Justice Reform Act of 1990).

On one thing most people agree: *all* of these developments are unfortunate. It takes too long to amend a rule or create a new one, and delay not only perpetuates whatever problem occasioned the call for amendment but also invites Congress and local courts to step in. The former undermines the Enabling Act process (and discards the benefits of expertise); the latter undermines national uniformity. If the Supreme Court cannot respond quickly to a problem, legislation or local rules must be the answer. That amendments to the Rules Enabling Act are themselves responsible for the extended rulemaking cycle—that is, that Congress is the source of the delay it bemoans—is no answer to those who seek prompt changes. At the same time, few people can be found to support the existence of multiple changes to the same rule. Professor Wright, an observer and long-time participant in the rulemaking process, has condemned the

process of overlapping amendments in no uncertain terms.[63] His *cri de coeur* is one among many strong and fundamentally correct indictments. It also illustrates the intractable nature of the problem—for it is precisely the change in the length of the cycle that has made overlaps inevitable!

When rules could be amended after a year or two of effort, and when the Chairs of the Advisory Committees and Standing Committee had indefinite terms, it was easy to have discrete and well-separated packages of rules. The heads of the committees could plan a coherent program, confident that they could see it through, and that if new information called for prompt change, they could accomplish it by adding it to an existing package. No more. The increased length and formality of the rulemaking process makes it difficult for a bright idea or alteration required by legislation to "catch up" with an existing package. Meanwhile the members of the committees serve shorter terms, so that fresh blood brings fresh suggestions every year and the Chairs, to have any effect before their three-year terms expire, must act with dispatch. No wonder we see a drawn-out process in which amending cycles overlap while local rules sprout like weeds. And it is almost impossible to imagine a cure while the duration from proposal to effectiveness is longer than the terms of Chairs.

What is worse, a cure that entailed enforced separation of rules packages—say, a maximum of one package per three-year term of a Chair—would have large costs of its own. Would the package have to start life at the outset of the Chair's time? Too soon; the Chair needs time to settle in, do some deep thinking, review the data, collect the thoughts of the committee, and so on. Then would the package start late in the Chair's term? Too late; its architect would leave before sheparding the package through and accommodating the many demands for amendments that occur in the process. Meanwhile new things come up—new statutes, decisions that interpret a rule to create a trap for the unwary (the source of the overlapping proposals concerning Fed. R. App. P. 3 and 4 that Prof. Wright bemoaned)—and the cost of tidiness may be that litigants forfeit their rights. Put to a choice between simplifying the life of judges and authors, and preserving the rights of litigants, the rules committees always should choose the latter. That seals the fate of proposals to simplify and separate amendment packages without any escape hatch. Once we allow the escape hatch, however, messiness is inevitable.

Several recommendations above aim at relieving the stresses that have led to the current problems. We have suggested longer terms for Chairs and slower turnover of committees. We have ruminated about the possibility of abbreviating the rulemaking process by skipping one or another of the participants (either the Judicial Conference or the Supreme Court). What we now take up is the possibility of setting norms for our own work—norms rather than rules, for the reasons we have explained, but norms that if implemented will relieve the points of stress.

One important step would be to establish biennial cycles as the norm. Rules would be issued for comment every other year—not every year, or every six months, as is possible now. Advisory Committees could be encouraged to make recommendations to the Standing Committee every year (to ease the problem of congestion for both the Advisory Committees and the Standing Committee), but proposals would be consolidated for biennial publication. All Advisory Committees could be on the same schedule, so unless some emergency intervened the bar could anticipate that, say, proposals would be sent out for public comment only in even-

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[63] Charles Alan Wright, Foreword: The Malaise of Federal Rulemaking, 14 Rev. Litigation 1 (1994).

numbered years. Chairs with longer tenure could plan for these cycles, and it would be easier for late-occurring ideas to "catch up" without the need for separate publication.

A change in the publication cycle could be accompanied, to advantage, by a change in the Standing Committee's schedule. The summer meeting of the Standing Committee has been set by working backward from the May 1 deadline for promulgating rules and transmitting them to Congress (with a December 1 effective date). The Supreme Court can promulgate the rules by May 1 only if it receives a recommendation of the Judicial Conference the preceding fall (a recommendation at the Conference's spring meeting would leave the Court too little time). The Conference can make the necessary recommendation only if the Standing Committee acts by July, which leaves time to write and circulate the final recommendations. The summer meeting is therefore an enduring feature of the rulemaking landscape, so long as the Judicial Conference and the Court play their current roles and the statutory schedule is unchanged.

Not so the winter meeting—and not so the content of meetings. If all recommendations to the Judicial Conference are consolidated for action at the summer meeting, the second meeting of the year can be reserved for the discussion of drafts the Advisory Committees want to publish for comment. A meeting of the Standing Committee in the fall, rather than the winter, would create sufficient time to have a full comment period, a meeting of the Advisory Committee the next spring, and consideration of the final proposals at the ensuing summer meeting of the Standing Committee. This change could shave six months to a year off the rulemaking schedule, making a biennial cycle more attractive.[64]

As we have stressed, it will be essential to allow exceptions for true exigencies, as well as for off-year republication of proposals that deserve further comment. These should be few, however, as a longer cycle will permit more concentrated thought. We therefore make the following

[18] Recommendation to the Standing Committee: The Standing Committee should establish a biennial cycle as the norm in rulemaking, should limit its summer meeting to the consideration of proposals to the Judicial Conference, and should hold a fall meeting for the consideration of recommendations that drafts by sent out for public comment.

Conclusion

The Subcommittee's overall impression of federal rulemaking echoes the hackneyed phrase, "If it ain't broke, don't fix it." There is nothing "broken" about the procedures for amending the federal rules. Federal court practices and procedures "continue to be the outstanding system of

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[64] The following schedule would work. In spring or summer of Year One, the Advisory Committee makes a recommendation for publication. The Standing Committee would consider the recommendation at a meeting between September 15 and 30. Publication at the beginning of November (giving the AO a month for preparation) would produce a comment period closing at the end of April in Year Two. Advisory Committees would meet toward the end of April, in conjunction with any oral hearings, to consider comments and make recommendations for a meeting of the Standing Committee to be held at the end of June of beginning of July. The Standing Committee would transmit any approved drafts to the Judicial Conference for consideration in the fall of Year Two. If the Conference and Supreme Court approved, the rule wiold take effect on December 1 of Year Three, a total time of approximately 2½ years from initial proposal to effectiveness.

procedure in the world,"[65] admired and emulated by the state court systems and by the court systems of other countries. The procedure that has evolved for maintaining that system of rules deserves substantial credit for this. Nevertheless, we offer these constructive criticisms and recommendations.

Our hope for this Self-Study Report is that it will assist the Standing Committee to consider and then recommend adjustments in the federal judicial rulemaking mechanism.

Respectfully submitted,

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65 Charles Alan Wright, Amendments to the Federal Rules: The Function of a Continuing Rules Committee, 7 Vand. L. Rev. 521, 555 (1954).