ADVISORY COMMITTEE
ON
CRIMINAL RULES

Portland, Oregon
June 21-22, 1999

CRIMINAL RULES
MEETING

June 21-22, 1999

I. PRELIMINARY MATTERS

A. Remarks and Administrative Announcements by the Chair
B. Review/Approval of Minutes of April 1999, Meeting in Washington, D.C.

II. REVISED RULES 1-9 & COMMITTEE NOTES (Subcommittee A)

A. Rules 1 through 9

III. CONSIDERATION OF FIRST DRAFT OF RULES 10-22 (Subcommittee B)

A. Rules 10 through 22
B. Subcommittee B's Initial Edits to SSC's Style Revisions
C. Research Questions Posed by Judge Parker and Professor Saltzburg's Responses
D. Edits to Rule 11 Suggested by Professor Stith and Roger Pauley

IV. DESIGNATION OF TIME AND PLACE FOR FUTURE MEETING

A. October 7-8, 1999, Williamsburg, Virginia

ADVISORY COMMITTEE ON CRIMINAL RULES

Chair:

Honorable W. Eugene Davis
United States Circuit Judge
800 Lafayette Street, Suite 5100
Lafayette, Louisiana 70501

Area Code 318
593-5280

FAX-318-593-5309

Members:

Honorable Edward E. Carnes
United States Circuit Judge
Frank M. Johnson, Jr. Federal Building
and Courthouse
15 Lee Street
Montgomery, Alabama 36104

Area Code 334
223-7132

FAX-334-223-7676

Honorable David D. Dowd, Jr.
United States Senior District Judge
402 U.S. Courthouse & Federal Building
Two South Main Street
Akron, Ohio 44308

Area Code 330
375-5834

FAX-330-375-5628

Honorable D. Brooks Smith
United States District Judge
United States District Court
319 Washington Street, Room 104
Johnstown, Pennsylvania 15901

Area Code 814
533-4514

FAX-814-533-4519

Honorable John M. Roll
United States District Judge
United States District Court
415 James A. Walsh Courthouse
44 East Broadway Boulevard
Tucson, Arizona 85701-1719

Area Code 520
620-7144

FAX-520-620-7147

Honorable Susan C. Bucklew
United States District Judge
United States District Court
109 United States Courthouse
611 North Florida Avenue
Tampa, Florida 33602

Area Code 813
301-5858

FAX-813-301-5757

ADVISORY COMMITTEE ON CRIMINAL RULES (CONTD.)

Honorable Tommy E. Miller United States Magistrate Judge 173 Walter E. Hoffman United States Courthouse 600 Granby Street Norfolk, Virginia 23510-1915	Area Code 757 222-7007 FAX-757-222-7027
Honorable Daniel E. Wathen Chief Justice, Maine Supreme Judicial Court 65 Stone Street Augusta, Maine 04330	Area Code 207 287-6950 FAX-207-287-4641
Professor Kate Stith Yale Law School Post Office Box 208215 New Haven, Connecticut 06520-8215	Area Code 203 432-4835 FAX-203-432-1148
Robert C. Josefsberg, Esquire Podhurst, Orseck, Josefsberg, Eaton, Meadow, Olin & Perwin, P.A. City National Bank Building, Suite 800 25 West Flagler Street Miami, Florida 33130-1780	Area Code 305 358-2800 FAX-305-358-2382
Darryl W. Jackson, Esquire Arnold & Porter 555 Twelfth Street, N.W. Washington, D.C. 20004	Area Code 202 942-5000 FAX-202-942-5999
Henry A. Martin, Esquire Federal Public Defender 810 Broadway, Suite 200 Nashville, Tennessee 37203	Area Code 615 736-5047 FAX-615-736-5265
Assistant Attorney General Criminal Division (ex officio) Roger A. Pauley, Esquire Director, Office of Legislation, U.S. Department of Justice 601 D Street, N.E., Room 6637 Washington, D.C. 20530	Area Code 202 514-3202 FAX 202-514-4042

ADVISORY COMMITTEE ON CRIMINAL RULES (CONTD.)

Reporter:

Professor David A. Schlueter
St. Mary's University
School of Law
One Camino Santa Maria
San Antonio, Texas 78228-8602

Area Code 210
431-2212

FAX-210-436-3717

Liaison Member:

Honorable William R. Wilson, Jr.
United States District Judge
600 West Capitol Avenue, Room 149
Little Rock, Arkansas 72201

Area Code 501
324-6863

FAX-501-324-6869

Secretary:

Peter G. McCabe
Secretary, Committee on Rules of
Practice and Procedure
Washington, D.C. 20544

Area Code 202
273-1820

FAX-202-273-1826

ADVISORY COMMITTEE ON CRIMINAL RULES

SUBCOMMITTEES

Subcommittee on Criminal Forfeiture
Judge David D. Dowd, Chair
Professor Kate Stith
Robert C. Josefsberg, Esquire
Roger A. Pauley, Esquire

Subcommittee on Local Rules
Judge W. Eugene Davis, Chair
Roger A. Pauley, Esquire

Subcommittee on Grand Jury
Judge David D. Dowd, Chair
Judge D. Brooks Smith
Darryl W. Jackson, Esquire
DOJ

Subcommittee on Video Conferencing
Judge John M. Roll, Chair
Judge Susan C. Bucklew
Judge Tommy E. Miller
DOJ

Subcommittee on Style Revision
Subcommittee A
Judge D. Brooks Smith, Chair
Judge Edward E. Carnes
Judge Susan C. Bucklew
Judge Tommy E. Miller
Professor Kate Stith
Darryl W. Jackson, Esquire
DOJ

Subcommittee B
Judge David D. Dowd, Chair
Judge John M. Roll
Justice Daniel E. Wathen
Robert C. Josefsberg, Esquire
Henry A. Martin, Esquire
DOJ

JUDICIAL CONFERENCE RULES COMMITTEES

Chairs

Honorable Anthony J. Scirica
United States Circuit Judge
22614 United States Courthouse
Independence Mall West
601 Market Street
Philadelphia, Pennsylvania 19106
Area Code 215-597-2399
FAX 215-597-7373

Honorable Will L. Garwood
United States Circuit Judge
903 San Jacinto Boulevard
Suite 300
Austin, Texas 78701
Area Code 512-916-5113
FAX 512-916-5488

Honorable Adrian G. Duplantier
United States District Judge
United States Courthouse
500 Camp Street
New Orleans, Louisiana 70130
Area Code 504-589-7535
FAX 504-589-4479

Honorable Paul V. Niemeyer
United States Circuit Judge
United States Courthouse
101 West Lombard Street
Baltimore, Maryland 21201
Area Code 410-962-4210
FAX 410-962-2277

Honorable W. Eugene Davis
United States Circuit Judge
800 Lafayette Street, Suite 5100
Lafayette, Louisiana 70501
Area Code 318-593-5280
FAX 318-593-5309

Reporters

Prof. Daniel R. Coquillette
Boston College Law School
885 Centre Street
Newton Centre, MA 02159
Area Code 617-552-8650
FAX-617-576-1933

Prof. Patrick J. Schiltz
Associate Professor
University of Notre Dame
Law School
Notre Dame, Indiana 46556
Area Code 219-631-8654
FAX-219-631-4197

Prof. Alan N. Resnick
Hofstra University
School of Law
121 Hofstra University
Hempstead, NY 11549-1210
Area Code 516-463-5872
FAX-516-481-8509

Prof. Edward H. Cooper
University of Michigan
Law School
312 Hutchins Hall
Ann Arbor, MI 48109-1215
Area Code 734-764-4347
FAX 734-763-9375

Prof. David A. Schlueter
St. Mary's University
School of Law
One Camino Santa Maria
San Antonio, Texas 78228-8602
Area Code 210-431-2212
FAX 210-436-3717

CHAIRS AND REPORTERS (CONTD.)

Chairs

Honorable Fern M. Smith
United States District Judge
United States District Court
P.O. Box 36060
450 Golden Gate Avenue
San Francisco, California 94102
Area Code 415-522-4120
FAX 415-522-4126

Reporters

Prof. Daniel J. Capra
Fordham University
School of Law
140 West 62nd Street
New York, New York 10023
Area Code 212-636-6855
FAX 212-636-6899

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

April 22-23, 1999
Washington, D.C.

The Advisory Committee on the Federal Rules of Criminal Procedure met at the Thurgood Marshall Federal Judiciary Building in Washington, D.C. on April 22 and 23, 1999. These minutes reflect the discussion and actions taken at that meeting.

I. CALL TO ORDER & ANNOUNCEMENTS

Judge Davis, Chair of the Committee, called the meeting to order at 8:30 a.m. on Thursday, April 22, 1999. The following persons were present for all or a part of the Committee's meeting:

Hon. W. Eugene Davis, Chair
Hon. Edward E. Carnes
Hon. David D. Dowd, Jr.
Hon. D. Brooks Smith
Hon. John M. Roll
Hon. Susan C. Bucklew
Hon. Tommy E. Miller
Hon. Daniel E. Wathen
Prof. Kate Stith
Mr. Robert C. Josefsberg, Esq.
Mr. Darryl W. Jackson, Esq.
Mr. Henry A. Martin, Esq.
Mr. Laird Kirkpatrick, designate of the Asst. Attorney General for the Criminal Division
Professor David A. Schlueter, Reporter

Also present at the meeting were: Hon. James A. Parker, member of the Standing Committee and Chair of that Committee's Style Subcommittee; Professor Daniel Coquillette, Reporter to the Standing Committee; Mr. Roger Pauley, Jr. of the Department of Justice, Mr. John Rabiej and Mr. Mark Shapiro from the Rules Committee Support Office of the Administrative Office of the United States Courts; Ms. Laurel Hooper from the Federal Judicial Center; Ms. Nancy Miller, Judicial Fellow at the Administrative Office; Mr. Joseph Spaniol, consultant to the Standing Committee, and Professor Stephen A. Saltzburg, consultant to the Style Subcommittee of the Standing Committee,. Judge Davis, the Chair, welcomed the attendees.

II. APPROVAL OF MINUTES OF OCTOBER 1998 MEETING

Chief Justice Wathen moved that the Minutes of the Committee's October 1998 meeting in Cape Elizabeth, Maine be approved. Following a second by Mr. Josefsberg, the motion carried by a unanimous vote.

III. RULES PENDING BEFORE SUPREME COURT

The Reporter indicated that the following rules were pending before the Supreme Court:

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

IV. RULES APPROVED BY STANDING COMMITTEE AND JUDICIAL CONFERENCE

The Reporter informed the Committee that both the Standing Committee (at its January 1999 meeting) and Judicial Conference (at its Spring 1999 meeting) had approved the following rules:

1. Rule 32.2. Criminal Forfeitures
2. Rule 7. The Indictment and Information (Conforming Amendment);
3. Rule 31. Verdict (Conforming Amendment);
4. Rule 32. Sentence and Judgment (Conforming Amendment); and
5. Rule 38. Stay of Execution (Conforming Amendment).

RULES AMENDMENTS EFFECTIVE DECEMBER 1, 1998

The Reporter also informed the Committee that amendments to the following Rules had become effective on December 1, 1998:

1. Rule 5.1 (Preliminary Examination; Production of Witness Statements);
2. Rule 26.2 (Production of Witness Statements; Applicability to Rule 5.1 Proceedings);
3. Rule 31 (Verdict; Individual Polling of Jurors);

4. Rule 33 (New Trial; Time for Filing Motion);
5. Rule 35(b) (Correction or Reduction of Sentence; Changed Circumstances); and
6. Rule 43 (Presence of Defendant; Presence at Reduction or Correction of Sentence).

V. CRIMINAL RULES CURRENTLY UNDER CONSIDERATION BY ADVISORY COMMITTEE

A. Proposed Style Amendments to Rules 1-9, Rules of Criminal Procedure

Judge Davis opened the discussion by noting that in addressing the proposed style changes —as originally drafted and then reviewed by Subcommittee A —the Committee would inevitably have to address the issue of whether to make an substantive changes as well. He also noted that it would be important to be alert to style changes that might inadvertently amount to changes in the substance of the Rule. Other members agreed with that observation and Judge Parker noted that in addressing the style changes to the Appellate Rules, the Appellate Rules Committee had decided to make substantive changes as well.

Judge Smith, Chair of Subcommittee A, indicated that the subcommittee had reviewed the proposed style changes and had met for a one-day meeting to review the proposed changes. Each member of that subcommittee had been assigned one or more rules and was prepared to discuss the changes.

1. **Rule 1. Scope**. Judge Carnes explained that the proposed changes to Rule 1 included what is currently in Rule 60 (Title of Rules) and Rule 54 (Application and Exception). Following discussion, the Committee agreed by a vote of 8 to 2 to delete subdivision (a) in the redrafted rule (current Rule 60) because there was no need to indicate in the Rules themselves what the Rules will be called. (All remaining subdivisions in the restyled Rule 1 were renumbered). Judge Carnes further explained that the language in current Rule 54(2)(Offenses Outside a District or State), (3) (Peace bonds), and (4) (Proceedings Before United States Magistrate Judges) had not been incorporated into restyled Rule 1 because they were not needed.

He also pointed out that language in Rule 54(b)(5) relating to proceedings involving fishery offenses and proceedings against a witness in a foreign country had been deleted as being obsolete. Following discussion, the Committee decided by a vote of 10 to 0 to delete the language currently in Rule 54(c) relating to the definition of the words "demurrer," " motion to quash," "plea in abatement," "plea in bar," and "special plea in

bar" because those terms are obsolete and there is no need to cross-reference Rule 12, which addresses the topic of motions.

The Committee discussed use of the term "government attorney" as contrasted to the current term used in the Rules, "attorney for the government" in Rule 54(c). Following discussion, the Committee decided to add to the definition those attorneys authorized by law to conduct proceedings under the criminal rules in the capacity of prosecutor. That change was intended to cover such attorneys as those in the Office of Independent Counsel or Special Counsel.

In addressing the definition of the term "Magistrate Judge," the Committee decided to include the following language: "When these rules authorize a magistrate judge to act, a United States judge as defined in 28 U.S.C. § 451 may act."

The Committee also added a definition for "organization" as defined in 18 U.S.C. § 18. Finally, the Committee voted unanimously to arrange the definition of terms in restyled Rule 1(c) alphabetically. During the discussion, other minor stylistic changes were made to the rule.

2. Rule 2. Purpose and Construction.

Following a brief discussion concerning the title of the Rule, the Committee made a minor change to the text of Rule 2 to indicate that the "rules are to be interpreted to provide.." as opposed to the current language, "are intended to provide..."

3. Rule 3. The Complaint.

The Committee briefly addressed the issue of whether a complainant must personally appear before a judicial officer in swearing to a complaint. Professor Saltzburg reported that his research had shown that there is no such requirement. Following brief discussion concerning the relationship between Rules 3, 4, and 5 the Committee decided to tentatively approve Rule 3 pending research and possible redrafting to make those three rules consistent.

4. Rule 4. Arrest Warrant or a Summons on a Complaint.

In discussing the proposed changes to Rule 4(a), the Committee decided to include an element of discretion in those instances where the defendant fails to respond to a summons. The redrafted rule provides that the judge may issue a warrant, but must do so in those cases where the government requests that a warrant be issued. The Committee

also clarified language concerning the ability of the judge to issue more than one warrant or summons on the same complaint.

Rule 4(b), which simply notes that hearsay evidence may be used to establish probable cause, was deleted as being unnecessary; the caselaw now clearly recognizes that principle. In discussing proposed Rule 4(c), the Committee addressed the issue of whether the current language "nearest available magistrate" was the most appropriate standard. There was also some discussion on the question of whether some preference should be stated for requiring that a defendant be brought before a federal judge, rather than a state officer. After discussing the issue, the Committee decided to change the rule to require that a warrant must command that "the defendant be arrested and brought promptly before a federal judge or, if none is reasonably available, before a state or local officer;" The consensus was that this language would more accurately reflect the thrust of the original rule —that time is of the essence and the necessity of bringing a defendant before a judicial officer with some dispatch, regardless of the location of that officer —and to state a preference for using federal judicial officers rather than state officers.

In discussing Rule 4(d)(3) (Manner of executing warrant), Mr. Josefsberg and Mr. Martin raised the question of whether the defendant must request to see the warrant before an officer is obliged to show it to the defendant. Following discussion of the issue the Committee voted unanimously to approve the language as drafted.

During the discussion on Rule 4, other minor stylistic changes were made to the rule.

5. Rule 5. Initial Appearance.

In Rule 5(a), the Committee again discussed the issue of timely appearance of a defendant before a magistrate and decided to change the Rule to require that officers "promptly" bring a defendant to a judicial officer, and not necessarily the nearest officer.

There was some discussion concerning the need for Rules to distinguish between appearances that follow the filing of a complaint and those that follow the return of an indictment or information.

6. Rule 5.1. Preliminary Hearing in a Felony Case.

In considering the proposed style changes to Rule 5.1, the Committee addressed the issue of providing transcripts and recordings of the hearing to a defendant. Following extended discussion, the Committee decided to provide in the Rule that a judge could provide copies of the recordings to either party, upon request. And a copy of the

transcript could be made available to either party upon request and payment and in accordance with any Judicial Conference guidelines.

7. Rule 6. The Grand Jury.

Professor Stith explained the proposed changes to Rule 6. In particular she focused first on the language in Rule 6(b)(1) that deals with objections to the qualifications of the grand jurors before they take their oath. She pointed out that although there might be a remote possibility that a defendant would even know who the grand jurors are going to be, the language seems to have no real value, a view previously expressed by Professor Saltzburg in reviewing an earlier draft of the rule. Following discussion, the Committee voted 11-1 to remove the sentence in Rule 6(b)(1) that indicates that any challenges to the grand jurors must be made before they take their oath.

There was also some discussion regarding interchangeable use of the words "court" and "judge" throughout the rules. This matter was later referred to Judge Smith for further study.

Judge Stith also raised the question of whether the current language in Rule 6(e) concerning contempt for violations of the rule applied to any violations or only those involving a breach of the secrecy provisions in 6(e). After a short discussion, the Committee asked that the matter be research further.

Addressing Rule 6(e)(3), Judge Roll raised the question whether under 6(e)(3)(D)(ii), a defendant must articulate a particularized need for the grand jury information. That matter was also designated as one for further study. The Committee also added a new provision in 6(e)(3)(D) for addressing disclosure of grand jury information to lawyers of the armed forces. Other minor stylistic changes were also made to the rule.

8. Rule 7. The Indictment and the Information.

Discussion for Rule 7 focused on several areas. First, the Committee addressed the issue of whether Rule 7(a) needed to contain any reference to "hard labor." Following some discussion, it was decided that that issue needed additional research. Second, a question was raised about 7(b) vis a vis the ability of a defendant to waive an indictment and whether that must be done in open court. Following discussion, the Committee decided to leave the language as presented, which requires that the waiver be in open court. Third, the Committee discussed the need, if any, for including a reference to harmless error in Rule 7(c)(2), in light of Rule 52. The Committee ultimately decided to change the title of that subdivision to "Citation Error" which more accurately reflects the essence of the provision. Finally, in discussing Rule 7(e), which permits amendments to an

information, the Committee decided to conduct more research on the issue of whether an indictment could ever be amended.

9. Rule 8. Joinder of Offenses or Defendants.

The Committee discussed Rule 8 only briefly, making one minor stylistic change to the proposed revision.

10 Rule 9. Arrest Warrant or Summons on an Indictment or Information.

Discussion regarding Rule 9 focused primarily on the current provision in Rule 9(b)(1) that "the court may fix the amount of bail and endorse it on the warrant." Mr. Jackson reported that he had completed research on that language and had concluded that as written it probably was inconsistent with the Bail Reform Act. There was a question, however, whether the Committee should simply change the language to indicate that a magistrate could recommend the amount of bail, if any. Following a discussion on the issue, the Committee voted unanimously to remove the last sentence of 9(b)(1). The Committee also discussed the question of whether Rule 9 should be redrafted to make it more consistent with other Rules, such as Rules 4, 5, and 5.1 deal with the same general subject matter. The Committee also made several other minor stylistic changes to the Rule.

B. Proposed Amendments to Rules of Criminal Procedure

Before addressing several proposed amendments to the Rules, the Reporter raised the issue of whether any approved amendments should be published for comment. He noted that unless there was some compelling need to publish the proposed changes, it would be better to wait until the affected rules were "restyled" and published as an entire package in the next year or so. He added that to start what would amount to a dual track system of publication and comment could be confusing to the bench and the bar. Mr. Pauley responded that several of the proposed amendments were important because they addressed sometimes conflicting court decisions and should be published without delay. To do so might simply invite additional litigation. Mr. Rabiej pointed out that there is some sentiment for not routinely publishing rules changes every year and that the Supreme Court had expressed some concern about the number of amendments. The Committee ultimately voted 6 to 4 to decide on a case-by-case basis whether any substantive amendments should be published before the restyling package was ready for publication.

1. Rule 10. Arraignment & Rule 43. Presence of Defendant.

The Reporter provided some background information on the proposed amendments to Rules 10 and 43 that would permit the defendant to waive his or her appearance at the arraignment. He noted that at a prior meeting Judge Miller and Mr. Martin had agreed on some proposed language in a new (c)(i) that would make it clear that the defendant's ability to waive an appearance is available only where he or she is entering a plea of not guilty and that a waiver may not be used where the defendant, under Rule 7(b), must appear in open court to waive an indictment where he has been charged with a criminal information in a felony case. He continued by noting that at the October 1998 meeting the Committee had asked him to draft the appropriate amendment.

Judge Roll indicated that he had submitted a memo to the Committee that summarized the existing practice in both federal and state courts. He noted that some of the states that use teleconferencing do not require the defendant's consent to that procedure.

Chief Justice Wathen added that Maine and used teleconferencing and had ultimately rejected its use. ; Judge Bucklew noted that that is the case in Florida state courts and Judge Miller observed that Hawaii also uses that procedure.

Following additional discussion, Judge Davis appointed a subcommittee of Judge Roll (Chair), Judge Bucklew, Judge Miller, Mr. Martin, Mr. Jackson, and a representative from the Department of Justice. He asked that the subcommittee study the issue of whether to add a teleconferencing provision to Rule 10 and possibly other rules and report their findings and recommended amendments at the next meeting..

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

The Reporter provided a brief background on the proposed changes to Rule 12.2, which would make three changes. First, the amendment would require the defendant to provide notice of an intent to introduce expert testimony in a capital case sentencing proceeding. Second, the amendment would authorize the defendant, who had provided such notice, to undergo a mental examination. And third, the proposed change would place some limits on the ability of the government to see the results of that examination before the penalty phase had begun. Based upon the Committee's discussion at the October 1998 meeting, he had drafted an amendment to the Rule. He also noted that the Judicial Center had been asked to study the practice in states concerning mental examinations and the procedures for disclosing the results to the prosecution and defense. The Chair recognized Ms. Laurel Hooper from the Judicial Center, who had conducted the study.

At the suggestion of Mr. Pauley, a minor stylistic change was made to Rule 12.2(a). During the general discussion which followed, several members noted that there are few federal capital cases from which to draw any meaningful experience. Several

members raised the question again about the timing of the disclosure of the report and whether the defense might wish to reconsider whether to give notice of a defense that focuses on the mental condition of the defendant. In addition, Judge Bucklew raised the issue of whether the disclosure of the defendant's statements, as provided in Rule 12.2(c)(3) would be triggered by lay testimony about the defendant's mental condition. The Reporter indicated that that issue could be researched for the next meeting. Further consideration of the amendment was deferred until the next meeting. The Reporter indicated that he would submit the most recent version of the amendment to the Style Subcommittee for its consideration.

3. Rule 26. Taking of Testimony.

The Reporter provided background information on the proposed changes to Rule 26, which had been approved at the October 1998 meeting. He explained that as a result of that meeting he had drafted the amendment to parallel the provisions for using a deposition in a criminal case, i.e., that the court must first find that the witness is unavailable to testify in court. He also pointed out that since the last meeting, the Second Circuit had affirmed the use of such procedures in *United States v. Gigante*, 166 F.3d 75 (2d Cir. 1999). Following discussion by the Committee regarding that decision and its impact on the proposed amendment, Chief Justice Wathen moved that the amendment be approved with the words "in the interest of justice" being added as a prerequisite for using remote transmissions. Judge Miller seconded the motion which carried by a unanimous vote.

The Reporter indicated that he would make the change and forward the proposed amendment to the Style Committee for its consideration.

4. Rule 35(b). Correction or Reduction of Sentence.

The Reporter pointed out that Judge Carnes had drawn the Committee's attention to *United States v. Orozco*, 160 F.3d 1309 (11th Cir. 1998). In that decision the court had addressed a potential gap in the rule, that is whether a court may grant sentence relief to a defendant who has provided information to the government within one year of sentencing but the information is not actually useful to the government until much later. The court had concluded that the plain language of Rule 35(b) prevented any relief being granted to the defendant in that situation and recommended that Congress consider a change to the rule.

Mr. Pauley explained that the Justice Department agreed with the court's conclusion that a gap existed. He indicated that the Department would circulate a letter on the issue and suggest appropriate language for amending the rule.

5. Rule 49. Service and Filing of Papers.

The Reporter informed the Committee that the Technology Subcommittee of the Standing Committee had considered possible amendments to the Rules of Procedure that would permit electronic service of papers. The Civil Rules Committee was actively considering possible amendments to the Civil Rules that would probably form the basis for a uniform rule governing electronic service. Because Criminal Rule 49 incorporates civil practice regarding service of papers, it would be important for the Committee to inform the Civil Rules Committee of any concerns or issues that it thought should be addressed. He added that approximately 10 courts, bankruptcy and district courts (civil) were conducting pilot programs to determine the feasibility of electronic filing. To date, the response has been largely positive.

Several members noted the potential problem of how proof of service would be accomplished, especially where the defendant fails to appear in response to electronic notification. The Reporter indicated that the Committee would have additional opportunities to express its concerns and encouraged the members to continue to consider the issue and note any other potential problems.

VI DESIGNATION OF TIME AND PLACE OF NEXT MEETING.

The next meeting of the Committee was scheduled for June 21 and 22 in Portland Oregon to consider style changes to the Rules. Judge Davis indicated that he would circulate information about possible dates in October for the Fall 1999 meeting.

Respectfully Submitted,

David A. Schlueter
Professor of Law
Reporter, Criminal Rules Committee

I. SCOPE, PURPOSE, AND CONSTRUCTION	**Title I. Applicability of Rules**
	Rule 1. Scope; Definitions
Rule 1. Scope These rules govern the procedure in all criminal proceedings in the courts of the United States, as provided in Rule 54(a); and, whenever specifically provided in one of the rules, to preliminary, supplementary, and special proceedings before United States magistrate judges and at proceedings before state and local judicial officers. **Rule 54. Application and Exception** (a) **Courts** These rules apply to all criminal proceedings in the United States District Courts; in the District of Guam; in the District Court for the Northern Mariana Islands, except as otherwise provided in articles IV and V of the covenant provided by the Act of March 24, 1976 (90 Stat. 263); in the District Court of the Virgin Islands; and (except as otherwise provided in the Canal Zone) in the United States District Court for the District of the Canal Zone; in the United States Courts of Appeals; and in the Supreme Court of the United States; except that the prosecution of offenses in the District Court of the Virgin Islands shall be by indictment or information as otherwise provided by law.	**(a) Scope.** **(1)** ***In General.*** These rules govern the procedure in all criminal proceedings in the United States District Courts, United States Courts of Appeals, and the Supreme Court of the United States. **(2)** ***State or Local Officer.*** When a rule so states, it applies to a proceeding before a state or local officer. **(3)** ***Territorial Courts.*** These rules also govern the procedure in criminal proceedings in the following courts: (A) the district court of Guam; (B) the district court for the Northern Mariana Islands, except as otherwise provided by law; and (C) the district court of the Virgin Islands, except that the prosecution of offenses in that court must be by indictment or information as otherwise provided by law.

(b) PROCEEDINGS (Rule 54 continued) **(1) Removed Proceedings.** These rules apply to criminal prosecutions removed to the United States district courts from state courts and govern all procedure after removal, except that dismissal by the attorney for the prosecution shall be governed by state law. **(2) Offenses Outside a District or State.** These rules apply to proceedings for offenses committed upon the high seas or elsewhere out of the jurisdiction of any particular state or district, except that such proceedings may be had in any district authorized by 18 U.S.C. § 3238. **(3) Peace Bonds.** These rules do not alter the power of judges of the United States or of United States magistrate judges to hold security of the peace and for good behavior under Revised Statutes, § 4069, 50 U.S.C. § 23, but in such cases the procedure shall conform to these rules so far as they are applicable. **(4) Proceedings Before United States Magistrate Judges.** Proceedings involving misdemeanors and other petty offenses are governed by Rule 58.	(4) ***Removed Proceedings.*** Although these rules govern all proceedings after removal from a state court, state law governs a dismissal by the prosecution.
(5) Other Proceedings. These rules are not applicable to extradition and rendition of fugitives; civil forfeiture of property for violation of a statute of the United States; or the collection of fines and penalties. Except as provided in Rule 20(d) they do not apply to proceedings under 18 U.S.C. Chapter 403 — Juvenile Delinquency — so far as they are inconsistent with that chapter. They do not apply to summary trials for offenses against the navigation laws under Revised Statutes §§ 4300-4305, 33 U.S.C. §§ 391-396, or to proceedings involving disputes between seamen under Revised Statutes §§ 4079-4081, as amended, 22 U.S.C. §§ 256-258, or to proceedings for fishery offenses under the Act of June 28, 1937, c. 392, 50 Stat. 325-327, 16 U.S.C. §§ 772-772i, or to proceedings against a witness in a foreign country under 28 U.S.C. § 1784.	(5) ***Excluded Proceedings.*** Proceedings not governed by these rules include: (A) the extradition and rendition of a fugitive; (B) a civil property forfeiture for the violation of a federal statute; (C) the collection of a fine or penalty; (D) a proceeding under a statute governing juvenile delinquency to the extent the procedure is inconsistent with the statute, unless Rule 20(d) provides otherwise; and (E) a dispute between seamen under 22 U.S.C. §§ 256–58.

(c) Application of Terms. (Rule 54 continued) As used in these rules the following terms have the designated meanings. "Act of Congress" includes any act of Congress locally applicable to and in force in the District of Columbia, in Puerto Rico, in Puerto Rico, in a territory or in any insular possession. "Attorney for the government" means the Attorney General, an authorized assistant of the Attorney General, a United States Attorney, an authorized assistant of a United States Attorney, when applicable to cases arising under the laws of Guam the Attorney General of Guam or such other person or persons as may be authorized by the laws of Guam to act therein, and when applicable to cases arising under the laws of the Northern Mariana Islands the Attorney General of the Northern Mariana Islands or any other person or persons as may be authorized by the laws of the Northern Marianas to act therein. "Civil action" refers to a civil action in a district court. The words "demurrer," "motion to quash," "plea in abatement," "plea in bar" and "special plea in bar," or words to the same effect, in any act of Congress shall be construed to mean the motion raising a defense or objection provided in Rule 12. "District court" includes all district courts named in subdivision (a) of this rule.	**(b) Definitions.** The following definitions apply to these rules: (1) ["Court" includes a district judge when a criminal proceeding is in a United States court or in a territorial court as described in Rule 1(a)(3) and also includes a magistrate judge when performing functions authorized by law.] (1) ["Federal judge" means: (A) a justice of the Supreme Court of the United States; (B) a judge of the United States as defined in 28 U.S.C. § 451; or (C) a United States magistrate judge.] — may be unnecessary after further review
"Federal magistrate judge" means a United States magistrate judge as defined in 28 U.S.C. §§ 631-639, a judge of the United States or another judge or judicial officer specifically empowered by statute in force in any territory or possession, the Commonwealth of Puerto Rico, or the District of Columbia, to perform a function to which a particular rule relates. "Judge of the United States" includes a judge of the district court, court of appeals, or the Supreme Court. "Law" includes statutes and judicial decisions. "Magistrate judge" includes a United States magistrate judge as defined in 28 U.S.C. §§ 631-639, a judge of the United States, another judge or judicial officer specifically empowered by statute in force in any territory or possession, the Commonwealth of Puerto Rico, or the District of Columbia, to perform a function to which a particular rule relates, and a state or local judicial officer, authorized by 18 U.S.C. § 3041 to perform the functions prescribed by Rules 3, 4, and 5.	(2) "Government attorney" means: (A) the Attorney General, or an authorized assistant; (B) a United States attorney, or an authorized assistant; (C) when applicable to cases arising under Guam law, the Guam Attorney General or other person whom Guam law authorizes to act in the matter; and (D) any other attorney authorized by law to conduct proceedings under these rules as a prosecutor. (3) "Judge" means a federal judge or a state or local officer. (4) "Magistrate Judge" means a United States magistrate judge.

"Oath" includes affirmations. "Petty offense" is defined in 18 U.S.C. § 19. "State" includes District of Columbia, Puerto Rico, territory and insular possession. "United States magistrate judge" means the officer authorized by 28 U.S.C. §§ 631-639.	(5) "Oath" includes an affirmation. (6) "Organization" is defined in 18 U.S.C. § 18. (7) "Petty offense" is defined in 18 U.S.C. § 19. (8) "State" includes the District of Columbia, and any commonwealth, territory, or possession of the United States. (9) "State or local officer" includes: (A) a state or local officer authorized to act under 18 U.S.C. § 3041; and (B) a judicial officer specifically empowered by statute in force in the District of Columbia or in any commonwealth, territory, or possession, to perform a function to which a particular rule relates. **(c) Authority of Justices and Judges of the United States.** When these rules authorize a magistrate judge to act, a justice or judge of the United States as defined in 28 U.S.C. § 451 may act.

ADVISORY COMMITTEE NOTE

Rule 1 has been entirely revised. The rule has been expanded by incorporating Rules 54 because that rule deals with the application of the rules— even though existing Rule 1 purports to cover "Scope." First, the Committee believed that a statement of the scope of the rules should be at the beginning to show readers which proceedings are governed by these rules. Second, the revised Rule also contains Rule 54(c) — "Application of Terms" — as a new Rule 1(b), now entitled "Definitions." The Committee believed that it would be helpful to include at the beginning the definitions that apply generally to all the rules.

Rule 1(a) now contains language from Rule 54(b)(1). Language in current Rule 54(b)(2)-(4) has been deleted for several reasons: First, Rule 54(b)(2) refers to a venue statute that indicates where an offense committed on the high seas or somewhere outside the jurisdiction of a particular district is to be tried; once venue has been established, then the Rules of Criminal Procedure automatically apply. Second, Rule 54(b)(3) currently deals with Peace Bonds; that provision is inconsistent with the governing statute and is therefore deleted. Finally, Rule 54(b)(4) addresses proceedings conducted before United States Magistrate Judges, a topic now covered in Rule 58. Thus, it too was considered redundant and has been deleted.

Rule 1(a)(5) consists of material currently located in Rule 54(b)(5), with the exception of the references to fishery offenses and to proceedings against a witness in a foreign country. Those provisions were considered obsolete; the result is that those procedures, if they were to arise, would be governed by the Rules of Criminal Procedure.

Rule 1(b) is composed of material currently located in Rule 54(c), with several exceptions. First, "Act of Congress" has been deleted from the restyled rules; instead the rules use the term "federal statute." Second, the language concerning demurrers, etc. has been deleted as being unnecessary in the Federal Rules. Third, the definitions of "civil action" and "district court" have been deleted as being unnecessary. Fourth, the term used currently, "attorney for the government," has been changed to "government attorney" and has been expanded to include reference to those attorneys who may serve as special or independent counsel under applicable federal statutes.

Fifth, the Committee has added a definition for the term "court" at Rule 1(b)(1) Although that term originally was almost always synonymous with the term "district judge," the term might be misleading or unduly narrow to the extent that magistrate judges now, at least in some districts, perform many of the functions originally limited to district judges. For example, in some districts magistrate judges take guilty pleas under Rule 11 and handle grand jury matters under Rule 6, although both of those rules use the term, "court." The proposed definition continues the traditional interpretation that court means district judge, but also reflects the current understanding that policy or law may permit magistrate judges to act as the "court."

Sixth, the term "Judge of the United States"` has been replaced with the term "Federal Judge." Seventh, the definition of "Law" has been deleted as being superfluous and possibly misleading in the sense that it suggests that administrative regulations are excluded.

Eighth, the current rules include three definitions for "magistrate judge." The term used in amended Rule 1(b)(4) is limited to United States Magistrate Judges. In the current rules the term magistrate judge reads broadly: it includes not only United States Magistrate Judges, but also district court judges, court of appeals justices, Supreme Court Justices, and where authorized, state and local officers. The Committee believed that the rules should reflect current practice, i.e. the wider and almost exclusive use of United States Magistrate Judges, especially in preliminary matters. The definition, however, is not intended to restrict the use of other federal judicial officers to perform those functions. Thus, Rule 1(c) has been added to make clear that where the rules authorize a magistrate judge to act, any other federal judge or justice may act.

Finally, the term "organization" has been added to the list of definitions.

The remainder of the rule has been amended to make the rule more easily understood. In addition to changes made to improve the understanding, the Advisory Committee has changed language to make style and terminology consistent throughout the Criminal Rules. These changes

are intended to be stylistic only.

Rule 2. Purpose and Construction	**Rule 2. Interpretation**
These rules are intended to provide for the just determination of every criminal proceeding. They shall be construed to secure simplicity in procedure, fairness in administration and the elimination of unjustifiable expense and delay.	These rules are to be interpreted to provide for the just determination of every criminal proceeding, to secure simplicity in procedure and fairness in administration, and to eliminate unjustifiable expense and delay.

ADVISORY COMMITTEE NOTE

The language of Rule 2 has been amended to make the rule more easily understood. In addition to changes made to improve the understanding, the Advisory Committee has changed language to make style and terminology consistent throughout the Criminal Rules. These changes are intended to be stylistic only.

In particular, Rule 2 has been amended to clarify the effect of the Rules of Criminal Procedure. The words "are intended" have been changed to read "are to be interpreted." The Committee believed that that was the original intent of the drafters and more accurately reflects the purpose of the rules.

II. PRELIMINARY PROCEEDINGS	**Title II. Preliminary Proceedings**
Rule 3. The Complaint	**Rule 3. The Complaint**
The complaint is a written statement of the essential facts constituting the offense charged. It shall be made upon oath before a magistrate judge.	The complaint is a written statement of the essential facts constituting the offense charged. It must be made under oath before a magistrate judge, or, if none is reasonably available, before a state or local officer.

ADVISORY COMMITTEE NOTE

Rule 3 has been amended to make the rule more easily understood. In addition to changes made to improve the understanding, the Advisory Committee has changed language to make style and terminology consistent throughout the Criminal Rules. These changes are intended to be stylistic only.

Current Rule 3 requires the complaint to be sworn before a "magistrate judge," which under current Rule 54 could include a state or local judicial officer. As that term is now defined in Rule 1, state and local officers are no longer included in the definition of magistrate judges for the purposes of these rules. Instead, the definition refers only to United States Magistrate Judges. Read

together, Rule 3 requires that the complaint be made before a United States Magistrate Judge, or if none is available, before a state or local officer. As noted in Rule 1(c), where the rules, such as this one, authorize a magistrate judge to act, any other federal judge or justice may act. Thus, the Rule more clearly indicates a preference for this procedure taking place before a federal judicial officer.

Rule 4. Arrest Warrant or Summons upon Complaint	**Rule 4. Arrest Warrant or a Summons on a Complaint**
(a) Issuance. If it appears from the complaint, or from an affidavit or affidavits filed with the complaint, that there is probable cause to believe that an offense has been committed and that the defendant has committed it, a warrant for the arrest of the defendant shall issue to any officer authorized by law to execute it. Upon the request of the attorney for the government a summons instead of a warrant shall issue. More than one warrant or summons may issue on the same complaint. If a defendant fails to appear in response to the summons, a warrant shall issue.	**(a) Issuance.** If the complaint or one or more affidavits filed with the complaint establish probable cause to believe that an offense has been committed and that the defendant committed it, the judge must issue an arrest warrant to an officer authorized to execute it. At the request of the government attorney, the judge must issue a summons, instead of a warrant, to a person authorized to serve it. A judge may issue more than one warrant or summons on the same complaint. If a defendant fails to appear in response to a summons, a judge may, and upon request of the government attorney must, issue a warrant.
(b) Probable Cause. The finding of probable cause may be based upon hearsay evidence in whole or in part.	
(c) Form. **(1) Warrant.** The warrant shall be signed by the magistrate judge and shall contain the name of the defendant or, if the defendant's name is unknown, any name or description by which the defendant can be identified with reasonable certainty. It shall describe the offense charged in the complaint. It shall command that the defendant be arrested and brought before the nearest available magistrate judge. **(2) Summons.** The summons shall be in the same form as the warrant except that it shall summon the defendant to appear before a magistrate at a stated time and place.	**(b) Form.** **(1)** ***Warrant.*** A warrant must: (A) contain the defendant's name or, if it is unknown, a name or description by which the defendant can be identified with reasonable certainty; (B) describe the offense charged in the complaint; (C) command that the defendant be arrested and promptly brought before a magistrate judge or, if none is reasonably available, before a state or local officer; and (D) be signed by a judge. **(2)** ***Summons.*** A summons is to be in the same form as a warrant except that it must require the defendant to appear before a magistrate judge at a stated time and place.

(d) Execution or Service; and Return. **(1) By Whom.** The warrant shall be executed by a marshal or by some other officer authorized by law. The summons may be served by any person authorized to serve a summons in a civil action. **(2) Territorial Limits.** The warrant may be executed or the summons may be served at any place within the jurisdiction of the United States.	**(c) Execution or Service, and Return.** **(1)** ***By Whom.*** Only a marshal or other authorized officer may execute a warrant. Any person authorized to serve a summons in a federal civil action may serve the summons. **(2)** ***Territorial Limits.*** A warrant may be executed, or a summons served, only within the jurisdiction of the United States.
(3) Manner. The warrant shall be executed by the arrest of the defendant. The officer need not have the warrant at the time of the arrest but upon request shall show the warrant to the defendant as soon as possible. If the officer does not have the warrant at the time of the arrest, the officer shall then inform the defendant of the offense charged and of the fact that a warrant has been issued. The summons shall be served upon a defendant by delivering a copy to the defendant personally, or by leaving it at the defendant's dwelling house or usual place of abode with some person of suitable age and discretion then residing therein and by mailing a copy of the summons to the defendant's last known address.	**(3)** ***Manner.*** (A) A warrant is executed by arresting the defendant. Upon arrest, the officer must inform the defendant of the warrant's existence and of the offense charged. At the defendant's request, the officer must show the warrant to the defendant as soon as possible. (B) A summons is served on a defendant: (i) by personal delivery; or (ii) by leaving it at the defendant's residence or usual place of abode with a person of suitable age and discretion residing at that location and by mailing a copy to the defendant's last known address. (C) A summons to an organization is served by delivering a copy to an officer or to a managing or general agent or to another agent appointed or legally authorized to receive service of process. If the agent is one statutorily authorized to receive service and if the statute so requires, a copy must also be mailed to the organization's last known address within the district or to its principal place of business elsewhere in the United States.

(4) Return. The officer executing a warrant shall make return thereof to the magistrate judge or other officer before whom the defendant is brought pursuant to Rule 5. At the request of the attorney for the government any unexecuted warrant shall be returned to and canceled by the magistrate judge by whom it was issued. On or before the return day the person to whom a summons was delivered for service shall make return thereof to the magistrate judge before whom the summons is returnable. At the request of the attorney for the government made at any time while the complaint is pending, a warrant returned unexecuted and not canceled or summons returned unserved or a duplicate thereof may be delivered by the magistrate judge to the marshal or other authorized person for execution or service.	**(4)** ***Return.*** (A) After executing a warrant, the officer must return it to the judge before whom the defendant is brought in accordance with Rule 5. At the government attorney's request, an unexecuted warrant must be brought back to and canceled by a magistrate judge or, if none is reasonably available, by a state or local officer. (B) The person to whom a summons was delivered for service must return it on or before the return day. (C) At the request of the government attorney, a judge may deliver an unexecuted warrant or an unserved summons or a copy of the warrant or summons to the marshal or other authorized person for execution or service.

ADVISORY COMMITTEE NOTE

Rule 4 has been amended to make the rule more easily understood. In addition to changes made to improve the understanding, the Advisory Committee has changed language to make style and terminology consistent throughout the Criminal Rules. These changes are intended to be stylistic only. Several substantive changes have been made, however.

Rule 4(a) has been amended to provide an element of discretion in those situations where the defendant fails to respond to a summons. Under the current rule, the judge must in call cases issue an arrest warrant. The rule now provides that if the government attorney does not request that an arrest warrant be issued on a failure to appear, the judge may decide whether to issue one or not.

Current Rule 4(b), which refers to the fact that hearsay evidence may be used to support probable cause, has been deleted. The case law is now perfectly clear on that proposition and is more appropriately covered under Rule 1101(d), Federal Rules of Evidence.

New Rule 4(b), which is currently Rule 4(c), addresses the form of an arrest warrant and a summons and includes two changes. First, Rule 4(b)(1)(C) now requires that the warrant require that the defendant be brought "promptly" before a judge. The Committee that this was a more appropriate standard than the current requirement that the defendant be brought before the nearest available magistrate judge. Under Rule 1(b)(4), a magistrate judge is a United States Magistrate Judge. This language accurately reflects the thrust of the original rule, that time is of the essence and the necessity of bringing a defendant before a judicial officer with some dispatch, regardless of the location of that officer. Second, the revised rule states a preference that the defendant be brought before a federal judicial officer.

Rule 4(b)(2) has been amended to require that if a summons is issued, the defendant must appear before a magistrate judge. The current rule requires the appearance before a "magistrate," which could include a state or local judicial officer. This is consistent with the preference for requiring defendants to appear before federal judicial officers stated in revised Rule 4(b)(1).

Rule 4(c), currently Rule 4(d), includes two substantive changes. First, Rule 4(c)(3)(C) is taken from former Rule 9(c)(1). That provision, which specifies the manner of serving a summons on an organization. The Committee believed that Rule 4 was the more appropriate place to locate the general provisions for addressing the mechanics of arrest warrants and summons. As noted at Rule 9, that rule now liberally cross-references the basic provisions appearing in Rule 4. Second, a change has been made in Rule 4(c)(4). Currently, Rule 4(d)(4) requires that an unexecuted warrant must returned to the magistrate judge who issued it. As amended, Rule 4(c)(4)(A) indicates that after a warrant is executed, the officer must return it to the judge before whom the defendant will appear under Rule 5. At the government's request, however, an unexecuted warrant may be returned and canceled by any magistrate judge. The change is based upon the view that at the time the warrant is returned, the issuing magistrate judge may not be available.

Rule 5. Initial Appearance Before the Magistrate Judge	**Rule 5. Initial Appearance**
(a) In General. An officer making an arrest under a warrant issued upon a complaint or any person making an arrest without a warrant shall take the arrested person without unnecessary delay before the nearest available federal magistrate judge or, in the event that a federal magistrate judge is not reasonably available, before a state or local judicial officer authorized by 18 U.S.C. § 3041. If a person arrested without a warrant is brought before a magistrate judge, a complaint shall be filed forthwith which shall comply with the requirements of Rule 4(a) with respect to the showing of probable cause. When a person, arrested with or without a warrant or given a summons, appears initially before the magistrate judge, the magistrate judge shall proceed in accordance with the applicable subdivisions of this rule.	**(a) In General.** (1) Any person making an arrest must promptly take the arrested person before a federal judge or, if none is reasonably available, before a state or local officer. (2) When a person arrested without a warrant is brought before the judge, a complaint meeting Rule 4(a)'s requirement of probable cause must be filed promptly.

(c) Offenses Not Triable by the United States Magistrate Judge. If the charge against the defendant is not triable by the United States magistrate judge, the defendant shall not be called upon to plead. The magistrate judge shall inform the defendant of the complaint against the defendant and of any affidavit filed therewith, of the defendant's right to retain counsel or to request the assignment of counsel if the defendant is unable to obtain counsel, and of the general circumstances under which the defendant may secure pretrial release. The magistrate judge shall inform the defendant that the defendant is not required to make a statement and that any statement made by the defendant may be used against the defendant. The magistrate judge shall also inform the defendant of the right to a preliminary examination. The magistrate judge shall allow the defendant reasonable time and opportunity to consult counsel and shall detain or conditionally release the defendant as provided by statute or in these rules. * * * * *	**(b) Felonies.** (1) If the offense charged is a felony, the judge must inform the defendant of the following: (A) the complaint against the defendant, and any affidavit filed with it; (B) the defendant's right to retain counsel or to request that counsel be appointed if the defendant cannot obtain counsel; (C) the circumstances under which the defendant may secure pretrial release; (D) any right to a preliminary hearing; and (E) the defendant's right not to make a statement, and that any statement made may be used against the defendant. (2) The judge must allow the defendant reasonable opportunity to consult counsel. (3) The judge must detain or conditionally release the defendant as provided by statute or these rules. (4) A defendant may be called to plead only under Rule 10.
(b) Misdemeanors and Other Petty Offenses. If the charge against the defendant is a misdemeanor or other petty offense triable by a United States magistrate judge under 18 U.S.C. § 3401, the magistrate judge shall proceed in accordance with Rule 58.	**(c) Misdemeanors.** If a defendant is charged with a misdemeanor, the judge must inform the defendant in accordance with Rule 58(b)(2).

ADVISORY COMMITTEE NOTE

Rule 5 has been amended to make the rule more easily understood. In addition to changes made to improve the understanding, the Advisory Committee has changed language to make style and terminology consistent throughout the Criminal Rules. These changes are intended to be stylistic only. In addition, several substantive changes have been made.

Rule 5(a), which governs initial appearances by an arrested defendant before a magistrate judge. First, Rule 5(a)(1) now provides that a person making the arrest must bring the defendant "promptly" before a magistrate judge, instead of the current reference to "nearest available" magistrate. This language parallels that in Rule 4 and reflects the view that time is of the essence, regardless of the

location of the judge before whom the defendant will appear. The Committee intends no change here; in *County of Riverside v. McLaughlin*, 500 U.S. 44 (1991), the Supreme Court used both terms interchangeably. The last sentence in current Rule 5(a) has been deleted as being unnecessary. As in other provisions throughout the rules, the preference is that the defendant be brought before a federal judicial officer. Only if a magistrate judge is not available should the defendant be taken before a state or local officer.

Rule 5(b), formerly Rule 5(c), has been retitled to more clearly reflect the subject of that subdivision, the procedure to be used if the defendant is charged with a felony. And Rule 5(b)(4) has been added to make clear that a defendant may only be called upon to enter a plea under the provisions of Rule 10.

Finally, the last portions of current Rule 5(c) have been moved to Rule 5.1, which deals with preliminary hearings in felony cases.

	Rule 5.1. Preliminary Hearing in a Felony Case Prior to Indictment or Information
	(a) In General. If charged with a felony prior to indictment or information,) a defendant is entitled to a preliminary hearing before a magistrate judge.
Rule 5(c) Offenses Not Triable by the United States Magistrate Judge. * * * * * A defendant is entitled to a preliminary examination, unless waived, when charged with any offense, other than a petty offense, which is to be tried by a judge of the district court. If the defendant waives preliminary examination, the magistrate judge shall forthwith hold the defendant to answer in the district court. If the defendant does not waive the preliminary examination, the magistrate judge shall schedule a preliminary examination. Such examination shall be held within a reasonable time but in any event not later than 10 days following the initial appearance if the defendant is in custody and no later than 20 days if the defendant is not in custody, provided, however, that the preliminary examination shall not be held if the defendant is indicted or if an information against the defendant is filed in district court before the date set for the preliminary examination.	**(b) Scheduling.** The **[court]** must hold a preliminary hearing within a reasonable time, but no later than 10 days after the initial appearance if the defendant is in custody and no later than 20 days if not in custody, unless: (1) the defendant waives the hearing; (2) the defendant is indicted; or (3) the government files an information.

With the consent of the defendant and upon a showing of good cause, taking into account the public interest in the prompt disposition of criminal cases, time limits specified in this subdivision may be extended one or more times by a federal magistrate judge. In the absence of such consent by the defendant, time limits may be extended by a judge of the United States only upon a showing that extraordinary circumstances exist and that delay is indispensable to the interests of justice	(c) **Extending the Time.** With the defendant's consent and upon a showing of good cause — taking into account the public interest in the prompt disposition of criminal cases — the **[court]** may extend the time limits in Rule 5.1(b) one or more times. If the defendant does not consent, the **[court]** may extend the time limits only on a showing that extraordinary circumstances exist and justice requires the delay.
Rule 5.1. Preliminary Examination. **(a) Probable Cause Finding.** If from the evidence it appears that there is probable cause to believe that an offense has been committed and that the defendant committed it, the federal magistrate judge shall forthwith hold the defendant to answer in district court. The finding of probable cause may be based upon hearsay evidence in whole or in part. The defendant may cross-examine adverse witnesses and may introduce evidence. Objections to evidence on the ground that it was acquired by unlawful means are not properly made at the preliminary examination. Motions to suppress must be made to the trial court as provided in Rule 12.	(d) **Probable-Cause Finding.** If the**[court]** finds probable cause to believe an offense has been committed and the defendant committed it, the **[court]** must promptly require the defendant to appear for further proceedings. The defendant may cross-examine adverse witnesses and may introduce evidence but cannot object to evidence on the ground that it was unlawfully acquired.
(b) Discharge of Defendant. If from the evidence it appears that there is no probable cause to believe that an offense has been committed or that the defendant committed it, the federal magistrate judge shall dismiss the complaint and discharge the defendant. The discharge of the defendant shall not preclude the government from instituting a subsequent prosecution for the same offense.	(e) **Discharging the Defendant.** If the **[court]** finds no probable cause to believe an offense has been committed or the defendant committed it, the **[court]** must dismiss the complaint and discharge the defendant. A discharge does not preclude the government from later prosecuting the defendant for the same offense.
(c) Records. After concluding the proceeding the federal magistrate judge shall transmit forthwith to the clerk of the district court all papers in the proceeding. The magistrate judge shall promptly make or cause to be made a record or summary of such proceeding. (1) On timely application to a federal magistrate judge, the attorney for a defendant in a criminal case may be given the opportunity to have the recording of the hearing on preliminary examination made available to that attorney in connection with any further hearing or preparation for trial. The court may, by local rule, appoint the place for and define the conditions under which such opportunity may be afforded counsel.	(f) **Records.** The preliminary hearing must be recorded by a court reporter or by a suitable recording device. The **[court]** may make a copy of the recording available to either party upon request and may make a transcript available to either party upon request and any payment as required in accordance with applicable Judicial Conference regulations.

(2) On application of a defendant addressed to the court or any judge thereof, an order may issue that the federal magistrate judge make available a copy of the transcript, or of a portion thereof, to defense counsel. Such order shall provide for prepayment of costs of such transcript by the defendant unless the defendant makes a sufficient affidavit that the defendant is unable to pay or to give security therefor, in which case the expense shall be paid by the Director of the Administrative Office of the United States Courts from available appropriated funds. Counsel for the government may move also that a copy of the transcript, in whole or in part, be made available to it, for good cause shown, and an order may be entered granting such motion in whole or in part, on appropriate terms, except that the government need not prepay costs nor furnish security therefor.	
(d) Production of Statements. (1) In General. Rule 26.2(a)-(d) and (f) applies at any hearing under this rule, unless the court, for good cause shown, rules otherwise in a particular case. (2) Sanctions for Failure to Produce Statement. If a party elects not to comply with an order under Rule 26.2(a) to deliver a statement to the moving party, the court may not consider the testimony of a witness whose statement is withheld.	**(g) Production of Statements.** (1) ***In General.*** Rule 26.2(a)-(d) and (f) applies at any hearing under this rule, unless the **[court]**, for good cause shown, rules otherwise in a particular case. (2) ***Sanctions for Failure to Produce Statement.*** If a party elects not to comply with an order under Rule 26.2(a) to deliver a statement to the moving party, the **[court]** must not consider the testimony of a witness whose statement is withheld.

ADVISORY COMMITTEE NOTE

Rule 5.1 has been amended to make the rule more easily understood. In addition to changes made to improve the understanding, the Advisory Committee has changed language to make style and terminology consistent throughout the Criminal Rules. These changes are intended to be stylistic only. Several substantive changes have been made to the Rule.

First, the title of the rule has been changed. Although the statute uses the phrase *preliminary examination*, the Advisory Committee believes that the phrase *preliminary hearing* is more accurate. What happens at this proceeding is more than just an examination; it includes an evidentiary hearing, argument, and a judicial ruling. Further, the phrase *preliminary hearing* predominates in actual usage.

Rule 5.1(a) is composed of the first sentence of the second paragraph of current Rule 5(c). Rule 5.1(b) now includes material formerly located in Rule 5(c): scheduling and extending the time limits for the hearing. Although the rule continues to refer to proceedings before a "court," the Committee recognizes that in many districts, magistrate judges perform these functions. That point is also referenced in the definition of "court" in Rule 1(b) that in turn recognizes that magistrate judges may be authorized to act.

Rule 5.1(d), which addresses the issue of probable cause, contains the language formerly located in Rule 5.1(a), with the exception of the sentence, "The finding of probable cause may be based upon hearsay evidence in whole or in part." The Advisory Committee believed that that language is now unnecessary. First, the case law is now perfectly clear on that point. Second, retaining the language might lead to the erroneous conclusion that hearsay may not be taken into consideration in other proceedings governed by the rules. Finally, the Committee believed that this matter was more appropriately covered under Rule 1101(d), Federal Rules of Evidence.

[**The following language will need to be addressed again after the Committee decides on use of the term "court." Under the current rule, the authority of the magistrate judge is limited; changing the term to court, may insert an unnecessary ambiguity** Rule 5.1(c) includes new language that expands the authority of a United States Magistrate Judge to determine whether to grant a continuance for a preliminary examination conducted under the Rule. Currently, the magistrate judge's authority to do so is limited to those cases in which the defendant has consented to the continuance. If the defendant does not consent, then the government must present the matter to a district court judge, usually on the same day. That procedure can lead to needless consumption of judicial resources and the consumption of time by counsel, staff personnel, marshals, and other personnel. The proposed amendment currently conflicts with 18 U.S.C. § 3060, which tracks the original language of the rule and permits only district court judges to grant continuances where the defendant objects. But the current distinction between continuances granted with or without the consent is an anomaly. While the magistrate judge is charged with making probable cause determination and other decisions regarding the defendant's liberty interests, the current rule prohibits the magistrate judge from making a decision regarding a continuance unless the defendant consents. On the other hand, it seems clear that the role of the magistrate judge has developed toward a higher level of responsibility for pre-indictment matters. Furthermore, the Committee believes that the change in the rule will provide greater judicial economy.]

Rule 5.1(e), which deals with the discharge of a defendant, consists of former Rule 5.1(b).

Rule 5.1(f) is a revised version of the material in current Rule 5.1(c). Instead of including detailed information in the rule itself concerning records of preliminary hearings, the Advisory Committee opted simply to direct the reader to the applicable Judicial Conference guidelines.

Finally, Rule 5.1(g), which addresses the production of statements made by a witness during preliminary hearings, reflects changes made to the rule on December 1, 1998.

III. INDICTMENT AND INFORMATION	**Title III. The Grand Jury, The Indictment, and The Information**
Rule 6. The Grand Jury	**Rule 6. The Grand Jury**
(a) Summoning Grand Juries. **(1) Generally.** The court shall order one or more grand juries to be summoned at such time as the public interest requires. The grand jury shall consist of not less than 16 nor more than 23 members. The court shall direct that a sufficient number of legally qualified persons be summoned to meet this requirement. **(2) Alternate Jurors.** The court may direct that alternate jurors may be designated at the time a grand jury is selected. Alternate jurors in the order in which they were designated may thereafter be impanelled as provided in subdivision (g) of this rule. Alternate jurors shall be drawn in the same manner and shall have the same qualifications as the regular jurors, and if impanelled shall be subject to the same challenges, shall take the same oath and shall have the same functions, powers, facilities and privileges as the regular jurors.	**(a) Summoning a Grand Jury.** (1) ***In General.*** When the public interest so requires, the **[court]** must order that one or more grand juries be summoned. A grand jury must have 16 to 23 members, and the court must order that enough legally qualified persons be summoned to meet this requirement. (2) ***Alternate Jurors.*** When a grand jury is selected, the court may designate alternate jurors. They must be drawn and summoned in the same manner and must have the same qualifications as regular jurors. Alternate jurors will be impaneled in the sequence in which they are designated. If impaneled, an alternate juror is subject to the same challenges, takes the same oath, and has the same functions, duties, powers, and privileges as a regular juror.
(b) Objections to Grand Jury and to Grand Jurors. **(1) Challenges.** The attorney for the government or a defendant who has been held to answer in the district court may challenge the array of jurors on the ground that the grand jury was not selected, drawn or summoned in accordance with law, and may challenge an individual juror on the ground that the juror is not legally qualified. Challenges shall be made before the administration of the oath to the jurors and shall be tried by the court. **(2) Motion to Dismiss.** A motion to dismiss the indictment may be based on objections to the array or on the lack of legal qualification of an individual juror, if not previously determined upon challenge. It shall be made in the manner prescribed in 28 U.S.C. § 1867(e) and shall be granted under the conditions prescribed in that statute. An indictment shall not be dismissed on the ground that one or more members of the grand jury were not legally qualified if it appears from the record kept pursuant to subdivision (c) of this rule that 12 or more jurors, after deducting the number not legally qualified, concurred in finding the indictment.	**(b) Objections to the Grand Jury or to a Grand Juror.** (1) ***Challenges.*** Either the government or a defendant may challenge the grand jury on the ground that it was not lawfully drawn, summoned, or selected, and may challenge an individual juror on the ground that the juror is not legally qualified. (2) ***Motion to Dismiss an Indictment.*** A party may move to dismiss the indictment based on an objection to the grand jury or on an individual juror's lack of legal qualification, unless the **[court]** has previously ruled on the same objection under Rule 6(b)(1). The motion to dismiss is governed by 28 U.S.C. § 1867(e). The court cannot dismiss the indictment on the ground that a grand juror was not legally qualified if the record shows that at least 12 qualified jurors concurred in the indictment.

(c) Foreperson and Deputy Foreperson. The court shall appoint one of the jurors to be foreperson and another to be deputy foreperson. The foreperson shall have power to administer oaths and affirmations and shall sign all indictments. The foreperson or another juror designated by the foreperson shall keep record of the number of jurors concurring in the finding of every indictment and shall file the record with the clerk of the court, but the record shall not be made public except on order of the court. During the absence of the foreperson, the deputy foreperson shall act as foreperson.	**(c) Foreperson and Deputy Foreperson.** The **[court]** will appoint one juror as the foreperson and another as the deputy foreperson. In the foreperson's absence, the deputy foreperson will act as the foreperson. The foreperson may administer oaths and affirmations and will sign all indictments. The foreperson — or another juror designated by the foreperson — will record the number of jurors concurring in every indictment and will file the record with the district clerk, but the record may not be made public unless the **[court]** so orders.
(d) Who May Be Present. **(1) While Grand Jury is in Session.** Attorneys for the government, the witness under examination, interpreters when needed and, for the purpose of taking the evidence, a stenographer or operator of a recording device may be present while the grand jury is in session. **(2) During Deliberations and Voting.** No person other than the jurors, and any interpreter necessary to assist a juror who is hearing or speech impaired, may be present while the grand jury is deliberating or voting.	**(d) Who May Be Present.** **(1)** ***While the Grand Jury Is in Session.*** The following persons may be present while the grand jury is in session: government attorneys, the witness being questioned, interpreters when needed, and a stenographer or operator of a recording device. **(2)** ***During Deliberations and Voting.*** No person other than the jurors, and any interpreter needed to assist a hearing-impaired or speech-impaired juror, may be present while the grand jury is deliberating or voting.

(e) Recording and Disclosure of Proceedings. **(1) Recording of Proceedings.** All proceedings, except when the grand jury is deliberating or voting, shall be recorded stenographically or by an electronic recording device. An unintentional failure of any recording to reproduce all or any portion of a proceeding shall not affect the validity of the prosecution. The recording or reporter's notes or any transcript prepared therefrom shall remain in the custody or control of the attorney for the government unless otherwise ordered by the court in a particular case. **(2) General Rule of Secrecy.** A grand juror, an interpreter, a stenographer, an operator of a recording device, a typist who transcribes recorded testimony, an attorney for the government, or any person to whom disclosure is made under paragraph (3)(A)(ii) of this subdivision shall not disclose matters occurring before the grand jury, except as otherwise provided for in these rules. No obligation of secrecy may be imposed on any person except in accordance with this rule. A knowing violation of Rule 6 may be punished as a contempt of court.	**(e) Recording and Disclosing Proceedings.** **(1)** ***Recording the Proceedings.*** Except while the grand jury is deliberating or voting, all proceedings must be recorded by a court reporter or by a suitable recording device. The validity of a prosecution is not affected by the unintentional failure to make a recording. Unless the **[court]** orders otherwise, a government attorney will retain control of the recording, the reporter's notes, and any transcript prepared from those notes. **(2)** ***General Rule of Secrecy.*** Unless these rules provide otherwise, the following persons must not disclose a matter occurring before the grand jury: (A) a grand juror; (B) an interpreter; (C) a court reporter; (D) an operator of a recording device; (E) a person who transcribes recorded testimony; (F) a government attorney; or (G) a person to whom disclosure is made under Rule 6(e)(3)(A)(ii).

(3) Exceptions. (A) Disclosure otherwise prohibited by this rule of matters occurring before the grand jury, other than its deliberations and the vote of any grand juror, may be made to— (i) an attorney for the government for use in the performance of such attorney's duty; and (ii) such government personnel (including personnel of a state or subdivision of a state) as are deemed necessary by an attorney for the government to assist an attorney for the government in the performance of such attorney's duty to enforce federal criminal law. (B) Any person to whom matters are disclosed under subparagraph (A)(ii) of this paragraph shall not utilize that grand jury material for any purpose other than assisting the attorney for the government in the performance of such attorney's duty to enforce federal criminal law. An attorney for the government shall promptly provide the district court, before which was impaneled the grand jury whose material has been so disclosed, with the names of the persons to whom such disclosure has been made, and shall certify that the attorney has advised such persons of their obligation of secrecy under this rule.	**(3) *Exceptions.*** (A) Disclosure of a grand-jury matter — other than the grand jury's deliberations or any grand juror's vote — may be made to: (i) a government attorney for use in performing that attorney's duty; or (ii) any government personnel — including those of a state or state subdivision or of an Indian tribe — that a government attorney considers necessary to assist in performing that attorney's duty to enforce federal criminal law. (B) A person to whom information is disclosed under Rule 6(e)(3)(A)(ii) may use that information only to assist a government attorney in performing that attorney's duty to enforce federal criminal law. A government attorney must promptly provide the **[court]** that impaneled the grand jury with the names of all persons to whom a disclosure has been made, and must certify that the attorney has advised those persons of their obligation of secrecy under this rule.

(C) Disclosure otherwise prohibited by this rule of matters occurring before the grand jury may also be made— (i) when so directed by a court preliminarily to or in connection with a judicial proceeding; (ii) when permitted by a court at the request of the defendant, upon a showing that grounds may exist for a motion to dismiss the indictment because of matters occurring before the grand jury; (iii) when the disclosure is made by an attorney for the government to another federal grand jury; or (iv) when permitted by a court at the request of an attorney for the government, upon a showing that such matters may disclose a violation of state criminal law, to an appropriate official of a state or subdivision of a state for the purpose of enforcing such law. If the court orders disclosure of matters occurring before the grand jury, the disclosure shall be made in such manner, at such time, and under such conditions as the court may direct.	(C) A government attorney may disclose any grand-jury matter to another federal grand jury. (D) The **[court]** may authorize disclosure — at a time, in a manner, and subject to any other conditions that it directs — of a grand-jury matter: (i) preliminarily to or in connection with a judicial proceeding; (ii) at the request of a defendant who shows that a ground may exist to dismiss the indictment because of a matter that occurred before the grand jury; (iii) at the request of the government if it shows that the matter may disclose a violation of state or Indian tribal criminal law, as long as the disclosure is to an appropriate state, state-subdivision official, or Indian tribal official for the purpose of enforcing that law; or (iv) at the request of the government if it shows that the matter may disclose a violation of military criminal law under the Uniform Code Military of Justice, as long as the disclosure is to an appropriate military official for the purpose of enforcing that law.
(D) A petition for disclosure pursuant to subdivision (e)(3)(C)(i) shall be filed in the district where the grand jury convened. Unless the hearing is ex parte, which it may be when the petitioner is the government, the petitioner shall serve written notice of the petition upon (i) the attorney for the government, (ii) the parties to the judicial proceeding if disclosure is sought in connection with such a proceeding, and (iii) such other persons as the court may direct. The court shall afford those persons a reasonable opportunity to appear and be heard.	(E) A petition to disclose a grand jury matter under Rule 6(e)(3)(D)(i) must be filed in the district where the grand jury convened. Unless the hearing is ex parte — as it may be when the government is the petitioner — the petitioner must serve the petition on, and the **[court]** must afford a reasonable opportunity to appear and be heard to: (i) the government attorney; (ii) the parties to the judicial proceeding; and (iii) any other person whom the **[court]** may designate.

(E) If the judicial proceeding giving rise to the petition is in a federal district court in another district, the court shall transfer the matter to that court unless it can reasonably obtain sufficient knowledge of the proceeding to determine whether disclosure is proper. The court shall order transmitted to the court to which the matter is transferred the material sought to be disclosed, if feasible, and a written evaluation of the need for continued grand jury secrecy. The court to which the matter is transferred shall afford the aforementioned persons a reasonable opportunity to appear and be heard.	(F) If the petition to disclose arises out of a proceeding in another district, the petitioned **[court]** must transfer the petition to the other **[court]** unless the petitioned **[court]** can reasonably determine whether disclosure is proper. If the petitioned **[court]** decides to transfer, it must send to the transferee **[court]** the material sought to be disclosed, if feasible, and a written evaluation of the need for continued grand-jury secrecy. The transferee **[court]** must afford those persons identified in Rule 6(e)(3)(E) a reasonable opportunity to appear and be heard.
(4) Sealed Indictments. The federal magistrate judge to whom an indictment is returned may direct that the indictment be kept secret until the defendant is in custody or has been released pending trial. Thereupon the clerk shall seal the indictment and no person shall disclose the return of the indictment except when necessary for the issuance and execution of a warrant or summons. **(5) Closed Hearing.** Subject to any right to an open hearing in contempt proceedings, the court shall order a hearing on matters affecting a grand jury proceeding to be closed to the extent necessary to prevent disclosure of matters occurring before a grand jury. **(6) Sealed Records.** Records, orders and subpoenas relating to grand jury proceedings shall be kept under seal to the extent and for such time as is necessary to prevent disclosure of matters occurring before a grand jury.	**(4)** ***Sealed Indictment.*** The magistrate judge to whom an indictment is returned may direct that the indictment be kept secret until the defendant is in custody or has been released pending trial. The clerk must then seal the indictment, and no person may disclose the indictment's existence except as necessary to issue or execute a warrant or summons. **(5)** ***Closed Hearing.*** Subject to any right to an open hearing in a contempt proceeding, the **[court]** must close any hearing to the extent necessary to prevent disclosure of a matter occurring before a grand jury. **(6)** ***Sealed Records.*** Records, orders, and subpoenas relating to grand-jury proceedings must be kept under seal to the extent and as long as necessary to prevent the unauthorized disclosure of a matter occurring before a grand jury. **(7)** ***Contempt.*** A knowing violation of Rule 6 may be punished as a contempt of court.

(f) Finding and Return of Indictment. A grand jury may indict only upon the concurrence of 12 or more jurors. The indictment shall be returned by the grand jury, or through the foreperson or deputy foreperson on its behalf, to a federal magistrate judge in open court. If a complaint or information is pending against the defendant and 12 persons do not vote to indict, the foreperson shall so report to a federal magistrate judge in writing as soon as possible.	**(f) Indictment and Return.** A grand jury may indict only if at least 12 jurors concur. The grand jury — or its foreperson — must return the indictment to a magistrate judge in open court. If a complaint or information is pending against the defendant and 12 jurors do not concur in the indictment, the foreperson must promptly and in writing report the lack of concurrence to the magistrate judge.
(g) Discharge and Excuse. A grand jury shall serve until discharged by the court, but no grand jury may serve more than 18 months unless the court extends the service of the grand jury for a period of six months or less upon a determination that such extension is in the public interest. At any time for cause shown the court may excuse a juror either temporarily or permanently, and in the latter event the court may impanel another person in place of the juror excused.	**(g) Discharge.** A grand jury must serve until the **[court]** discharges it, but it may serve more than 18 months only if the **[court]**, having determined that an extension is in the public interest, extends the grand jury's service for no more than 6 months. **(h) Excuse.** At any time, for good cause, the **[court]** may excuse a juror either temporarily or permanently, and if permanently, the **[court]** may impanel an alternate juror in place of the excused juror. **(i) Indian Tribe.** Indian tribe means an Indian tribe recognized by the Secretary of the Interior on a list published in the Federal Register under 25 U.S.C. § 479a-1.

ADVISORY COMMITTEE NOTE

Rule 6 has been amended to make the rule more easily understood. In addition to changes made to improve the understanding, the Advisory Committee has changed language to make style and terminology consistent throughout the Criminal Rules. These changes are intended to be stylistic only. The amended rule includes several substantive changes.

The first substantive change is in Rule 6(b)(1). The last sentence of current Rule 6(b)(1) indicates that "Challenges shall be made before the administration of the oath to the jurors and shall be tried by the court." That language has been deleted from the amended rule. The thrust of this subdivision rests on the assumption that some formal proceedings have begun against a person, i.e. the indictment. The Advisory Committee believed that although the first sentence reflects current practice of a defendant being able to challenge the composition or qualifications of the grand jurors after the indictment is returned, the second sentence does not comport with modern practice. That is, a defendant will normally not know the composition or identity of the grand jurors before they are administered their oath. Thus, the opportunity to challenge them and have the court decide the issue before the oath is given, is not possible.

In Rule 6(d)(1), the term court "stenographer" has been changed to "court reporter." Similar changes have been made in Rule 6(e)(1) and (2). **[The language in Rule 6(d)(2) regarding the**

presence of interpreters has been approved by the Supreme Court and is now before Congress]

Rule 6(e) continues to spell out the general rule of secrecy of grand jury proceedings and the exceptions to that general rule. The last sentence in current Rule 6(e)(2) concerning contempt for violating Rule 6 now appears in Rule 6(3)(7). No change in substance is intended.

[A footnote in a earlier draft indicated that Professor Saltzburg was researching the issue of whether the language in the first sentence of Rule 6(e)(3) "otherwise prohibited by these rules" could be omitted as suggested by the SSC. Has this matter been resolved?]

Rule 6(e)(3)(A)(ii) includes a new provision recognizing the sovereignty of Indian Tribes and the possibility that it would necessary to disclose grand jury information to such persons in order to enforce federal law. Similar language has been added to Rule 6(e)(3)(D)(iii). Rule 6(e)(D)(iv) is a new provision that addresses disclosure of grand jury information to armed forces personnel where the disclosure is for the purpose of enforcing military criminal law under the Uniform Code of Military Justice, 10 U.S.C. §§ 801-946. *See*, e.g., Department of Defense Directive 5525.7 (January 22, 1985); 1984 Memorandum of Understanding Between Department of Justice and Department of Justice; Memorandum of Understanding Between the Departments of Justice and Transportation (Coast Guard) Relating to the Investigations and Prosecution of Crimes Over Which the Two Departments Have Concurrent Jurisdiction (October 9, 1967).

[In Rule 6(e)(3)(E)(i), the Committee considered whether to amend the language relating to "parties to the judicial proceeding" and determined that in the context of the rule, it was understood that the parties referred to are the parties in the same judicial proceeding identified in Rule 6(e)(3)(D)(I).]

[Rule 6(f) language has been approved by the Supreme Court and is now pending at Congress]

Current Rule 6(g) has been divided into two new subdivisions, Rule 6(g), Discharge and Rule 6(h), Excuse.

Rule 6(i) is a new provision defining the term "Indian Tribe." **[Subcommittee A was considering whether to the definition is needed only "for purposes of this rule" or whether it may apply to other rules as well, in which case it perhaps should be added to Rule 1. Has this been resolved?]**

Rule 7. The Indictment and the Information	Rule 7. The Indictment and the Information
(a) Use of Indictment or Information. An offense which may be punished by death shall be prosecuted by indictment. An offense which may be punished by imprisonment for a term exceeding one year or at hard labor shall be prosecuted by indictment or, if indictment is waived, it may be prosecuted by information. Any other offense may be prosecuted by indictment or by information. An information may be filed without leave of court.	**(a) When Used.** (1) ***Felony.*** An offense must be prosecuted by an indictment if it is punishable: (A) by death; or (B) by imprisonment for more than one year, unless the defendant waives indictment. (2) Misdemeanor. An offense punishable by imprisonment for one year or less may be prosecuted by indictment or information in accordance with Rule 58(b)(1).
(b) Waiver of Indictment. An offense which may be punished by imprisonment for a term exceeding one year or at hard labor may be prosecuted by information if the defendant, after having been advised of the nature of the charge and of the rights of the defendant, waives in open court prosecution by indictment.	**(b) Waiving Indictment.** An offense punishable by imprisonment for more than one year may be prosecuted by information if the defendant — in open court and after being advised of the nature of the charge and of the defendant's rights — waives prosecution by indictment.

(c) Nature and Contents. **(1) In General.** The indictment or the information shall be a plain, concise and definite written statement of the essential facts constituting the offense charged. It shall be signed by the attorney for the government. It need not contain a formal commencement, a formal conclusion or any other matter not necessary to such statement. Allegations made in one count may be incorporated by reference in another count. It may be alleged in a single count that the means by which the defendant committed the offense are unknown or that the defendant committed it by one or more specified means. The indictment or information shall state for each count the official or customary citation of the statute, rule, regulation or other provision of law which the defendant is alleged therein to have violated. **(2) Criminal Forfeiture.** No judgment of forfeiture may be entered in a criminal proceeding unless the indictment or the information shall allege the extent of the interest or property subject to forfeiture. **(3) Harmless Error.** Error in the citation or its omission shall not be ground for dismissal of the indictment or information or for reversal of a conviction if the error or omission did not mislead the defendant to the defendant's prejudice.	**(c) Nature and Contents.** (1) ***In General.*** The indictment or information must be a plain, concise, and definite written statement of the essential facts constituting the offense charged and must be signed by a government attorney. It need not contain a formal introduction or conclusion. A count may incorporate by reference an allegation made in another count. A count may allege that the means by which the defendant committed the offense are unknown or that the defendant committed it by one or more specified means. For each count, the indictment or information must give the official or customary citation of the statute, rule, regulation, or other provision of law that the defendant is alleged to have violated. (2) ***Criminal Forfeiture.*** No judgment of forfeiture may be entered in a criminal proceeding unless the indictment or the information provides notice that the defendant has an interest in property that is subject to forfeiture in accordance with the applicable statute. [Pending Approval by Supreme Court] (3) ***Citation Error.*** Unless the defendant was misled and thereby prejudiced, neither an error in a citation nor a citation's omission is a ground to dismiss the indictment or information or to reverse a conviction.
(d) Surplusage. The court on motion of the defendant may strike surplusage from the indictment or information.	**(d) Surplusage.** On the defendant's motion, the **[court]** may strike surplusage from the indictment or information.
(e) Amendment of Information. The court may permit an information to be amended at any time before verdict or finding if no additional or different offense is charged and if substantial rights of the defendant are not prejudiced.	**(e) Amending an Information.** Unless an additional or different offense is charged or a substantial right of the defendant is prejudiced, the **[court]** may permit an information to be amended at any time before verdict or finding.
(f) Bill of Particulars. The court may direct the filing of a bill of particulars. A motion for a bill of particulars may be made before arraignment or within ten days after arraignment or at such later time as the court may permit. A bill of particulars may be amended at any time subject to such conditions as justice requires.	**(f) Bill of Particulars.** The **[court]** may direct the government to file a bill of particulars. The defendant may move for a bill of particulars before or within 10 days after arraignment or at a later time if the **[court]** permits. The government may amend a bill of particulars subject to such conditions as justice requires.

ADVISORY COMMITTEE NOTE

Rule 7 has been amended to make the rule more easily understood. In addition to changes made to improve the understanding, the Advisory Committee has changed language to make style and terminology consistent throughout the Criminal Rules. These changes are intended to be stylistic only. The amended rule includes several substantive changes.

The Committee has deleted the references to "hard labor" in the Rule. Such punishment is no longer part of the Federal Sentencing Guidelines.

[Rule 7(c)(3), Criminal Forfeiture, is language approved by the Judicial Conference but not yet by the Supreme Court]

The title of Rule 7(c)(3) has been amended. The Committee believed that potential confusion could arise with the use of the term "harmless error" Rule 52, which deals with the issue of harmless error and plain error is sufficient to address the topic. Potentially, the topic of harmless error could arise with regard to any of the other rules and that there was insufficient need to highlight the term in Rule 7. The focus in the language of (c)(3), on the other hand is specifically on the topic of the effect of an error in the citation of authority in the indictment; that material remains but without any reference to harmless error.

Rule 8. Joinder of Offenses and of Defendants	**Rule 8. Joinder of Offenses or Defendants**
(a) Joinder of Offenses. Two or more offenses may be charged in the same indictment or information in a separate count for each offense if the offenses charged, whether felonies or misdemeanors or both, are of the same or similar character or are based on the same act or transaction or on two or more acts or transactions connected together or constituting parts of a common scheme or plan.	**(a) Joinder of Offenses.** The indictment or information may charge a defendant in separate counts with two or more offenses if the offenses charged — whether felonies or misdemeanors or both — are of the same or similar character, or are based on the same act or transaction, or are connected with or constitute parts of a common scheme or plan.
(b) Joinder of Defendants. Two or more defendants may be charged in the same indictment or information if they are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses. Such defendants may be charged in one or more counts together or separately and all of the defendants need not be charged in each count.	**(b) Joinder of Defendants.** The indictment or information may charge two or more defendants if they are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses. The defendants may be charged in one or more counts together or separately. All defendants need not be charged in each count.

ADVISORY COMMITTEE NOTE

Rule 8 has been amended to make the rule more easily understood. In addition to changes made to improve the understanding, the Advisory Committee has changed language to make style and terminology consistent throughout the Criminal Rules. These changes are intended to be stylistic only.

Rule 9. Warrant or Summons Upon Indictment or Information	**Rule 9. Arrest Warrant or Summons on an Indictment or Information**
(a) Issuance. Upon the request of the attorney for government the court shall issue a warrant for each defendant named in an information supported by a showing of probable cause under oath as is required by Rule 4(a), or in an indictment. Upon the request of the attorney for the government a summons instead of a warrant shall issue. If no request is made, the court may issue either a warrant or a summons in its discretion. More than one warrant or summons may issue for the same defendant. The clerk shall deliver the warrant or summons to the marshal or other person authorized by law to execute or serve it. If a defendant fails to appear in response to the summons, a warrant shall issue. When a defendant arrested with a warrant or given a summons appears initially before a magistrate judge, the magistrate judge shall proceed in accordance with the applicable subdivisions of Rule 5.	**(a) Issuance.** The **[court]** must issue a warrant — or at the government's request, a summons — for each defendant named in an indictment or named in an information if one or more affidavits accompanying the information establish probable cause to believe that an offense has been committed and that the defendant committed it. More than one warrant or summons may issue for the same defendant. If a defendant fails to appear in response to a summons, the **[court]** may, and upon request of the government attorney must, issue a warrant. The **[court]** must issue the arrest warrant to an officer authorized to execute it or the summons to a person authorized to serve it.
(b) Form. **(1) Warrant.** The form of the warrant shall be as provided in Rule 4(c)(1) except that it shall be signed by the clerk, it shall describe the offense charged in the indictment or information and it shall command that the defendant be arrested and brought before the nearest available magistrate judge. The amount of bail may be fixed by the court and endorsed on the warrant. **(2) Summons.** The summons shall be in the same form as the warrant except that it shall summon the defendant to appear before a magistrate judge at a stated time and place.	**(b) Form.** **(1)** ***Warrant.*** The warrant must conform to Rule 4(b)(1) except that it must be signed by the clerk and must describe the offense charged in the indictment or information. **(2)** ***Summons.*** The summons is to be in the same form as a warrant except that it must require the defendant to appear before a magistrate judge at a stated time and place.

(c) Execution or Service; and Return. **(1) Execution or Service.** The warrant shall be executed or the summons served as provided in Rule 4(d)(1), (2) and (3). A summons to a corporation shall be served by delivering a copy to an officer or to a managing or general agent or to any other agent authorized by appointment or by law to receive service of process and, if the agent is one authorized by statute to receive service and the statute so requires, by also mailing a copy to the corporation's last known address within the district or at its principal place of business elsewhere in the United States. The officer executing the warrant shall bring the arrested person without unnecessary delay before the nearest available federal magistrate judge or, in the event that a federal magistrate judge is not reasonably available, before a state or local judicial officer authorized by 18 U.S.C. § 3041.	**(c) Execution or Service; Return; Initial Appearance.** **(1)** ***Execution or Service.*** (A) The warrant must be executed or the summons served as provided in Rule 4(c)(1), (2), and (3). (B) The officer executing the warrant must proceed in accordance with Rule 5(a)(1).
(2) Return. The officer executing a warrant shall make return thereof to the magistrate judge or other officer before whom the defendant is brought. At the request of the attorney for the government any unexecuted warrant shall be returned and cancelled. On or before the return day the person to whom a summons was delivered for service shall make return thereof. At the request of the attorney for the government made at any time while the indictment or information is pending, a warrant returned unexecuted and not cancelled or a summons returned unserved or a duplicate thereof may be delivered by the clerk to the marshal or other authorized person for execution or service.	**(2)** ***Return.*** A warrant or summons will be returned in accordance with Rule 4(c)(4). **(3)** ***Initial Appearance.*** When an arrested or summoned defendant first appears before the **[court]**, the judge must proceed under Rule 5.
[(d) Remand to United States Magistrate for Trial of Minor Offenses] (Abrogated Apr. 28, 1982, eff. Aug. 1, 1982).	

ADVISORY COMMITTEE NOTE

The amendments to Rule 9 are intended to make the rule more easily understood. In addition to changes made to improve the understanding, the Advisory Committee has changed language to make style and terminology consistent throughout the Criminal Rules. These changes are intended to be stylistic only. The amended rule includes several substantive changes.

Rule 9 has been changed to reflect its relationship to Rule 4 procedures for obtaining an arrest warrant or summons. Thus, rather than simply repeating material that is already located in Rule 4, the Committee determined that where appropriate, Rule 9 should simply direct the reader to the procedures specified in Rule 4.

Rule 9(a) has been amended to permit some discretion in whether to issue an arrest warrant if the defendant fails to respond to a summons. Under the current language of the rule, if the defendant

fails to appear, the judge must issue a summons. Under the amended version, if the defendant fails to appear and the government requests that a warrant be issued, the judge must issue one. In the absence of such a request, the judge has the discretion whether to do so. This mirrors language in amended Rule 4(a).

Rule 9(b)(1) has been amended to delete language that indicates that the amount of bail may be fixed by the court on the warrant. The Committee believes that that language is now inconsistent with the 1984 Bail Reform Act. *See United States v. Thomas*, 992 F. Supp. 782 (D. Virgin Islands 1998) (bail amount endorsed on warrant that has not been determined in proceedings conducted under Bail Reform Act has no bearing on decision by judge conducting Rule 40 hearing).

The language in current Rule 9(c)(1) concerning service of a summons on an organization has been moved to Rule 4.

III-A

IV. ARRAIGNMENT AND PREPARATION FOR TRIAL	**Title IV. Arraignment and Preparation for Trial**
Rule 10. Arraignment[83]	**Rule 10. Arraignment**
(a) Arraignment, which shall be conducted in open court, ~~and shall~~ consists of: (1) reading the indictment or information to the defendant or stating to the defendant the substance of the charge; and (2) calling on[84] the defendant to plead ~~thereto~~ to the indictment or information. (b) The defendant shall be given a copy of the indictment or information before being called upon[85] to enter a plea ~~plead~~. (c) A defendant need not be present for the arraignment if: (1) the defendant has been charged by indictment or misdemeanor information; (2) the defendant has waived such appearance in a written waiver signed by the defendant and counsel and the waiver affirms that the defendant has received and understands the indictment or information and states that the defendant's plea is not guilty to the charges; and (3) the court accepts the waiver.	**(a) In General.** Arraignment, which must be conducted in open court, consists of: (1) giving the defendant a copy of the indictment or information; (2) reading the indictment or information to the defendant or stating to the defendant the substance of the charge; and then (3) asking the defendant to plead to the indictment or information. **(b) Waiving Appearance.** A defendant need not be present for the arraignment if the defendant has waived an appearance in writing and the court accepts the waiver. **(c)** A defendant need not be present for the arraignment if: (1) the defendant has been charged by indictment or misdemeanor information; (2) the defendant has waived such appearance in a written waiver signed by the defendant and counsel and the waiver affirms that the defendant has received and understands the indictment or information and states that the defendant's plea is not guilty to the charges; and (3) the court accepts the waiver.

[83] Matter underlined and struck out reflect changes generally approved by full advisory committee, subject to edit by SSC.

[84] See note 42.

[85] Ditto.

Rule 11. Pleas	Rule 11. Pleas
(a) Alternatives. **(1) In General.** A defendant may plead guilty, not guilty, or nolo contendere. If a defendant refuses to plead, or if a defendant organization, as defined in 18 U.S.C. § 18, fails to appear, the court shall enter a plea of not guilty.[86] **(2) Conditional Pleas.** With the approval of the court and the consent of the government, a defendant may enter a conditional plea of guilty or nolo contendere, reserving in writing the right, on appeal from the judgment, to review of the adverse determination of any specified pretrial motion. A defendant who prevails on appeal shall be allowed to withdraw the plea.	**(a) Alternatives.** **(1)** ***In General.*** A defendant may plead guilty, not guilty, or (with the court's consent) nolo contendere. If a defendant refuses to plead or if a defendant organization fails to appear, the court must enter a plea of not guilty. **(2)** ***Conditional Plea.*** With the consent of the court and the government, a defendant may enter a conditional plea of guilty or nolo contendere, reserving in writing the right to have an appellate court review an adverse determination of a specified pretrial motion. A defendant who prevails on appeal may then withdraw the plea.
(b) Nolo Contendere. A defendant may plead nolo contendere only with the consent of the court. Such a plea shall be accepted by the court only after due consideration of the views of the parties and the interest of the public in the effective administration of justice.	**(b) Nolo Contendere.**[87] Before accepting a plea of nolo contendere, the court must consider the parties' views and the public interest in the effective administration of justice.

[86] This new language is not yet a part of the rule. It has been approved by the Judicial Conference and will be acted on by the Supreme Court before May 1, 1999.

[87] It would be a shift in practice, but the Advisory Committee might consider changing the phrase *nolo contendere* to *no contest*. If this project is to result in a truly plain-English, it's worth considering. We aren't expecting this change to be made, but we feel confident that it would find some support both within and without the legal community

(c) Advice to Defendant. Before accepting a plea of guilty or nolo contendere, the court must address the defendant personally in open court and inform the defendant of, and determine that the defendant understands, the following: **(1)** the nature of the charge to which the plea is offered, the mandatory minimum penalty provided by law, and the maximum possible penalty provided by law including the effect of any special parole or supervised release term, the fact that the court is required to consider any applicable sentencing guidelines but may depart from those guidelines under some circumstances, and, when applicable, that the court may also order the defendant to make restitution to any victim of the offense; and **(2)** if the defendant is not represented by an attorney, that the defendant has the right to be represented by an attorney at every stage of the proceeding, and, if necessary, one will be appointed to represent the defendant; and **(3)** that the defendant has the right to plead not guilty or to persist in that plea if it has already been made, the right to be tried by a jury and at that trial the right to the assistance of counsel, the right to confront and cross-examine adverse witnesses, and the right against compelled self-incrimination; and **(4)** that if a plea of guilty or nolo contendere is accepted by the court there will not be a further trial of any kind, so that by pleading guilty or nolo contendere the defendant waives the right to a trial; and **(5)** if the court intends to question the defendant under oath, on the record, and in the presence of counsel about the offense to which the defendant has pleaded, that the defendant's answers may later be used against the defendant in a prosecution for perjury or false statement; and (6) the terms of any provision in a plea agreement waiving the right to appeal or to collaterally attack the sentence.[88]	**(c) Advice to the Defendant.**[89] Before accepting a plea of guilty or nolo contendere, the court must address the defendant personally in open court. During this address, the court must inform the defendant of, and determine that the defendant understands, the following: (1) the right to plead not guilty or, having already so pleaded, to persist in that plea; (2) the right to a jury trial; (3) the right to be represented by counsel — and if necessary to have the court appoint counsel — at trial and at every other stage of the proceeding; (4) the right at trial to confront and cross-examine adverse witnesses, to be protected from compelled self-incrimination, to testify and present evidence, and to compel the attendance of witnesses; (5) the defendant's waiver of these trial rights if the court accepts a plea of guilty or nolo contendere; (6) the nature of each charge to which the defendant is pleading; (7) any maximum possible penalty, including imprisonment, fine, special assessment, forfeiture, restitution, and term of supervised release; (8) any mandatory minimum penalty; (9) the court's obligation to apply the sentencing guidelines, and the court's authority to depart from those guidelines under some circumstances;

[88]This new language is not yet a part of the rule. It has been approved by the Judicial Conference and will be acted on by the Supreme Court before May 1, 1999.

[89] Professor Saltzburg approved separating Rule 11(c) into 12 numbered paragraphs. Paragraphs (6), (10), and (11) incorporate wording he suggested.

	(10) the terms of any plea-agreement provision waiving the right to appeal or to collaterally attack the sentence; and (11) if questioned by the court about the offense, any answer that the defendant gives under oath may be used against the defendant in a later prosecution for perjury or false statement.
(d) Insuring That the Plea is Voluntary. The court shall not accept a plea of guilty or nolo contendere without first, by addressing the defendant personally in open court, determining that the plea is voluntary and not the result of force or threats or of promises apart from the plea agreement. The court shall also inquire as to whether the defendant's willingness to plead guilty or nolo contendere results from prior discussions between the attorney for the government and the defendant or the defendant's attorney.[90]	**(d) Ensuring That a Plea Is Voluntary.** Before accepting a plea of guilty or nolo contendere, the court must address the defendant personally in open court and determine that the plea is voluntary and did not result from force, threats, or promises (other than promises in a plea agreement).

[90] The language in this sentence (in the left column) apparently resulted from *Santobello v. New York*, 404 U.S 257, 261-62 (1971). Obviously, there are "prior discussions" that lead to a plea agreement. The reference to "promises apart from the plea agreement" in the preceding sentence addresses the same subject. Professor Saltzburg recommended deleting the sentence.

(e) Plea Agreement Procedure. (1) **In General.** The attorney for the government and the attorney for the defendant — or the defendant when acting pro se — may agree that, upon the defendant's entering a plea of guilty or nolo contendere to a charged offense, or to a lesser or related offense, the attorney for the government will: (A) move to dismiss other charges; or (B) recommend, or agree not to oppose the defendant's request for a particular sentence or sentencing range, or that a particular provision of the Sentencing Guidelines, or policy statement, or sentencing factor is or is not applicable to the case. Any such recommendation or request is not binding on the court; or (C) agree that a specific sentence or sentencing range is the appropriate disposition of the case, or that a particular provision of the Sentencing Guidelines, or policy statement, or sentencing factor is or is not applicable to the case. Such a plea agreement is binding on the court once it is accepted by the court. The court shall not participate in any discussions between the parties concerning any such plea agreement.[91]	**(e) Plea Agreement.** **(1)** ***In General.*** The government's attorney and the defendant's attorney, or the defendant when acting pro se, may discuss and agree to a plea. The court must not participate in these discussions. If the defendant pleads guilty or nolo contendere to either the charged offense or a lesser or related offense, the plea agreement may specify that the government's attorney will:[92] (A) not bring or will move to dismiss other charges; or (B) recommend, or agree not to oppose the defendant's request, that a particular sentence or sentencing range is appropriate or that a particular provision of the Sentencing Guidelines, or policy statement, or sentencing factor is or is not applicable, with the understanding that the recommendation or request does not bind the court; or (C) agree that a specific sentence or sentencing range is the appropriate disposition of the case, or that a particular provision of the Sentencing Guidelines, or policy statement, or sentencing factor is or is not applicable; such a plea agreement binds the court once the court accepts it.[93]

[91]This new language is not yet a part of the rule. It has been approved by the Judicial Conference and will be acted on by the Supreme Court before May 1, 1999

[92] The SSC considers this language stylistically much preferable to the language that came out of the June 1998 Standing Committee meeting That draft contained unnumbered dangling text at the end of Rule 11(e)(1)(C)

[93] This new language is not yet a part of the rule It has been approved by the Judicial Conference and will be acted on by the Supreme Court before May 1, 1999.

(2) Notice of Such Agreement. If a plea agreement has been reached by the parties, the court shall, on the record, require the disclosure of the agreement in open court or, upon a showing of good cause, in camera, at the time the plea is offered. If the agreement is of the type specified in subdivision (e)(1)(A) or (C), the court may accept or reject the agreement, or may defer its decision as to the acceptance or rejection until there has been an opportunity to consider the presentence report. If the agreement is of the type specified in subdivision (e)(1)(B), the court shall advise the defendant that if the court does not accept the recommendation or request the defendant nevertheless has no right to withdraw the plea.	**(2)** ***Disclosing a Plea Agreement.*** (A) When a plea agreement is reached, the parties must notify the court as soon as reasonably possible.[94] **[Consider retaining original version, i.e., (5) Time of Plea Agreement Procedure. Except for good cause shown, notification to the court of the existence of a plea agreement shall be given at the arraignment or at such other time, prior to trial, as may be fixed by the court.]** (B) The parties must disclose the plea agreement in open court, unless the court for good cause allows the parties to disclose the plea agreement in camera. (C) If the plea agreement is of the type specified in Rule 11(e)(1)(A) or (C), the court may accept the agreement, reject it, or defer a decision until the court has reviewed the presentence report. (D) If the plea agreement is of the type specified in Rule 11(e)(1)(B), the court must advise the defendant that the defendant has no right to withdraw the plea if the court accepts the plea agreement but does not follow the recommendation or request.[95]
(3) Acceptance of Plea Agreement. If the court accepts the plea agreement, the court shall inform the defendant that it will embody in the judgment and sentence the disposition provided in the plea agreement.	**(3)** ***Accepting a Plea Agreement.*** If the court accepts the plea agreement, it must inform the defendant that the disposition stated in the plea agreement will be included in the judgment and sentence.

[94] This sentence is Professor Saltzburg's suggestion.

[95] This language clarifies the relation between this subparagraph and Rule 11(e)(4). Professor Saltzburg has approved the change and has been asked to do a little further research on the point.

(4) Rejection of Plea Agreement. If the court rejects the plea agreement, the court shall, on the record, inform the parties of this fact, advise the defendant personally in open court or, on a showing of good cause, in camera, that the court is not bound by the plea agreement, afford the defendant the opportunity to then withdraw the plea, and advise the defendant that if the defendant persists in a guilty plea or plea of nolo contendere the disposition of the case may be less favorable to the defendant than that contemplated by the plea agreement.	**(4)** ***Rejecting a Plea Agreement.*** If the court rejects the plea agreement, the court must do the following on the record: (A) inform the parties that the court rejects the plea agreement; (B) advise the defendant personally[96] in open court — or, for good cause, in camera — that the court is not bound by the plea agreement, and give the defendant an opportunity to withdraw the plea;[97] and (C) advise the defendant that if the plea is not withdrawn, the court may dispose of the case less favorably toward the defendant than the plea agreement contemplated.
(5) Time of Plea Agreement Procedure. Except for good cause shown, notification to the court of the existence of a plea agreement shall be given at the arraignment or at such other time, prior to trial, as may be fixed by the court.[98]	

[96] One SSC member, Judge Wilson, wanted to cut this word, and asked that his dissent be noted from the majority's decision to retain it.

[97] We recommend an Advisory Committee note explaining the relationship between this provision and Rule 11(e)(2)(C), and perhaps explaining *United States v Hyde*, 520 U.S 670 (1997) We also need to ensure that the rewritten rule correctly captures the essence of *Hyde*

[98] This language in the left column has been incorporated into the new Rule 11(e)(2)(A).

(6) Inadmissibility of Pleas, Plea Discussions, and Related Statements. Except as otherwise provided in this paragraph, evidence of the following is not, in any civil or criminal proceeding, admissible against the defendant who made the plea or was a participant in the plea discussions: **(A)** a plea of guilty which was later withdrawn; **(B)** a plea of nolo contendere; **(C)** any statement made in the course of any proceedings under this rule regarding either of the foregoing pleas; or **(D)** any statement made in the course of plea discussions with an attorney for the government which do not result in a plea of guilty or which result in a plea of guilty later withdrawn. However, such a statement is admissible (i) in any proceeding wherein another statement made in the course of the same plea or plea discussions has been introduced and the statement ought in fairness be considered contemporaneously with it, or (ii) in a criminal proceeding for perjury or false statement if the statement was made in by the defendant under oath, on the record, and in the presence of counsel.	(5) ***Inadmissibility of Pleas, Plea Discussions, and Related Statements.*** Except as otherwise provided in this paragraph, evidence of the following is not, in any civil or criminal proceeding, admissible against the defendant who made the plea or was a participant in the plea discussions: (A) a plea of guilty which was later withdrawn; (B) a plea of nolo contendere; (C) any statement made in the course of any proceedings under this rule regarding either of the foregoing pleas; or (D) any statement made in the course of plea discussions with an attorney for the government which do not result in a plea of guilty or which result in a plea of guilty later withdrawn. However, such a statement is admissible (i) in any proceeding wherein another statement made in the course of the same plea or plea discussions has been introduced and the statement ought in fairness be considered contemporaneously with it, or (ii) in a criminal proceeding for perjury or false statement if the statement was made in by the defendant under oath, on the record, and in the presence of counsel.
(f) Determining Accuracy of Plea. Notwithstanding the acceptance of a plea of guilty, the court should not enter a judgment upon such plea without making such inquiry as shall satisfy it that there is a factual basis for the plea.	**(f) Determining the Accuracy of a Plea.** Before entering judgment on a guilty plea, the court must determine whether a factual basis for the plea exists.[99]
(g) Record of Proceedings. A verbatim record of the proceedings at which the defendant enters a plea shall be made and, if there is a plea of guilty or nolo contendere, the record shall include, without limitation, the court's advice to the defendant, the inquiry into the voluntariness of the plea including any plea agreement, and the inquiry into the accuracy of a guilty plea.	**(g) Recording the Proceedings.** The proceedings during which the defendant enters a plea must be recorded verbatim by a court reporter or by a suitable recording device. If there is a guilty plea or a nolo contendere plea, the record must include the inquiries and advice to the defendant required under Rule 11(c), (d), and (f).
(h) Harmless Error. Any variance from the procedures required by this rule which does not affect substantial rights shall be disregarded.	**(h) Harmless Error.** A variance from the requirements of this rule is harmless error if it does not affect substantial rights.

[99] This adopts language suggested by Professor Saltzburg

COMPREHENSIVE REVISION

Rule 11. Pleas

(a) Entering a Plea. [formerly "Alternatives']

(1) **In General**. A defendant may plead guilty, not guilty, or (with the court's consent) nolo contendere.

(2) **Conditional Plea.** With the consent of the court and government, a defendant may enter a conditional plea of guilty or nolo contendere, reserving in writing the right to have an appellate court review an adverse determination of a specified pretrial motion. A defendant who prevails on appeal may then withdraw the plea.

(3) **Nolo Contendere Plea**. Before accepting a plea of nolo contendere, the court must consider the parties' views and the public interest in the effective administration of justice.**[Formerly subdivision (b)]**

(4) **Failure to Enter a Plea**. If a defendant refuses to [enter a plea] plead or if a defendant organization fails to appear, the court must enter a plea of not guilty. **[Moved from former 11(a)(1)][I do not have answer to Roger's question about different treatment for organizations]**

(b) Consideration and Acceptance of a Guilty or Nolo Contendere Plea. [New Heading]

(1) **Advice to the Defendant**. Before accepting a plea of guilty or nolo contendere, the court must address the defendant personally in open court. During this address, the court must inform the defendant of, and determine that the defendant understands, the following:

(A) the right to plead not guilty, or having already so pleaded, to persist in that plea;

(B) the right to a jury trial;

(C) the right to be represented by counsel —and if necessary have the court appoint counsel —at trial and at every other stage of the proceeding;

	(D) the right at trial to confront and cross-examine adverse witnesses, to be protected from compelled self-incrimination, to testify and present evidence, and to compel the attendance of witnesses; (E) the defendant's waiver of these trial rights if the court accepts a plea of guilty or nolo contendere; (F) the nature of the charge to which the defendant is pleading; (G) any maximum possible penalty, including imprisonment, fine, special assessment, forfeiture, restitution, and term of supervised release; (H) any mandatory minimum penalty; (I) the court's obligation to apply the sentencing guidelines, and the court's authority to depart from those guidelines under some circumstances; (J) the terms of any plea-agreement provision waiving the right to appeal or to collaterally attack the sentence: and (K) if questioned by the court about the offense, any answer that the defendant gives under oath may be used against the defendant in a later prosecution for perjury or false statement.**[Former 11(c)(1)]** (2) **Ensuring That a Plea Is Voluntary**. Before accepting a plea of guilty or nolo contendere, the court must address the defendant personally in open court and determine that the plea is voluntary and did not result from force, threats, or promises (other than promises in a plea agreement). **[Former 11(d]** (3) **Determining the Accuracy of a Plea**. Before entering judgment on a guilty plea, the court must determine [that] [whether] a factual basis for the plea exists.**[Former 11(f)]**

	(c) Plea Agreement Procedure. [Former 11(e)] (1) **In General.** The government attorney and the defendant's attorney, or the defendant when acting pro se may discuss and agree to a plea. The court must not participate in these discussions. If the defendant pleads guilty or nolo contendere to either the charged offense or a lesser or related offense, the plea agreement may specify that the government's attorney will: (A) not bring, or will move to dismiss, other charges; (B) recommend, or agree not to oppose the defendant's request, that a particular sentence or sentencing range is appropriate or that a particular provision of the Sentencing Guidelines, or policy statement, or sentencing factor is or is not applicable, with the understanding that the recommendation or request does not bind the court; or (C) agree that a specific sentence or sentencing range is the appropriate disposition of the case, or that a particular provision of the Sentencing Guidelines, or policy statement, or sentencing factor is or is not applicable; such a plea agreement binds the court once the court accepts it. (2) **Disclosing a Plea Agreement. [New heading]** (A) Except for good cause shown, the parties must inform the court of the existence of a plea agreement at the arraignment, or at some other time, prior to trial, as established by the court. **[Former 11(e)(5)][Roger is checking with AUSA's on this language]** (B) The parties must disclose the plea agreement in open court when the plea is offered, unless the court for good cause allows the parties to disclose the plea agreement in camera. **[Former 11(e)(2)]**

	(3) **Judicial Consideration of a Plea Agreement [New heading]** (A) If the plea agreement is of the type specified in Rule 11(c)(1)(A) or (C), the court may accept the agreement, reject it, or defer a decision until the court has reviewed the presentence report. **[Former 11(e)(2)]** (B) If the plea agreement is of the type specified in Rule 11(c)(1)(B), the court must advise the defendant that the defendant has no right to withdraw the plea if the court accepts the plea agreement but does not follow the recommendation or request. **[Former 11(e)(2)]** (4) **Accepting a Plea Agreement**. If the court accepts the plea agreement, it must inform the defendant that the disposition stated in the plea agreement will be included in the judgment. **[Former 11(e)(3)]** (5) **Rejecting a Plea Agreement**. [The court may reject any plea agreement.] If the court rejects a plea agreement of the type specified in Rule 11(c)(1)(A) or (C), the court must do the following on the record: (A) inform the parties that the court rejects the plea agreement; (B) advise the defendant personally in open court–or, for good cause, in camera–that the court is not bound by the plea agreement and give the defendant an opportunity to withdraw the plea; and (C) advise the defendant that if the plea is not withdrawn, the court may dispose of the case less favorably toward the defendant than the plea agreement contemplated. **[Former 11(e)(4)]**

	(d) Withdrawing a Plea. A defendant may withdraw a plea of guilty or nolo contendere as follows: (1) Before the court accepts a plea of guilty or a plea of nolo contendere, the defendant may withdraw the plea for any, or no, reason. (2) After the court accepts a plea of guilty or nolo contendere, but before it imposes sentence, the defendant may withdraw the plea if: (A) the court rejects a plea agreement between the defendant and the government, **[as provided in (c)(1)(A) or (C) Roger suggests deleting this language]**; or (B) the defendant can show fair and just reasons for requesting the withdrawal. (3) After the court imposes sentence the defendant may not withdraw a plea of guilty or nolo contendere **[and the plea may be set aside only on direct appeal or by motion under 28 U.S.C. § 2255. Roger suggests deleting this language and retaining it in Rule 32] [New Provision]** **(e) Admissibility or Inadmissibility of a Plea, Plea Discussions, and Related Statements.** Except as otherwise provided in this paragraph, evidence of the following is not, in any civil or criminal proceeding, admissible against the defendant who made the plea or was a participant in the plea discussions: (1) a plea of guilty which was later withdrawn; (2) a plea of nolo contendere: (3) any statement made in the course of any proceedings under this rule regarding either of the foregoing pleas; or

	(4) any statement made in the course of plea discussions with an [government attorney] attorney for the government which do not result in a plea of guilty or which result in a plea of guilty later withdrawn. However, such a statement is admissible (i) in any proceeding wherein another statement made in the course of the same plea or plea discussions has been introduced and the statement ought in fairness be considered contemporaneously with it, [or] (ii) in a criminal proceeding for perjury or false statement if the statement was made by the defendant under oath, on the record, and in the presence of counsel **[or, (iii) if the statement consists of an offer by the government of a conditional guilty plea where relevant at sentencing to a defendant's claim after trial, of entitlement to acceptance of responsibility—Roger's suggestion based upon Judge Sedwick's memo]**. **[Former 11(e)(6)]** **(f) Recording the Proceedings**. The proceedings during which the defendant enters a plea must be recorded [verbatim] by a court reporter or by a suitable recording device. If there is a guilty plea or a nolo contendere plea, the record must include the inquiries and advice to the defendant required under Rule 11(c), (d), and (f). **[Former 11(g)]** **(g) Harmless Error**. A variance from the requirements of this rule is harmless error if it does not affect substantial rights. **[Former 11(h)]**
Rule 12. Pleadings and Motions Before Trial; Defenses and Objections.	**Rule 12. Pretrial Motions**
(a) Pleadings and Motions. Pleadings in criminal proceedings shall be the indictment and the information, and the pleas of not guilty, guilty and nolo contendere. All other pleas, and demurrers and motions to quash are abolished, and defenses and objections raised before trial which heretofore could have been raised by one or more of them shall be raised only by motion to dismiss or to grant appropriate relief, as provided in these rules.	**(a)** [abrogated]

(b) Pretrial Motions. Any defense, objection, or request which is capable of determination without the trial of the general issue may be raised before trial by motion. Motions may be written or oral at the discretion of the judge. the following must be raised prior to trial: **(1)** Defenses and objections based on defects in the institution of the prosecution; or **(2)** Defenses and objections based on defects in the indictment or information (other than that it fails to show jurisdiction in the court or to charge an offense which objections shall be noticed by the court at any time during the pendency of the proceedings); or **(3)** Motions to suppress evidence; or **(4)** Requests for discovery under Rule 16; or **(5)** Requests for severance of charges or defendants under Rule 14.	**(b) Pretrial Motions.** **(1)** ***In General.*** The parties may raise by pretrial motion any defense, objection, or request that the court can determine without a trial of the general issue. At the court's discretion, a motion may be written or oral. The following must be raised before trial: (A) a motion alleging defense a defect in the institution of the prosecution; (B) a motion alleging a defect in the indictment or information — but at any time during the proceeding, the court may hear a claim that the indictment or information fails to state the court's jurisdiction or fails to show an offense; (C) a motion to suppress evidence; (D) a Rule 14 motion to sever charges or defendants; and (E) a Rule 16 motion for discovery. **(2)** ***Notice by the Government of the Intention to Use Evidence.***[100] **(To be revised)** (A) ***At the Discretion of the Government.*** At the arraignment or as soon thereafter as is practicable, the government may give notice to the defendant of its intention to use specified evidence at trial in order to afford the defendant an opportunity to raise objections to such evidence prior to trial under subdivision (b)(3) of this rule. (B) ***At the Request of the Defendant.*** At the arraignment or as soon thereafter as is practicable, the defendant may, in order to afford an opportunity to move to suppress evidence under subdivision (b)(3) of this rule, request notice of the government's intention to use (in its evidence in chief at trial) any evidence which the defendant may be entitled to discover under Rule 16.

[100] The revised language based on this rule was moved to new 12(b)(2). The later sections have been relettered accordingly.

(c) Motion Date. Unless otherwise provided by local rule, the court may, at the time of the arraignment or as soon thereafter as practicable, set a time for the making of pretrial motions or requests and, if required, a later date of hearing.	**(c) Motion Deadline.** The court may at the arraignment, or as soon afterward as practicable, set a deadline for the parties to make pretrial motions and may also schedule a motion hearing.
(d) Notice by the Government of the Intention to Use Evidence.[101] **(1) At the Discretion of the Government.** At the arraignment or as soon thereafter as is practicable, the government may give notice to the defendant of its intention to use specified evidence at trial in order to afford the defendant an opportunity to raise objections to such evidence prior to trial under subdivision (b)(3) of this rule. **(2) At the Request of the Defendant.** At the arraignment or as soon thereafter as is practicable, the defendant may, in order to afford an opportunity to move to suppress evidence under subdivision (b)(3) of this rule, request notice of the government's intention to use (in its evidence in chief at trial) any evidence which the defendant may be entitled to discover under Rule 16 subject to any relevant limitations prescribed in Rule 16.	
(e) Ruling on Motion. A motion made before trial shall be determined before trial unless the court, for good cause, orders that it be deferred for determination at the trial of the general issue or until after verdict, but no such determination shall be deferred if a party's right to appeal is adversely affected. Where factual issues are involved in determining a motion, the court shall state its essential findings on the record.	**(d) Ruling on a Motion.** The court must decide every pretrial motion before trial unless it finds good cause to defer a ruling. The court must not defer a pretrial motion if the deferral will adversely affect a party's right to appeal. When factual issues are involved in deciding a motion, the court must state its essential findings on the record.
(f) Effect of Failure To Raise Defenses or Objections. Failure by a party to raise defenses or objections or to make requests which must be made prior to trial, at the time set by the court pursuant to subdivision (c), or prior to any extension thereof made by the court, shall constitute waiver thereof, but the court for cause shown may grant relief from the waiver.	**(e) Waiver of a Defense or Objection.** A party waives any defense or objection not raised or any pretrial request not made by the deadline the court sets under Rule 12(c) or by any extension the court provides. For good cause, the court may grant relief from the waiver.
(g) Records. A verbatim record shall be made of all proceedings at the hearing, including such findings of fact and conclusions of law as are made orally.	**(f) Records.** All proceedings at a motion hearing, including any findings of fact and conclusions of law made by the court, must be recorded verbatim by a court reporter or by a suitable recording device .

[101] The revised language based on this rule was moved to new 12(b)(2). The later sections have been relettered accordingly.

(h) Effect of Determination. If the court grants a motion based on a defect in the institution of the prosecution or in the indictment or information, it may also order that the defendant be continued in custody for a specified time pending the filing of a new indictment or information. Nothing in this rule shall be deemed to affect the provisions of any Act of Congress relating to periods of limitations.	**(g) Defendant's Continued Custody or Release Status.**[102] If the court grants a motion to dismiss based on a defect in the institution of the prosecution, in the indictment, or in the information, it may continue bail or custody for a specified time until a new indictment or information is filed. This rule does not affect any federal statutory period of limitations.
(i) Production of Statements at Suppression Hearing. Rule 26.2 applies at a hearing on a motion to suppress evidence under subdivision (b)(3) of this rule. For purposes of this subdivision, a law enforcement officer is deemed a government witness.	**(h) Producing Statements at a Suppression Hearing.** Rule 26.2 applies at a suppression hearing under Rule 12(b)(1)(C). In a suppression hearing, a law-enforcement officer is considered a government witness.

[102] The SSC thinks that the Advisory Committee should consider moving this subdivision into Rule 46.

Rule 12.1 Notice of Alibi	Rule 12.1. Notice of Alibi Defense[103]
(a) Notice by Defendant. Upon written demand of the attorney for the government stating the time, date, and place at which the alleged offense was committed, the defendant shall serve within ten days, or such different time as the court may direct, upon the attorney for the government a written notice of the defendant's intention to offer a defense of alibi. Such notice by the defendant shall state the specific place or places at which the defendant claims to have been at the time of the alleged offense and the names and addresses of the witnesses upon whom the defendant intends to rely to establish such alibi.	**(a) Government Request for Notice and Defendant's Response.** **(1)** ***Government's Request.*** The government attorney may request in writing that the defendant notify the government attorney of any intended alibi defense. The request must state the time, date, and place of the alleged offense. **(2)** ***Defendant's Response.*** Within 10 days after the request, or some other time the court directs, the defendant must serve written notice on the government attorney of any intended alibi defense. The defendant's notice must state the specific places where the defendant claims to have been at the time of the alleged offense and the names and addresses of the alibi witnesses on whom the defendant intends to rely.
(b) Disclosure of Information and Witness. Within ten days thereafter, but in no event less than ten days before trial, unless the court otherwise directs, the attorney for the government shall serve upon the defendant or the defendant's attorney a written notice stating the names and addresses of the witnesses upon whom the government intends to rely to establish the defendant's presence at the scene of the alleged offense and any other witnesses to be relied upon to rebut testimony of any of the defendant's alibi witnesses.	**(b) Disclosure of Government Witnesses.** **(1)** ***Disclosure.*** If the defendant serves a Rule 12.1(a)(2) notice, the government attorney must disclose in writing to the defendant, or the defendant's attorney, the names and addresses of the witnesses the government intends to rely on to establish the defendant's presence at the scene of the alleged offense, and any government rebuttal witnesses to the defendant's alibi witnesses. **(2)** ***Time to Disclose.*** Unless the court directs otherwise, the government attorney must give notice under Rule 12.1(b)(1) within 10 days after the defendant serves notice of an intended alibi defense under Rule 12.1(a)(2), but no later than 10 days before trial.

[103] The SSC suggests that the Advisory Committee consider making the notice requirements in 12.1, 12.2, and 12.3 more uniform. Rule 12 1(a)(2) and (b)(2) require ten days' notice. Rule 12.2(a) and (b) require notice "within the time provided for the filing a pretrial motion." Rule 12.3(a)(1) requires notice "within the time provided for filing a pretrial motion"; Rule 12.3(a)(3) requires a government response within ten days of the defendant's notice, and Rule 12.3(a)(4)(B) and (C) require action within seven days of the government's demand or defendant's response. Also, the SSC recommends that the Advisory Committee adopt a deadline for when the government's attorney should present the written demand that the defendant give notice of any intended alibi defense. A logical deadline would be "within the time provided for filing a pretrial motion" — this language appears in Rule 12.2(a) and (b) and in Rule 12 3(a(1). The SSC carefully considered the suggestion to combine Rules 12.1, 12.2, and 12.3, but after several drafting attempts, the SSC abandoned the effort as impracticable.

(c) Continuing Duty to Disclose. If prior to or during trial, a party learns of an additional witness whose identity, if known, should have been included in the information furnished under subdivision (a) or (b), the party shall promptly notify the other party or the other party's attorney of the existence and identity of such additional witness.	**(c) Continuing Duty to Disclose.** Both the government attorney and the defendant or the defendant's attorney must promptly disclose in writing[104] to the other party the name and address of any additional witness if: **(Josefsberg and Roll to revise)** (1) the disclosing party learns of the witness before or during trial; and (2) the witness should have been disclosed under Rule 12.1(a) or (b) if the disclosing party had earlier known it.
(d) Failure to Comply. Upon failure of either party to comply with the requirements of this rule, the court may exclude the testimony of any undisclosed witness offered by such party as to the defendant's absence from or presence at, the scene of the alleged offense. This rule shall not limit the right of the defendant to testify.	**(d) Exceptions.** The court may for good cause grant an exception to any requirement of Rule 12.1 (a) - (c).
(e) Exceptions. For good cause shown, the court may grant an exception to any of the requirements of subdivisions (a) through (d) of this rule.	**(e) Failure to Comply.** If a party fails to comply with this rule, the court may exclude the testimony of any undisclosed witness regarding the defendant's alibi. This rule does not limit the defendant's right to testify.
(f) Inadmissibility of Withdrawn Alibi. Evidence of an intention to rely upon an alibi defense, later withdrawn, or of statements made in connections with such intention, is not, in any civil or criminal proceeding, admissible against the person who gave notice of the intention.	**(f) Inadmissibility of Withdrawn Alibi.** Evidence of an intention to rely upon an alibi defense, later withdrawn, or of statements made in connections with such intention, is not admissible in any civil or criminal proceeding against the person who gave notice of the intention.

[104] *In writing* was added here to be consistent with 12.3(b)

Rule 12.2. Notice of Insanity Defense or Expert Testimony of Defendant's Mental Condition[105]	Rule 12.2. Notice of Insanity Defense; Mental Examination[106]
(a) Defense of Insanity. If a defendant intends to rely upon the defense of insanity at the time of the alleged offense, the defendant shall, within the time provided for the filing of pretrial motions or at such later time as the court may direct, notify the attorney for the government in writing of such intention and file a copy of such notice with the clerk. If there is a failure to comply with the requirements of this subdivision, insanity may not be raised as a defense. The court may for cause shown allow late filing of the notice or grant additional time to the parties to prepare for trial or make such other order as may be appropriate.	**(a) Notice of an Insanity Defense.** A defendant who intends to rely on a defense of insanity at the time of the alleged offense must notify the government's attorney in writing within the time provided for filing a pretrial motion, or at any later time the court directs. A defendant who fails to comply with the requirements of this subdivision cannot rely on an insanity defense. The court may — for good cause — allow the defendant to file the notice late, grant additional trial-preparation time, or make other appropriate orders.
(b) Expert Testimony of Defendant's Mental Condition. If a defendant intends to introduce expert testimony relating to a mental disease or defect or any other mental condition of the defendant bearing upon (1) the issue of guilt, or (2) the issue of punishment in a capital case, the defendant shall, within the time provided for the filing of pretrial motions or at such later time as the court may direct, notify the attorney for the government in writing of such intention and file a copy of such notice with the clerk. The court may for cause shown allow late filing of the notice or grant additional time to the parties to prepare for trial or make such other order as may be appropriate.	**(b) Notice of Expert Testimony of a Mental Condition.** A defendant who intends to introduce expert testimony relating to a mental disease, mental defect, or any other mental condition bearing on the defendant's guilt must so notify the government's attorney in writing within the time provided for filing a pretrial motion, or at any later time the court directs. The court may — for good cause — allow the defendant to file the notice late, grant additional trial-preparation time, or make other appropriate orders.

[105] Matter underlined and struck out reflects proposed amendments being considered by full advisory committee, subject to edit by SSC

[106] The SSC suggests that the Advisory Committee consider making the notice requirements in 12.1, 12.2, and 12.3 more uniform. See fn. 104.

(c) Mental Examination of Defendant. **(1) Authority to Order Examination; Procedures. If the defendant provides notice under subdivision (a)** ~~In an appropriate case~~ the court ~~may~~ must, upon motion of the attorney for the government, order the defendant to submit to an examination conducted pursuant to 18 U.S.C. ~~4241 or~~ 4242. If the defendant provides notice under subdivision (b) the court may, upon motion of the attorney for the government, order the defendant to submit to an examination conducted pursuant to procedures as ordered by the court. (2) Disclosure of Results of Examination. The results of the examination conducted solely pursuant to notice under subdivision (b)(2) shall be sealed and not disclosed to any atorney for the government or the defendant unless and until the defendant is found guilty of one or more capital crimes and the defendant confirms his or her intent to offer mental condition evidence during sentencing proceedings. (A) The results of the examination may be disclosed earlier to the defendant upon good cause shown. (B) If early disclosure is made to the defendant, similar disclosure must be made tot he attorney for the government. (3) **Disclosure of Statements by the Defendant.** No statement made by the defendant in the course of any examination for by this rule, whether the examination with or without the consent of the defendant, no testimony by the expert based upon such statement, and no other fruits of the statement shall be admitted in evidence against the defendant in any criminal proceeding except on an issue respecting mental condition on which the defendant has introduced testimony.	**(c) Mental Examination.** On the government's motion, the court may order the defendant to submit to an examination under 18 U.S.C. § 4241 or 4242. If the court orders this examination, the following are inadmissible in any criminal proceeding — whether or not the defendant consented to the examination — except on an issue concerning mental condition on which the defendant has introduced testimony: (1) the defendant's statements made during the examination; (2) the expert's testimony based on the defendant's statements; and (3) any other fruits of the defendant's statements.
(d) Failure to Comply. If there is a failure to give notice when required by subdivision (b) of this rule or to submit to an examination when ordered under subdivision (c) of this rule, the court may exclude the testimony of any expert witness offered by the defendant on the issue of the defendant's guilt.	**(d) Failure to Comply.** If the defendant fails to give notice under Rule 12.2(b) or does not submit to an examination when ordered under Rule 12.2(c), the court may exclude the testimony of the defendant's expert witness on the issue of the defendant's mental disease, mental defect, or any other mental condition bearing on the defendant's guilt **[or punishment in a capital case]. (Subject to new amendment)**
(e) Inadmissibility of Withdrawn Intention. Evidence of an intention as to which notice was given under subdivision (a) or (b), later withdrawn, is not, in any civil or criminal proceeding, admissible against the person who gave notice of the intention.	**(e) Inadmissibility of Withdrawn Intention.** Evidence of an intention as to which notice was given under subdivision (a) or (b), later withdrawn, is not admissible in any civil or criminal proceeding against the person who gave notice of the intention.

Rule 12.3. Notice of defense based upon public authority	Rule 12.3. Notice of Public-Authority Defense[107]
(a) Notice by defendant; government response; disclosure of witnesses. **(1) Defendant's Notice and Government's Response.** A defendant intending to claim a defense of actual or believed exercise of public authority on behalf of a law enforcement or Federal intelligence agency at the time of the alleged offense shall, within the time provided for the filing of pretrial motions or at such later time as the court may direct, serve upon the attorney for the Government a written notice of such intention and file a copy of such notice with the clerk. Such notice shall identify the law enforcement or Federal intelligence agency and any member of such agency on behalf of which and the period of time in which the defendant claims the actual or believed exercise of public authority occurred. If the notice identifies a Federal intelligence agency, the copy filed with the clerk shall be under seal. Within ten days after receiving the defendant's notice, but in no event less than twenty days before the trial, the attorney for the Government shall serve upon the defendant or the defendant's attorney a written response which shall admit or deny that the defendant exercised the public authority identified in the defendant's notice.	**(a) Notice of Defense and Disclosure of Witnesses.** **(1)** ***Notice in General.*** A defendant who intends to assert a defense of [actual or believed] exercise of public authority on behalf of a law-enforcement agency or federal intelligence agency at the time of the alleged offense must so notify the government attorney in writing within the time provided for filing a pretrial motion, or at any later time the court directs. The notice filed with the clerk must be under seal if the notice identifies a federal intelligence agency under whose authority the defendant claims to have acted. **(2)** ***Contents.*** The notice must contain the following information: (A) the law-enforcement agency or federal intelligence agency involved; (B) the agency member on whose behalf the defendant claims to have acted; and (C) the time during which the defendant claims to have acted with public authority. **(3)** ***Response to Notice.*** The government attorney must serve a written response on the defendant or the defendant's attorney within 10 days after receiving the defendant's notice, but no later than 20 days before trial. The response must admit or deny that the defendant exercised the public authority identified in the defendant's notice.

[107] The SSC suggests that the Advisory Committee consider making the notice requirements in 12.1, 12.2, and 12.3 more uniform. See fn. 104.

(2) Disclosure of Witnesses. At the time that the Government serves its response to the notice or thereafter, but in no event less than twenty days before trial, the attorney for the Government may serve upon the defendant or the defendant's attorney a written demand for the names and addresses of the witnesses, if any, upon whom the defendant intends to rely in establishing the defense identified in the notice. Within seven days after receiving the Government's demand, the defendant shall serve upon the attorney for the Government a written statement of the names and addresses of any such witnesses. Within seven days after receiving the defendant's written statement, the attorney for the Government shall serve upon the defendant or the defendant's attorney a written statement of the names and addresses of the witnesses, if any, upon whom the Government intends to rely in opposing the defense identified in the notice.	**(4)** ***Disclosing Witnesses.*** (A) *Government's Request.* The government attorney may request in writing that the defendant disclose the names and addresses of any witnesses the defendant intends to rely on to establish a public-authority defense. The government's attorney may serve the request when the government serves its response to the defendant's notice under Rule 12.3(a)(1), or later, but must serve the notice no later than 20 days before trial. (B) *Defendant's Response.* Within 7 days after receiving the government's request, the defendant must serve on the government attorney a written statement of the names and addresses of the witnesses. (C) *Government's Reply.* Within 7 days after receiving the defendant's statement, the government attorney must serve on the defendant or the defendant's attorney a written statement of the names and addresses of any witnesses the government intends to rely on to oppose the defendant's public-authority defense.
(3) Additional Time. If good cause is shown, the court may allow a party additional time to comply with any obligation imposed by this rule.	**(5)** ***Additional Time.*** The court may for good cause allow a party additional time to comply with this rule.
(b) Continuing duty to disclose. If, prior to or during trial, a party learns of any additional witness whose identity, if known, should have been included in the written statement furnished under subdivision (a)(2) of this rule, that party shall promptly notify in writing the other party or the other party's attorney of the name and address of any such witness.	**(b) Continuing Duty to Disclose.** Both the government attorney and the defendant or the defendant's attorney must promptly disclose in writing to the other party the name and address of any additional witness if: **(1)** the disclosing party learns of the witness before or during trial; and **(2)** the witness's identity should have been disclosed under Rule 12.3(a)(2) if the disclosing party had earlier known it.

(c) Failure to comply. If a party fails to comply with the requirements of this rule, the court may exclude the testimony of any undisclosed witness offered in support of or in opposition to the defense, or enter such other order as it deems just under the circumstances.[108] This rule shall not limit the right of the defendant to testify.	**(c) Failure to Comply.** If a party fails to comply with this rule, the court may exclude the testimony of any undisclosed witness regarding the public-authority defense. This rule does not limit the defendant's right to testify.
(d) Protective procedures unaffected. This rule shall be in addition to and not supersede the authority of the court to issue appropriate protective orders, or the authority of the court to order that any pleading be filed under seal.	**(d) Protective Procedures Unaffected.** This rule does not limit the court's authority to issue appropriate protective orders or to order that any pleading be sealed.
(e) Inadmissibility of withdrawn defense based upon public authority. Evidence of an intention as to which notice was given under subdivision (a), later withdrawn, is not, in any civil or criminal proceeding, admissible against the person who gave notice of the intention.	**(e) Inadmissibility of withdrawn defense based upon public authority.** Evidence of an intention as to which notice was given under subdivision (a), later withdrawn, is not admissible in any civil or criminal proceeding against the person who gave notice of the intention.

[108] The SSC deleted the following language "or enter such other order as it deems just under the circumstances" from the restyled version because it seems unnecessary, and because deleting it makes this subdivision consistent with the parallel provisions in Rules 12.1(d) and 12.2(d).

Rule 13. Trial Together of Indictments or Informations	Rule 13. Joint Trial of Separate Cases
The court may order two or more indictments or informations or both to be tried together if the offenses, and the defendants if there is more than one, could have been joined in a single indictment or information. The procedure shall be the same as if the prosecution were under such single indictment or information.	The court may order that separate cases be tried together as though brought in a single indictment or information if all offenses and all defendants could have been joined in a single indictment or information.

Rule 14. Relief from Prejudicial Joinder	Rule 14. Relief from Prejudicial Joinder
If it appears that a defendant or the government is prejudiced by a joinder of offenses or of defendants in an indictment or information or by such joinder for trial together, the court may order an election or[109] separate trials of counts, grant a severance of defendants or provide whatever other relief justice requires. In ruling on a motion by a defendant for severance the court may order the attorney for the government to deliver to the court for inspection *in camera* any statements or confessions[110] made by the defendants which the government intends to introduce in evidence at the trial.	**(a) Relief.** If the joinder of offenses or defendants in an indictment, an information, or a consolidation for trial appears to prejudice the defendant or the government, the court may order separate trials of counts, sever the defendants' trials, or provide any other relief that justice requires. **(b) Defendants' Statements.** Before ruling on a defendant's motion to sever, the court may order the government attorney to deliver to the court for in camera inspection any of the defendants' statements that the government intends to use as evidence.

[109] Professor Saltzburg says deletion of *an election or* is OK

[110] Professor Saltzburg says deletion of *or confessions* is OK; the phrase is included in the word *statements*.

Rule 15. Depositions	Rule 15. Depositions
(a) When Taken. Whenever due to exceptional circumstances of the case it is in the interest of justice that the testimony of a prospective witness of a party be taken and preserved for use at trial, the court may upon motion of such party and notice to the parties order that testimony of such witness be taken by deposition and that any designated book paper, document, record, recording, or other material not privileged, be produced at the same time and place. If a witness is detained pursuant to section 3144 of title 18, United States Code, the court on written motion of the witness and upon notice to the parties may direct the witness' deposition be taken. After the deposition has been subscribed the court may discharge the witness.	**(a) When Taken.** **(1)** ***In General.*** A party may move that a prospective witness be deposed in order to preserve testimony for trial. The court may grant such motion due to exceptional circumstances in the case and in the interest of justice. If the court orders the deposition to be taken, it may also require the deponent to produce at the deposition any designated book, paper, document, record, recording, data, or other material not privileged. **(2)** ***Detained Material Witness.*** A witness who is detained under 18 U.S.C. § 3144 may request to be deposed by filing a written motion and giving notice to the parties. The court may then order that the deposition be taken and may discharge the witness after the witness has signed under oath the deposition transcript.
(b) Notice of Taking. The party at whose instance a deposition is to be taken shall give to every party reasonable written notice of the time and place for taking the deposition. The notice shall state the name and address of each person to be examined. On motion of a party upon whom the notice is served, the court for cause shown may extend or shorten the time or change the place for taking the deposition. The officer having custody of a defendant shall be notified of the time and place set for the examination and shall, unless the defendant waives in writing the right to be present, produce the defendant at the examination and keep the defendant in the presence of the witness during the examination, unless, after being warned by the court that disruptive conduct will cause the defendant's removal from the place of the taking of the deposition, the defendant persists in conduct which is such as to justify exclusion from that place. A defendant not in custody shall have the right to be present at the examination upon request subject to such terms as may be fixed by the court, but a failure, absent good cause shown, to appear after notice and tender of expenses in accordance with subdivision (c) of this rule shall constitute a waiver of that right and of any objection to the taking and use of the deposition based upon that right.	**(b) Notice.** **(1)** ***In General.*** A party seeking to take a deposition must notify every other party in writing of the deposition's date and location. The notice must state the name and address of each deponent. If requested by a party receiving the notice, the court for good cause may change the deposition's date or location. **(2)** ***To the Custodial Officer.*** The party seeking to take the deposition must also notify the officer who has custody of the defendant of the scheduled date and location.

	(c) Defendant's Presence.[111] **(1)** ***Defendant in Custody.*** The officer who has custody of the defendant must produce the defendant at the deposition and keep the defendant in the witness's presence during the examination, unless the defendant: (A) waives in writing the right to be present; or (B) persists in disruptive conduct justifying exclusion after the court has warned the defendant that disruptive conduct will result in the defendant's exclusion. **(2)** ***Defendant Not in Custody.*** A defendant who is not in custody has the right upon request to be present at the deposition, subject to any conditions fixed by the court. If the government tenders the defendant's expenses as provided in Rule 15(d) but the defendant still fails to appear, the defendant — absent good cause — waives both the right to appear and any objection to the deposition or its use based upon that right.
(c) Payment of Expenses. Whenever a deposition is taken at the instance of the government, or whenever a deposition is taken at the instance of a defendant who is unable to bear the expenses of the taking of the deposition, the court may direct that the expense of travel and subsistence of the defendant and the defendant's attorney for attendance at the deposition and the cost of the transcript of the deposition shall be paid by the government.	**(d) Expenses.** If the deposition was requested by the government or by a defendant who is unable to bear the deposition expenses, the court may order the government to pay: **(1)** the travel and subsistence expenses of the defendant and the defendant's attorney to attend the deposition, and **(2)** the deposition transcript costs.

[111] Rule 15(b) involves notice. The subject of a defendant's right to be present should be the subject of a separate subdivision: Rule 15(c).

(d) How Taken. Subject to such additional conditions as the court shall provide, a deposition shall be taken and filed in the manner provided in civil actions except as otherwise provided in these rules, provided that (1) in no event shall a deposition be taken of a party defendant without that defendant's consent, and (2) the scope and manner of examination and cross-examination shall be such as would be allowed in the trial itself. The government shall make available to the defendant or the defendant's counsel for examination and use at the taking of the deposition any statement of the witness being deposed which is in the possession of the government and to which the defendant would be entitled at the trial.	**(e) How Taken.** Unless a rule or a court order provides otherwise, a deposition must be taken and filed in the same manner as a deposition in a civil action, with the following differences: **(1)** A defendant may not be deposed without that defendant's consent. **(2)** The scope and manner of the deposition examination and cross-examination must be the same as would be allowed during trial. **(3)** The government must provide to the defendant or the defendant's attorney, for use at the deposition, any statement of the deponent in the government's possession to which the defendant would be entitled at trial.
(e) Use. At the trial or upon any hearing, a part or all of a deposition, so far as otherwise admissible under the rules of evidence, may be used as substantive evidence if the witness is unavailable, as unavailability is defined in Rule 804(a) of the Federal Rules of Evidence, or the witness gives testimony at the trial or hearing inconsistent with that witness' deposition. Any deposition may also be used by any party for the purpose of contradicting or impeaching the testimony of the deponent as a witness. If only a part of a deposition is offered in evidence by a party, an adverse party may require the offering of all of it which is relevant to the part offered and any party may offer other parts.	**(f) Use as Evidence** **(1) Substantive and Impeachment Use.** If admissible under the Federal Rules of Evidence, a party may use all or part of a deposition — (A) as substantive evidence at a trial or hearing if: (i) the witness is unavailable as defined in Federal Rule of Evidence 804(a); or (ii) the witness testifies inconsistently with the deposition at the trial or hearing; and (B) to impeach the deponent. **(2)** ***Parts of a Deposition.*** If a party introduces in evidence only a part of a deposition, an adverse party may require the introduction of other admissible parts that are relevant to the part introduced. Any party may offer other parts.

(f) Objections to Deposition Testimony. Objections to deposition testimony or evidence or parts thereof and the grounds for the objection shall be stated at the time of the taking of the deposition.	**(g) Objections.** A party who objects to deposition testimony or evidence must state the grounds for the objection during the deposition.
(g) Deposition by Agreement Not Precluded. Nothing in this rule shall preclude the taking of a deposition, orally or upon written questions, or the use of a deposition, by agreement of the parties with the consent of the court.	**(h) Agreed Depositions Permitted.** The parties may by agreement take and use a deposition with the court's consent.

Rule 16. Discovery and Inspection	Rule 16. Discovery and Inspection
(a) Governmental Disclosure of Evidence. **(1) Information Subject to Disclosure.** **(A) Statement of Defendant.** Upon request of a defendant the government must disclose to the defendant and make available for inspection, copying, or photographing: any relevant written or recorded statements made by the defendant, or copies thereof, within the possession, custody, or control of the government, the existence of which is known, or by the exercise of due diligence may become known, to the attorney for the government; that portion of any written record containing the substance of any relevant oral statement made by the defendant whether before or after arrest in response to interrogation by any person then known to the defendant to be a government agent; and recorded testimony of the defendant before a grand jury which relates to the offense charged. The government must also disclose to the defendant the substance of any other relevant oral statement made by the defendant whether before or after arrest in response to interrogation by any person then known by the defendant to be a government agent if the government intends to use that statement at trial. Upon request of a defendant which is an organization such as a corporation, partnership, association, or labor union, the government must disclose to the defendant any of the foregoing statements made by a person who the government contends (1) was, at the time of making the statement, so situated as a director, officer, employee or agent as to have been able legally to bind the defendant in respect to the subject of the statement, or (2) was, at the time of the offense, personally involved in the alleged conduct constituting the offense and so situated as a director, officer, employee, or agent as to have been able legally to bind the defendant in respect to that alleged conduct in which the person was involved.	**(a) Government's Disclosure.** **(1)** ***Disclosable Information.*** (A) ***A Defendant's Oral Statement.*** The government must disclose to the defendant the substance of any relevant oral statement made by the defendant, before or after arrest, in response to interrogation by a person the defendant knew was a government agent if the government intends to use the statement at trial. (B) ***A Defendant's Written or Recorded Statement.*** At the defendant's request, the government must also disclose to the defendant, and make available for inspection, copying, or photographing, all of the following: (i) any relevant written or recorded statement by the defendant if: (a) the statement is within the government's possession, custody, or control; and (b) the government attorney knows — or through due diligence could know — that the statement exists; (ii) the portion of any written record containing the substance of any relevant oral statement made before or after arrest if the defendant made the statement in response to interrogation by a person the defendant knew was a government agent; and (iii) the defendant's recorded testimony before a grand jury relating to the charged offense.
	(C) ***Organizational Defendant.*** At the defendant's request, if the defendant is an organization, the government must disclose to the defendant any statement described in Rule 16(a)(1)(A) and (B) if the government contends that the person making the statement:

	(a) was legally able to bind the defendant regarding the subject of the statement because of that person's position as the defendant's director, officer, employee, or agent; or (b) was personally involved in the alleged conduct constituting the offense and was legally able to bind the defendant regarding that conduct because of that person's position as the defendant's director, officer, employee, or agent.
(B) Defendant's Prior Record. Upon request of the defendant, the government shall furnish to the defendant such copy of the defendant's prior criminal record, if any, as is within the possession, custody, or control of the government, the existence of which is known, or by the exercise of due diligence may become known, to the attorney for the government.	(D) ***Defendant's Prior Record.*** Upon request, the government must furnish a defendant with a copy of that defendant's prior criminal record that is within the government's possession, custody, or control if the government's attorney knows — or through due diligence could know — that the record exists.
(C) Documents and Tangible Objects. Upon request of the defendant the government shall permit the defendant to inspect and copy or photograph books, papers, documents, photographs, tangible objects, buildings or places, or copies or portions thereof, which are within the possession, custody or control of the government, and which are material to the preparation of the defendant's defense or are intended for use by the government as evidence in chief at the trial, or were obtained from or belong to the defendant.	(E) ***Documents and Objects.*** At the defendant's request, the government must permit the defendant to inspect and copy, or photograph books, papers, documents, data, photographs, tangible objects, buildings or places, or copies or portions of any of these items, if: (i) the item is within the government's possession, custody, or control; (ii) the item is material to the preparation of the defendant's defense, or the government intends to use the item in its case-in-chief at trial; or (iii) the item was obtained from or belongs to the defendant.

(D) Reports of Examinations and Tests. Upon request of a defendant the government shall permit the defendant to inspect and copy or photograph any results or reports of physical or mental examinations, and of scientific tests or experiments, or copies thereof, which are within the possession, custody, or control of the government, the existence of which is known, or by the exercise of due diligence may become known, to the attorney for the government, and which are material to the preparation of the defense or are intended for use by the government as evidence in chief at the trial.	(F) ***Reports of Examinations and Tests.*** Upon request, the government must permit a defendant to inspect and copy, or photograph the results or reports of any physical or mental examination and of any scientific test or experiment if: (i) the item is within the government's possession, custody, or control; (ii) the government's attorney knows — or through due diligence could know — that the item exists; and (iii) the item is material to the preparation of the defendant's defense, or the government intends to use the item in its case-in-chief at trial.
(E) Expert Witnesses. At the defendant's request, the government shall disclose to the defendant a written summary of testimony the government intends to use under Rules 702, 703, or 705 of the Federal Rules of Evidence during its case in chief at trial. This summary must describe the witnesses' opinions, the bases and the reasons therefor, and the witnesses' qualifications.	(G) ***Expert Testimony.*** Upon request, the government must give to the defendant a written summary of any testimony the government intends to use in its case-in-chief at trial under Federal Rules of Evidence 702, 703, or 705. The summary must describe the witness's opinions, the bases and reasons for these opinions, and the witness's qualifications.
(2) Information Not Subject to Disclosure. Except as provided in paragraphs (A), (B), (D), and (E) of subdivision (a)(1), this rule does not authorize the discovery or inspection of reports, memoranda, or other internal government documents made by the attorney for the government or other government agents in connection with the investigation or prosecution of 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. [112]	**(2)** ***Nondisclosable Information.*** Except as Rule 16(a)(1) provides otherwise, this rule does not authorize the discovery or inspection of reports, memoranda, or other internal government documents made by the government attorney or other government agent in connection with the case's investigation or prosecution, or statements made by prospective government witnesses as provided in 18 U.S.C. § 3500.
(3) Grand Jury Transcripts. Except as provided in Rules 6, 12(i) and 26.2, and subdivision (a)(1)(A) of this rule, these rules do not relate to discovery or inspection of recorded proceedings of a grand jury.	**(3)** ***Grand Jury Transcripts.*** Except as Rules 6, 12(i), 16(a)(1)(A), and 26.2 provide otherwise, this rule does not apply to the discovery or inspection of a grand jury's recorded proceedings.
[(4) Failure to Call Witness.] (Deleted Dec. 12, 1975)	

[112] On Professor Saltzburg's recommendation, the SSC deleted this sentence from the restyled version.

(b) The Defendant's Disclosure of Evidence. **(1) Information Subject to Disclosure.** **(A) Documents and Tangible Objects.** If the defendant requests disclosure under subdivision (a)(1)(C) or (D) of this rule, upon compliance with such request by the government, the defendant, on request of the government, shall permit the government to inspect and copy or photograph books, papers, documents, photographs, tangible objects, or copies or portions thereof, which are within the possession, custody, or control of the defendant and which the defendant intends to introduce as evidence in chief at the trial.	**(b) Defendant's Disclosure.** **(1)** ***Disclosable Information.*** (A) ***Documents and Objects.*** If the defendant requests disclosure under Rule 16(a)(1)(E), then upon compliance and the government's request, the defendant must permit the government to inspect and copy, or photograph any book, paper, document, data, tangible object, or portion of any of these items, if: (i) the item is within the defendant's possession, custody, or control; and (ii) the defendant intends to introduce as evidence in the defendant's case-in-chief at trial.
(B) Reports of Examinations and Tests. If the defendant requests disclosure under subdivision (a)(1)(C) or (D) of this rule, upon compliance with such request by the government, the defendant, on request of the government, shall permit the government to inspect and copy or photograph any results or reports of physical or mental examinations and of scientific tests or experiments made in connection with the particular case, or copies thereof, within the possession or control of the defendant, which the defendant intends to introduce as evidence in chief at the trial or which were prepared by a witness whom the defendant intends to call at the trial when the results or reports related to that witness' testimony.	(B) ***Reports of Examinations and Tests.*** If the defendant requests disclosure under Rule 16(a)(1)(F), then upon compliance and the government's request, the defendant must permit the government to inspect and copy, or photograph the results or reports of any physical or mental examination and of any scientific test or experiment if: (i) the item is within the defendant's possession, custody, or control; and (ii) the defendant intends to introduce the item as evidence in the defendant's case-in- chief at trial, or intends to call the witness who prepared the report and the report relates to the witness's testimony.[113]
(C) Expert Witnesses. If the defendant requests disclosure under subdivision (a)(1)(E) of this rule and the government complies, 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 describe the opinions of the witnesses, the bases and reasons therefor, and the witnesses' qualifications.	(C) ***Expert Testimony.*** If the defendant requests disclosure under Rule 16(a)(1)(G), then upon compliance and the government's request, the defendant must give the government a written summary of any testimony the defendant intends to use as evidence at trial under Federal Rules of Evidence 702, 703, or 705. The summary must describe the witness's opinions, the bases and reasons for these opinions, and the witness's qualifications.

[113] I'd favor combining (A) and (B) The wording of (B) is identical to (A) except for the heading and the last four lines. — JFS.

(2) Information Not Subject To Disclosure. Except as to scientific or medical reports, this subdivision does not authorize the discovery or inspection of reports, memoranda, or other internal defense documents made by the defendant, or the defendant's attorneys or agents in connection with the investigation or defense of the case, or of statements made by the defendant, or by government or defense witnesses, or by prospective government or defense witnesses, to the defendant, the defendant's agents or attorneys.	**(2)** ***Nondisclosable Information.***[114]**[Except for the things discoverable under Rule 16(b)(1), a defendant is not required to disclose any other information.]** Except for scientific or medical reports, Rule 16(b)(1) does not authorize discovery or inspection of the following: (A) reports, memoranda, or other documents made by the defendant, or the defendant's attorney or agent, during the case's investigation or defense; or (B) a statement made to the defendant, or the defendant's attorney or agent, by: (i) the defendant; (ii) a government or defense witness; or (iii) a prospective government or defense witness.
[(3) Failure to Call Witness.] (Deleted Dec. 12, 1975)	
(c) Continuing Duty to Disclose. If, prior to or during trial, a party discovers additional evidence or material previously requested or ordered, which is subject to discovery or inspection under this rule, such party shall promptly notify the other party or that other party's attorney or the court of the existence of the additional evidence or material.	**(c) Continuing Duty to Disclose.** A party who discovers additional evidence or material before or during trial must promptly disclose its existence to the other parties, their attorneys, or the court if: (1) the evidence or material may be discovered or inspected under this rule; and (2) another party previously requested, or the court ordered, its production.
(d) Regulation of Discovery. **(1) Protective and Modifying Orders.** Upon a sufficient showing the court may at any time order that the discovery or inspection be denied, restricted, or deferred, or make such other order as is appropriate. Upon motion by a party, the court may permit the party to make such showing, in whole or in part, in the form of a written statement to be inspected by the judge alone. If the court enters an order granting relief following such an ex parte showing, the entire text of the party's statement shall be sealed and preserved in the records of the court to be made available to the appellate court in the event of an appeal.	**(d) Regulating Discovery.** **(1)** ***Protective and Modifying Orders.*** At any time the court may for good cause deny, restrict, or defer discovery or inspection, or grant other appropriate relief. The court may permit a party to show good cause by a written statement that the court will inspect ex parte. If relief is granted, the court must preserve the entire text of the party's statement under seal in the court's records should an appeal occur.

[114] The SSC recommends that Rule 16(b)(2) be shortened to the following: "Except for the things discoverable under Rule 16(b)(1), a defendant is not required to disclose any other information."

(2) Failure To Comply With a Request. If at any time during the course of proceedings it is brought to the attention of the court that a party has failed to comply with this rule, the court may order such party to permit the discovery or inspection, grant a continuance, or prohibit the party from introducing evidence not disclosed, or it may enter such other order as it deems just under the circumstances. The court may specify the time, place and manner of making the discovery and inspection and may prescribe such terms and conditions as are just.	(2) ***Failure to Comply.*** If a party fails to comply with Rule 16, the court may: (A) order the disobedient party to permit the discovery or inspection; specify its time, place, and manner; and prescribe other just terms and conditions; (B) grant a continuance; (C) prohibit the disobedient party from introducing the undisclosed evidence; or (D) enter any other order that is just under the circumstances.
(e) Alibi Witnesses. Discovery of alibi witnesses is governed by Rule 12.1.[115]	

[115] The SSC deleted this section because it's duplicative of Rule 12.1. Professor Saltzburg concurred.

Rule 17. Subpoena	Rule 17. Subpoena
(a) For Attendance of Witnesses; Form; Issuance. A subpoena shall be issued by the clerk under the seal of the court. It shall state the name of the court and the title, if any, of the proceeding, and shall command each person to whom it is directed[116] to attend and give testimony at the time and place specified therein. The clerk shall issue a subpoena, signed and sealed but otherwise in blank to a party requesting it, who shall fill in the blanks before it is served. A subpoena shall be issued by a United States magistrate judge in a proceeding before that magistrate judge, but it need not be under the seal of the court.	**(a) Witness's Attendance.** A subpoena must state the court's name and the title of the proceeding, include the seal of the court, and command the witness to attend and testify at the time and place the subpoena specifies. The clerk must issue a blank subpoena — signed and sealed — to the party requesting it and that party must fill in the blanks before the subpoena is served. When a magistrate judge issues a subpoena in a proceeding before the magistrate judge, the subpoena need not contain the court's seal.
(b) Defendants Unable to Pay. The court shall order at any time that a subpoena be issued for service on a named witness upon an ex parte application of a defendant upon a satisfactory showing that the defendant is financially unable to pay the fees of the witness and that the presence of the witness is necessary to an adequate defense. If the court orders the subpoena to be issued, the costs incurred by the process and the fees of the witness so subpoenaed shall be paid in the same manner in which similar costs and fees are paid in case of a witness subpoenaed in behalf of the government.	**(b) Defendant Unable to Pay.** Upon a defendant's ex parte application, the court must order that a subpoena be issued for a named witness if the defendant shows an inability to pay the witness's fees and the necessity of the witness's presence for an adequate defense. If the court orders a subpoena to be issued, the process costs and witness fees will be paid in the same manner as those paid for witnesses the government subpoenas.
(c) For Production of Documentary Evidence and of Objects. A subpoena may also command the person to whom it is directed to produce the books, papers, documents or other objects designated therein. The court on motion made promptly may quash or modify the subpoena if compliance would be unreasonable or oppressive.[117] The court may direct that books, papers, documents or objects designated in the subpoena be produced before the court at a time prior to the trial or prior to the time when they are to be offered in evidence and may upon their production permit the books papers, documents or objects or portions thereof to be inspected by the parties and their attorneys.	**(c) Producing Documents and Objects.** **(1)** A subpoena may order the witness to produce any books, papers, documents or other objects the subpoena designates. The court may direct the witness to produce the designated items in court before trial or before they are to be offered in evidence. When the items arrive, the court may permit the parties and their attorneys to inspect all or part of them. **(2)** On motion made promptly, the court may quash or modify the subpoena if compliance would be unreasonable.

[116] Professor Saltzburg approved substituting *witness* for *each person to whom it is directed.*

[117] Professor Saltzburg approved deleting *or oppressive.*

(d) Service. A subpoena may be served by the marshal, by a deputy marshal or by any other person who is not a party and who is not less than 18 years of age. Service of a subpoena shall be made by delivering a copy thereof to the person named and by tendering to that person the fee for 1 day's attendance and the mileage allowed by law. Fees and mileage need not be tendered to the witness upon service of a subpoena issued in behalf of the United States or an officer or agency thereof.	**(d) Service.** A marshal, deputy marshal, or any nonparty who is at least 18 years old may serve a subpoena. The server must deliver a copy of the subpoena to the witness and must tender to the witness one day's witness-attendance fee and the legal mileage allowance. The server need not tender the attendance fee or mileage allowance when the United States, a federal officer, or a federal agency has requested the subpoena.
(e) Place of Service. **(1) In United States.** A subpoena requiring the attendance of a witness at a hearing or trial may be served at any place within the United States. **(2) Abroad.** A subpoena directed to a witness in a foreign country shall issue under the circumstances and in the manner and be served as provided in Title 28, U.S.C., § 1783.	**(e) Place of Service.** **(1)** ***In the United States.*** A subpoena requiring a witness to attend a hearing or trial may be served at any place within the United States. **(2)** ***In a Foreign Country.*** If the witness is in a foreign country, title 28 U.S.C. § 1783[118] governs the subpoena's service.
(f) For Taking Depositions; Place of Examination. **(1) Issuance.** An order to take a deposition authorizes the issuance by the clerk of the court for the district in which the deposition is to be taken of subpoenas for the persons named or described therein. **(2) Place.** The witness whose deposition is to be taken may be required by subpoena to attend at any place designated by the trial court, taking into account the convenience of the witness and the parties.	**(f) Deposition Subpoena.** **(1)** ***Issuance.*** A court order to take a deposition authorizes the clerk in the district where the deposition is to be taken to issue a subpoena for any witness named or described in the order. **(2)** ***Place.*** After considering the convenience of the witness and the parties, the court may order — and the subpoena may require — the witness to appear anywhere the court designates.
(g) Contempt. Failure by any person without adequate excuse to obey a subpoena served upon that person may be deemed a contempt of the court from which the subpoena issued or of the court for the district in which it issued if it was issued by a United States magistrate judge.	**(g) Contempt.** The district court may hold in contempt a witness who, without adequate excuse, disobeys a subpoena issued by that court or by a magistrate judge of that district.
(h) Information Not Subject to Subpoena. Statements made by witnesses or prospective witnesses may not be subpoenaed from the government or the defendant under this rule but shall be subject to production only in accordance with the provisions of Rule 26.2.	**(h) Information Not Subject to a Subpoena.** No party may subpoena a statement of a witness or of a prospective witness under this rule. Rule 26.2 governs the production of those statements.

[118] Consider substituting *Federal law* or *A federal statute* for the U.S. Code reference

Rule 17.1 Pretrial Conference	Rule 17.1. Pretrial Conference
At any time after the filing of the indictment or information[119] the court upon motion of any party or upon its own motion may order one or more conferences to consider such matters as will promote a fair and expeditious trial. At the conclusion of a conference the court shall prepare and file a memorandum of the matters agreed upon. No admissions made by the defendant or the defendant's attorney at the conference shall be used against the defendant unless the admissions are reduced to writing and signed by the defendant and the defendant's attorney. This rule shall not be invoked in the case of a defendant who is not represented by counsel.	On its own, or on a party's motion, the court may hold one or more pretrial conferences to promote a fair and expeditious trial. When a conference ends, the court must prepare and file a memorandum of any matters agreed to during the conference. The government may not use any statement[120] made during the conference by the defendant or the defendant's attorney unless it is in writing and signed by the defendant and the defendant's attorney. The court may not hold a pretrial conference if the defendant is unrepresented.[121] **(Should this last sentence be deleted?)**

V. VENUE	**Title V. Venue**
Rule 18. Place of Prosecution and Trial	**Rule 18. Place of Prosecution and Trial**
Except as otherwise permitted by statute or by these rules, the prosecution shall be had in a district in which the offense was committed. The court shall fix the place of trial within the district with due regard to the convenience of the defendant and the witnesses and the prompt administration of justice.	Unless a statute or these rules permit otherwise, the government must prosecute an offense in the district in which the offense was committed. After considering the convenience of the defendant and the witnesses and the prompt administration of justice, the court must fix the place of trial within the district. **ALTERNATIVELY The court must fix the place of trial within the district with due regard for the convenience of the defendant and the witnesses, and the prompt administration of justice.**

[119] Professor Saltzburg approved deleting *at any time after the filing of the indictment or information.*

[120] Professor Saltzburg recommended this change from the word *admission*

[121] Professor Saltzburg notes that this rule was adopted before the Supreme Court's decision in *Faretta v California*, which recognized the right of self-representation. He urges that the rule be rethought substantively, and he recommends that self-represented defendants be allowed to attend pretrial conferences. If the Advisory Committee agrees, the rule's last sentence should be deleted.

Rule 19. Rescinded.	Rule 19. [Rescinded.]

Rule 20. Transfer From the District for Plea and Sentence	Rule 20. Transfer for Plea and Sentence
(a) Indictment or Information Pending. A defendant arrested, held, or present in a district other than that in which an indictment or information is pending against that defendant may state in writing a wish to plead guilty or nolo contendere, to waive trial in the district in which the indictment or information is pending, and to consent to disposition of the case in the district in which that defendant was arrested, held, or present, subject to the approval of the United States attorney for each district. Upon receipt of the defendant's statement and of the written approval of the United States attorneys, the clerk of the court in which the indictment or information is pending shall transmit the papers in the proceeding or certified copies thereof to the clerk of the court for the district in which the defendant is arrested, held, or present, and the prosecution shall continue in that district.	**(a) Indictment or Information Pending.** **(1)*Consent to Transfer.*** A prosecution will be transferred from the district where the indictment or information is pending to the district where the defendant is arrested, held, or present, if: (A) the defendant states in writing a wish to plead guilty or nolo contendere and to waive trial in the district where the indictment or information is pending, consents in writing to the court's disposing of the case in the transferee district, and files the statement in the transferee district[122]; and (B) the United States attorneys for both districts approve the transfer in writing. **(2) *Clerk's Duties.*** After receiving the defendant's statement and the required approvals,[123] the clerk where the indictment or information is pending must send the file, or a certified copy, to the clerk in the transferee district.

[122] Adding *and files the statement in the transferee district* makes this rule parallel to Rule 20(b)(1)(A).

[123] The SSC added this introductory language (*After receiving the defendant's statement and the required approvals*) to show when the clerk must act. The existing rule says *upon receipt*

(b) Indictment or Information Not Pending. A defendant arrested, held, or present, in a district other than the district in which a complaint is pending against that defendant may state in writing a wish to plead guilty or nolo contendere, to waive venue and trial in the district in which the warrant was issued, and to consent to disposition of the case in the district in which that defendant was arrested, held, or present, subject to the approval of the United States attorney for each district. Upon filing the written waiver of venue in the district in which the defendant is present, the prosecution may proceed as if venue were in such district.	**(b) Complaint Pending (No Indictment or Information).** **(1)** ***Consent to Transfer.*** A prosecution will be transferred from the district where the complaint is pending to the district where the defendant is arrested, held, or present, if: (A) the defendant states in writing a wish to plead guilty or nolo contendere and to waive trial in the district where the warrant was issued, consents in writing to the court's disposing of the case in the transferee district, and files the statement in the transferee district; and (B) the United States attorneys for both districts approve the transfer in writing.[124] **(2) Clerk's Duties.** After receiving the defendant's statement and the required approvals, the clerk where the complaint is pending must send the file, or a certified copy, to the clerk in the transferee district.[125]
(c) Effect of Not Guilty Plea. If after the proceeding has been transferred pursuant to subdivision (a) or (b) of this rule the defendant pleads not guilty, the clerk shall return the papers to the court in which the prosecution was commenced, and the proceeding shall be restored to the docket of that court. The defendant's statement that the defendant wishes to plead guilty or nolo contendere shall not be used against that defendant.	**(c) Effect of Not Guilty Plea.** If the defendant pleads not guilty after the case has been transferred under Rule 20(a) or (b), the clerk must return the papers to the court where the prosecution began, and that court must restore the proceeding to its docket. The defendant's statement that the defendant wished to plead guilty or nolo contendere is not admissible in any civil or criminal proceeding against the defendant. **ALTERNATIVELY ... that the defendant wished to plead guilty or nolo contendere is not, in any civil or criminal proceeding, admissible against the defendant.**

[124] The SSC added the phrase *in writing* to make this paragraph parallel with Rule 20(a). Also, Professor Saltzburg says this language was intended even though not explicitly stated.

[125] Professor Saltzburg recommended adding this "Clerk's Duties" paragraph to Rule 20(b) and to 20(d) to make them parallel to Rule 20(a).

(d) Juveniles. A juvenile (as defined in 18 U.S.C. § 5031) who is arrested, held, or present in a district other than that in which the juvenile is alleged to have committed an act in violation of a law of the United States not punishable by death or life imprisonment may, after having been advised by counsel and with the approval of the court and the United States attorney for each district, consent to be proceeded against as a juvenile delinquent in the district in which the juvenile is arrested, held, or present. The consent shall be given in writing before the court but only after the court has apprised the juvenile of the juvenile's rights, including the right to be returned to the district in which the juvenile is alleged to have committed the act, and of the consequences of such consent.	**(d) Juveniles.** **(1)** ***Consent to Transfer.*** A juvenile ~~defendant~~ may be prosecuted as a juvenile in the district where the ~~juvenile~~ defendant is arrested, held, or present, if: **ALTERNATIVELY A juvenile may be proceeded against as a juvenile delinquent in the district where the juvenile is arrested, held, or present, if:** (A) the ~~defendant~~ individual **(ALTERNATIVELY defendant)** meets the definition of a juvenile under federal law;[126] (B) the alleged offense that occurred in the other district is not punishable by death or life imprisonment; (C) an attorney has advised the juvenile; (D) the court has informed the ~~defendant~~ individual of the defendant's rights — including the right to be returned to the district where the offense ~~allegedly~~ **(stet)** occurred — and the consequences of waiving those rights; (E) the defendant, after receiving the court's information about rights, consents in writing to be proceeded against in the transferee district, and files the consent in the transferee district; (F) the United States attorneys for both districts approve the transfer in writing; and (G) the transferee court enters an order approving the transfer. **(2)** ***Clerk's Duties.*** After receiving the defendant's written consent and the required approvals, the clerk where the indictment or information or complaint is pending or where the alleged offense occurred must send the file, or a certified copy, to the clerk in the transferee district.[127]

[126] The SSC substituted *federal law* for the U.S. Code citation because "juvenile" may be defined under statutes other than 18 U.S.C. § 5031 if Congress enacts any of the pending bills relating to juvenile offenses.

[127] The SSC has added this paragraph on Professor Saltzburg's suggestion.

	ALTERNATIVE CONSOLIDATION PROPOSED BY JOE SPANIOL **Rule 20. Transfer for Plea and Sentence** **(a) Consent to Transfer.** A prosecution may be transferred from the district where the indictment or information is pending, or from which a warrant on a complaint has been issued, to the district where the defendant is arrested, held, or present, if: (1) the defendant states in writing a wish to plead guilty or nolo contendere and to waive trial in the district where the indictment, information, or complaint is pending, consents in writing to the court's disposing of the case in the transferee district, and files the statement in the transferee district; and (2) the United States attorneys in both districts approve the transfer in writing. **(b) Clerk's Duties.** After receiving the defendant's statement and the required approvals, the clerk where the indictment, information, or complaint is pending must send the file, or a certified copy, to the clerk in the transferee district. **(c) Effect of a Not Guilty Plea.** If the defendant pleads not guilty.... **(d) Juveniles.** A person arrested, held, or present in the district, who is a juvenile within the meaning of federal law and is not being charged with a capital offense, may consent to a transfer under Rule 20(a) if: (1) an attorney is advising that person; and (2) the court has informed the person of that person's rights — including the right to be returned to the district where the offense occurred — and the consequences of waiving those rights.

Rule 21. Transfer From The District for Trial.	Rule 21. Transfer for Trial
(a) For Prejudice in the District. The court upon motion of the defendant shall transfer the proceeding as to that defendant to another district whether or not such district is specified in the defendant's motion if the court is satisfied that there exists in the district where the prosecution is pending so great a prejudice against the defendant that the defendant cannot obtain a fair and impartial trial at any place fixed by law for holding court in that district.	**(a) For Prejudice.** Upon the defendant's motion, the court must transfer the proceeding to another district if the court is satisfied that so ~~great a~~ much prejudice against the defendant exists in the transferring district that the defendant cannot obtain a fair and impartial trial there.
(b) Transfer in Other Cases. For the convenience of parties and witnesses, and in the interest of justice, the court upon motion of the defendant may transfer the proceeding as to that defendant or any one or more of the counts thereof to another district.	**(b) For Convenience.** Upon the defendant's motion, the court may transfer the proceeding, or one or more counts, as to that defendant to another district for the convenience of the parties and witnesses and in the interest of justice.
(c) Proceedings on Transfer. When a transfer is ordered the clerk shall transmit to the clerk of the court to which the proceeding is transferred all papers in the proceeding or duplicates thereof and any bail taken, and the prosecution shall continue in that district.	**(c) Proceedings on Transfer.** When the court orders a transfer, the clerk must send to the transferee district the file or a certified copy of it, and any bail taken. The prosecution will then continue in the transferee district.
	(d) Time to File a Motion to Transfer. A motion to transfer may be made at or before arraignment or at any other time the court or these rules prescribe.[128]

Rule 22. Time of Motion to Transfer	Rule 22. Time to File a Motion to Transfer[129]
A motion to transfer under these rules may be made at or before arraignment or at such other time as the court or these rules may prescribe.	[Transferred to Rule 21(d).]

[128] This paragraph is old Rule 22, which the SSC suggests abrogating as a separate rule and including here because it is a subpart of Rule 21 — transfer for trial.

[129] This rule has now become Rule 21(d). See fn. 130

SUBCOMMITTEE B's INITIAL EDITS TO SSC's STYLE REVISIONS

LEONIDAS RALPH MECHAM
Director

CLARENCE A. LEE, JR.
Associate Director

ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS

WASHINGTON, D.C. 20544

JOHN K. RABIEJ
Chief
Rules Committee Support Office

May 21, 1999
Via Fax

MEMORANDUM TO CRIMINAL RULES SUBCOMMITTEE "B"

SUBJECT: *"Master" Copy Containing Suggested Edits to Rules 10-22*

I am sending to you a "master" copy of restyled Rules 10 through 22, which contains the edits and other comments suggested by all subcommittee members. Please bring it with you to the Tuesday, May 25 meeting. I have also attached a memorandum from Professor Schlueter on proposed changes to Rule 11 addressing the *Hyde* issue.

John K. Rabiej

Attachments

cc: Honorable W. Eugene Davis
Honorable James A. Parker
Professor Kate Stith
Roger A. Pauley
Professor David A. Schlueter
Professor Stephen A. Saltzburg
Joseph F. Spaniol
Bryan A. Garner
Peter G. McCabe, Secretary

no time limit for withdrawing a plea after the defendant has prevailed on appeal. Should it? (RP)

Rule 11. Pleas	Rule 11. Pleas
(a) Alternatives. **(1) In General.** A defendant may plead not guilty, guilty, or nolo contendere. If a defendant refuses to plead or if a defendant corporation fails to appear, the court shall enter a plea of not guilty. *(1) In General. A defendant may plead guilty, not guilty, or nolo contendere If a defendant refuses to plead, or if a defendant organization, as defined in 18 U.S.C. § 18, fails to appear, the court shall enter a plea of not guilty.*[87] **(2) Conditional Pleas.** With the approval of the court and the consent of the government, a defendant may enter a conditional plea of guilty or nolo contendere, reserving in writing the right, on appeal from the judgment, to review of the adverse determination of any specified pretrial motion. A defendant who prevails on appeal shall be allowed to withdraw the plea.	**(a) Alternatives.** (1) ***In General.*** A defendant may plead guilty, not guilty, or (with the court's consent) nolo contendere. If a defendant refuses to plead or if a defendant organization, ~~as defined in 18 U.S.C. § 18~~ fails to appear, the court must enter a plea of not guilty. (KS) (RP RJ) (2) ***Conditional Plea.*** With the consent of the court ~~'s approval~~ and the government ~~'s consent,~~ a defendant may enter a conditional plea of guilty or nolo contendere, reserving in writing the right to have an appellate court review an adverse determination of a specified pretrial motion. A defendant who prevails on appeal may then withdraw the plea.
(b) Nolo Contendere. A defendant may plead nolo contendere only with the consent of the court. Such a plea shall be accepted by the court only after due consideration of the views of the parties and the interest of the public in the effective administration of justice.	**(b) Nolo Contendere.**[88] Before accepting a plea of nolo contendere, the court must consider the parties' views and the public interest in the effective administration of justice. (KS)

(RP RJ) (KS)

[87] This new language is not yet a part of the rule. It has been approved by the Judicial Conference and will be acted on by the Supreme Court before May 1, 1999.

[88] It would be a shift in practice, but the Advisory Committee might consider changing the phrase *nolo contendere* to *no contest*. If this project is to result in a truly plain-English, it's worth considering. We aren't expecting this change to be made, but we feel confident that it would find some support both within and without the legal community.

I agree. (RJ) I disagree (RP)

(c) Advice to Defendant. Before accepting a plea of guilty or nolo contendere, the court must address the defendant personally in open court and inform the defendant of, and determine that the defendant understands, the following:

(1) the nature of the charge to which the plea is offered, the mandatory minimum penalty provided by law, and the maximum possible penalty provided by law including the effect of any special parole or supervised release term, the fact that the court is required to consider any applicable sentencing guidelines but may depart from those guidelines under some circumstances, and, when applicable, that the court may also order the defendant to make restitution to any victim of the offense; and

(2) if the defendant is not represented by an attorney, that the defendant has the right to be represented by an attorney at every stage of the proceeding, and, if necessary, one will be appointed to represent the defendant; and

(3) that the defendant has the right to plead not guilty or to persist in that plea if it has already been made, the right to be tried by a jury and at that trial the right to the assistance of counsel, the right to confront and cross-examine adverse witnesses, and the right against compelled self-incrimination; and

(4) that if a plea of guilty or nolo contendere is accepted by the court there will not be a further trial of any kind, so that by pleading guilty or nolo contendere the defendant waives the right to a trial; and

(5) if the court intends to question the defendant under oath, on the record, and in the presence of counsel about the offense to which the defendant has pleaded, that the defendant's answers may later be used against the defendant in a prosecution for perjury or false statement.

and

(6) the terms of any provision in a plea agreement waiving the right to appeal or to collaterally attack the sentence [89]

redundant. See (4) as revised. RP

(c) Advice to the Defendant.[90] Before accepting a plea of guilty or nolo contendere, the court must address the defendant personally in open court. During this address, the court must inform the defendant of, and determine that the defendant understands, the following: superfluous? RJ

(1) the nature of the charge to which the defendant is pleading; KS forfeiture and

(2) any mandatory minimum penalty;

(3) any maximum possible penalty, including the effect of any special parole or supervised release term; KS

(4) the court's obligation to comply with ~~consider~~ any applicable sentencing guidelines, and the court's authority to depart from those guidelines under some circumstances;

(5) the court's authority to order the defendant to make restitution to any victim of the offense;

(6) the defendant's right to be represented by counsel at trial and at every stage of the proceeding and, if necessary, to have the court appoint counsel; RP RJ

(7) the defendant's right to plead not guilty or, having already so pleaded, to persist in that plea;

(8) the defendant's right to a jury trial;

(9) the defendant's right at trial to the assistance of counsel, to confront and cross-examine adverse witnesses, and to be protected from compelled self-incrimination;

(10) the defendant's waiver of the right to a trial if the court accepts a plea of guilty or nolo contendere;

[89] This new language is not yet a part of the rule. It has been approved by the Judicial Conference and will be acted on by the Supreme Court before May 1, 1999

[90] Professor Saltzburg approved separating Rule 11(c) into 12 numbered paragraphs. Paragraphs (6). (10), and (11) incorporate wording he suggested.

18 U.S.C. § 1623 ~~refuses~~ permits a perjury prosecution based on inconsistent answers under oath. The existing (c)(5) contains no such limitation (i.e. "false") and it may well be correct not to do so. (RP)	(11) the terms of any plea-agreement provision waiving the right to appeal or to collaterally attack the sentence; and (12) the fact that any ~~false~~ (KS) answer that the defendant gives under oath, ~~on the record, and in the presence of counsel~~ in answer to the court's questions about the offense may be used against the defendant ~~in a later~~ prosecution for perjury or false statement. (RP RJ) (KS)
(d) Insuring That the Plea is Voluntary. The court shall not accept a plea of guilty or nolo contendere without first, by addressing the defendant personally in open court, determining that the plea is voluntary and not the result of force or threats or of promises apart from the plea agreement. The court shall also inquire as to whether the defendant's willingness to plead guilty or nolo contendere results from prior discussions between the attorney for the government and the defendant or the defendant's attorney.[91]	**(d) Ensuring That a Plea Is Voluntary.** Before accepting a plea of guilty or nolo contendere, the court must address the defendant personally in open court ~~to determine whether the plea is voluntary or resulted~~ from force, threats, or promises (other than promises in a plea agreement).

Under recently amended general false statement statute, 18 U.S.C. § 1001, a false statement prosecution does not lie for statements made by a party to the court. But there may be other false statement statutes where this is not clear. Research should be done on whether "or false statement" needs to be retained. (RP)

and determine that the plea is voluntary and did not result (KS) (RP)

in response to (RJ)

[91] The language in this sentence (in the left column) apparently resulted from *Santobello v New York*, 404 U.S 257, 261–62 (1971). Obviously, there are "prior discussions" that lead to a plea agreement. The reference to "promises apart from the plea agreement" in the preceding sentence addresses the same subject. Professor Saltzburg recommended deleting the sentence

(e) Plea Agreement Procedure.

(1) In General. The attorney for the government and the attorney for the defendant or the defendant when acting pro se may engage in discussions with a view toward reaching an agreement that, upon entering a plea of guilty or nolo contendere to a charged offense, the attorney for the government will do any of the following:

(A) move for dismissal of other charges; or

(B) make a recommendation, or agree not to oppose the defendant's request, for a particular sentence, with the understanding that such recommendation or request shall not be binding upon the court; or

(C) agree that a specific sentence is the appropriate disposition of the case.

The court shall not participate in any such discussions.

(e) PLEA AGREEMENT PROCEDURE.

(1) In General. The attorney for the government and the attorney for the defendant — or the defendant when acting pro se — may agree that, upon the defendant's entering a plea of guilty or nolo contendere to a charged offense, or to a lesser or related offense, the attorney for the government will.

(A) move to dismiss other charges; or

(B) recommend, or agree not to oppose the defendant's request for a particular sentence or sentencing range, or that a particular provision of the Sentencing Guidelines, or policy statement, or sentencing factor is or is not applicable to the case Any such recommendation or request is not binding on the court, or

(C) agree that a specific sentence or sentencing range is the appropriate disposition of the case, or that a particular provision of the Sentencing Guidelines, or policy statement, or sentencing factor is or is not applicable to the case. Such a plea agreement is binding on the court once it is accepted by the court.

The court shall not participate in any discussions between the parties concerning any such plea agreement [92]

(e) Plea Agreement.

(1) ***In General.*** The government's attorney and the defendant's attorney, or the defendant when acting pro se, may discuss and agree to a plea. The court must not participate in these discussions. If the defendant pleads guilty or nolo contendere to either the charged offense or a lesser or related offense, the plea agreement may specify that the government's attorney will:[93] not bring or (RP)

(A) move to dismiss other charges;

not bring or will (KS)

(B) recommend, or agree not to oppose the defendant's request, that a particular sentence or sentencing range is appropriate or that a particular provision of the Sentencing Guidelines, or policy statement, or sentencing factor is or is not applicable, with the understanding that the recommendation or request does not bind the court; or

(C) agree that a specific sentence or sentencing range is the appropriate disposition of the case, or that a particular provision of the Sentencing Guidelines, or policy statement, or sentencing factor is or is not applicable; such a plea agreement binds the court once the court accepts it.[94]

[92]This new language is not yet a part of the rule. It has been approved by the Judicial Conference and will be acted on by the Supreme Court before May 1, 1999.

[93] The SSC considers this language stylistically much preferable to the language that came out of the June 1998 Standing Committee meeting. That draft contained unnumbered dangling text at the end of Rule 11(e)(1)(C).

[94] This new language is not yet a part of the rule. It has been approved by the Judicial Conference and will be acted on by the Supreme Court before May 1, 1999.

(2) Notice of Such Agreement. If a plea agreement has been reached by the parties, the court shall, on the record, require the disclosure of the agreement in open court or, upon a showing of good cause, in camera, at the time the plea is offered. If the agreement is of the type specified in subdivision (e)(1)(A) or (C), the court may accept or reject the agreement, or may defer its decision as to the acceptance or rejection until there has been an opportunity to consider the presentence report. If the agreement is of the type specified in subdivision (e)(1)(B), the court shall advise the defendant that if the court does not accept the recommendation or request the defendant nevertheless has no right to withdraw the plea.	(2) *Disclosing a Plea Agreement.* (A) When a plea agreement is reached, the parties must notify the court as soon as reasonably possible.[95] (B) If the parties have agreed to a plea, they must disclose the plea agreement in open court when the plea is offered. But the court may, for good cause, allow the parties to disclose the plea agreement in camera. (C) If the plea agreement is of the type specified in Rule 11(e)(1)(A) or (C), the court may accept the agreement, reject it, or defer a decision until the court has reviewed the presentence report. (D) If the plea agreement is of the type specified in Rule 11(e)(1)(B), the court must advise the defendant that the defendant has no right to withdraw the plea if the court accepts the plea agreement but does not follow the recommendation or request.[96]
(3) Acceptance of Plea Agreement. If the court accepts the plea agreement, the court shall inform the defendant that it will embody in the judgment and sentence the disposition provided in the plea agreement.	(3) *Accepting a Plea Agreement.* If the court accepts ~~the plea~~ an agreement, it must inform the defendant that the disposition stated in the plea agreement will be included in the judgment and sentence.

Except for good cause shown (RP)

Delete (RJ)

(KS) , unless

(KS) e

What happens if we permit the plea to be taken by videoconferencing? (RJ)

Superfluous (RP)

of the type specified in Rule 11(e)(1)(c). (KS)

[95] This sentence is Professor Saltzburg's suggestion. I agree. "Reasonably possible" seems to cover Roger's worry. (KS)

[96] This language clarifies the relation between this subparagraph and Rule 11(e)(4). Professor Saltzburg has approved the change and has been asked to do a little further research on the point.

(4) Rejection of Plea Agreement. If the court rejects the plea agreement, the court shall, on the record, inform the parties of this fact, advise the defendant personally in open court or, on a showing of good cause, in camera, that the court is not bound by the plea agreement, afford the defendant the opportunity to then withdraw the plea, and advise the defendant that if the defendant persists in a guilty plea or plea of nolo contendere the disposition of the case may be less favorable to the defendant than that contemplated by the plea agreement. How will "in open court" be effected by videoconferencing? RJ	(4) ***Rejecting a Plea Agreement.*** If the court rejects the plea agreement, the court must do the following on the record: (A) inform the parties that the court rejects the plea agreement; (B) advise the defendant personally[97] in open court — or, for good cause, in camera — that the court is not bound by the plea agreement, and give the defendant an opportunity to withdraw the plea;[98] and (C) advise the defendant that if the plea is not withdrawn, the court may dispose of the case less favorably toward the defendant than the plea agreement contemplated.
(5) Time of Plea Agreement Procedure. Except for good cause shown, notification to the court of the existence of a plea agreement shall be given at the arraignment or at such other time, prior to trial, as may be fixed by the court.[99]	

[97] One SSC member, Judge Wilson, wanted to cut this word, and asked that his dissent be noted from the majority's decision to retain it.

[98] We recommend an Advisory Committee note explaining the relationship between this provision and Rule 11(e)(2)(C), and perhaps explaining *United States v. Hyde*, 520 U.S. 670 (1997). We also need to ensure that the rewritten rule correctly captures the essence of *Hyde*. I agree RJ RP

[99] This language in the left column has been incorporated into the new Rule 11(e)(2)(A).

III-B

I believe we should keep this Rule, though we could restyle it. (KS)

(6) Inadmissibility of Pleas, Plea Discussions, and Related Statements. Except as otherwise provided in this paragraph, evidence of the following is not, in any civil or criminal proceeding, admissible against the ~~defendant~~ person who made the plea or was a participant in the plea discussions: (KS) **(A)** a plea of guilty which was later withdrawn; **(B)** a plea of nolo contendere; **(C)** any statement made in the course of any proceedings under this rule regarding either of the foregoing pleas; or **(D)** any statement made in the course of plea discussions with an attorney for the government which do not result in a plea of guilty or which result in a plea of guilty later withdrawn. However, such a statement is admissible (i) in any proceeding wherein another statement made in the course of the same plea or plea discussions has been introduced and the statement ought in fairness be considered contemporaneously with it, or (ii) in a criminal proceeding for perjury or false statement if the statement was made in by the defendant under oath, on the record, and in the presence of counsel.	(5) ***Admissibility or Inadmissibility of a Plea, Plea Discussions, and Related Statements.*** The admissibility or inadmissibility of plea discussions and related statements is governed by Rule 410 of the Federal Rules of Evidence.[100]
(f) Determining Accuracy of Plea. Notwithstanding the acceptance of a plea of guilty, the court should not enter a judgment upon such plea without making such inquiry as shall satisfy it that there is a factual basis for the plea.	**(f) Determining the Accuracy of a Plea.** Before entering judgment on a guilty plea, the court must determine ~~whether~~ that a factual basis for the plea exists.[101] (KS) (RJ)
(g) Record of Proceedings. A verbatim record of the proceedings at which the defendant enters a plea shall be made and, if there is a plea of guilty or nolo contendere, the record shall include, without limitation, the court's advice to the defendant, the inquiry into the voluntariness of the plea including any plea agreement, and the inquiry into the accuracy of a guilty plea.	**(g) Recording the Proceedings.** The court must record verbatim the proceedings during which the defendant enters a plea. If there is a guilty plea or a nolo contendere plea, the record must include the inquiries and advice to the defendant required under Rule 11(c), (d), and (f). all of (RJ)

[100] This rewrite was suggested by Professor Saltzburg, and Professor Capra (reporter to the Advisory Committee on Evidence) has agreed with it. Essentially, the rule now in effect simply tracks Evidence Rule 410. But Rule 410 contains an extra bit of language: *or comparable state procedure*, and adopting it as part of Rule 11(e)(6) may be considered a substantive amendment.

In *U S v. Simmons*, 164 F.3d 76 (2d Cir. 1998), the Second Circuit recently treated this rule as a rule of evidence and not a rule that would afford a defendant any greater protection than Evidence Rule 410. *Simmons* held that sentencing hearings under Rule 32 were governed by 18 U.S.C. § 3661 So the SSC believes that the simplest, most practical approach would be the one reflected here

[101] This adopts language suggested by Professor Saltzburg

Prefer existing language – but change ~~"shall"~~ to "must." (RP)

(h) Harmless Error. Any variance from the procedures required by this rule which does not affect substantial rights shall be disregarded.	**(h) Harmless Error.** ~~As long as it does not affect substantial rights,~~ a variance from this rule's requirements is harmless error ~~and must be disregarded~~ if it does not affect substantial rights. (RJ) (RS) (RS)

Rule 12. Pleadings and Motions Before Trial; Defenses and Objections.	**Rule 12. Pleadings and Pretrial Motions**
(a) Pleadings and Motions. Pleadings in criminal proceedings shall be the indictment and the information, and the pleas of not guilty, guilty and nolo contendere. All other pleas, and demurrers and motions to quash are abolished, and defenses and objections raised before trial which heretofore could have been raised by one or more of them shall be raised only by motion to dismiss or to grant appropriate relief, as provided in these rules.	**(a) Pleadings.** The pleadings in a criminal proceeding are the indictment or the information and the plea of guilty, not guilty, or nolo contendere. should add reference to conditional pleas (RP)

I find no need to add reference to conditional pleas. (RS)

I do not like the term "pleadings." Everyone defines the written papers filed as "pleadings." A plea (if oral) is no "pleading." (RJ)

(b) Pretrial Motions. Any defense, objection, or request which is capable of determination without the trial of the general issue may be raised before trial by motion. Motions may be written or oral at the discretion of the judge. the following must be raised prior to trial: **(1)** Defenses and objections based on defects in the institution of the prosecution; or **(2)** Defenses and objections based on defects in the indictment or information (other than that it fails to show jurisdiction in the court or to charge an offense which objections shall be noticed by the court at any time during the pendency of the proceedings); or **(3)** Motions to suppress evidence; or **(4)** Requests for discovery under Rule 16; or **(5)** Requests for severance of charges or defendants under Rule 14.	**(b) Pretrial Motions.** (1) ***In General.*** The parties may raise by pretrial motion any defense, objection, or request that the court can determine without a trial of the general issue. A defense or a pretrial objection may be raised only by a motion to dismiss or by a motion to grant appropriate relief. At the court's discretion, a motion may be written or oral. The following ~~motions~~ must be raised before trial: a motion allesing (A) ~~a defense or objection based on~~ a defect in the institution of the prosecution; motion allesing (B) a ~~defense or objection based on~~ a defect in the indictment or information — but at any time during the proceeding, the court may hear a claim that the indictment or information fails to show the court's jurisdiction or fails to ~~show~~ State an offense; (C) a motion to suppress evidence; (D) a Rule 14 motion to sever charges or defendants; and (E) a Rule 16 motion for discovery. (2) ***Government's Notice of an Intention to Use Evidence.*** The defendant may request the government to disclose its intention to use in its case-in-chief any evidence discoverable by the defendant under Rule 16 in order to give the defendant an opportunity to file a motion to suppress evidence. For the same purpose, the government's attorney may, without awaiting a defendant's request, disclose its intention to offer specified evidence at trial.[102] Both the defendant's request and the government's voluntary disclosure should be made at arraignment or as soon thereafter as practicable.
(c) Motion Date. Unless otherwise provided by local rule, the court may, at the time of the arraignment or as soon thereafter as practicable, set a time for the making of pretrial motions or requests and, if required, a later date of hearing.	**(c) Motion Deadline.** Unless a local rule provides otherwise, the court may ~~at the arraignment, or~~ as soon ~~afterward~~ as practicable, set a deadline for the parties to make pretrial motions, and if necessary, may also schedule a motion hearing.

[102] On Professor Saltzburg's recommendation, this language was moved from 12(d), which itself was then deleted — BAG.

(d) Notice by the Government of the Intention to Use Evidence.[103] **(1) At the Discretion of the Government.** At the arraignment or as soon thereafter as is practicable, the government may give notice to the defendant of its intention to use specified evidence at trial in order to afford the defendant an opportunity to raise objections to such evidence prior to trial under subdivision (b)(3) of this rule. **(2) At the Request of the Defendant.** At the arraignment or as soon thereafter as is practicable, the defendant may, in order to afford an opportunity to move to suppress evidence under subdivision (b)(3) of this rule, request notice of the government's intention to use (in its evidence in chief at trial) any evidence which the defendant may be entitled to discover under Rule 16 subject to any relevant limitations prescribed in Rule 16.	Omission of reference to "essential" substantive ? RP RJ
(e) Ruling on Motion. A motion made before trial shall be determined before trial unless the court, for good cause, orders that it be deferred for determination at the trial of the general issue or until after verdict, but no such determination shall be deferred if a party's right to appeal is adversely affected. Where factual issues are involved in determining a motion, the court shall state its essential findings on the record.	**(d) Ruling on a Motion.** Unless ~~for good cause~~ the court orders otherwise, all pretrial motions must be determined before trial. The court must not defer a pretrial motion if the deferral will adversely affect a party's right to appeal. When factual issues are involved in deciding a motion, the court must state its findings on the record.
(f) Effect of Failure To Raise Defenses or Objections. Failure by a party to raise defenses or objections or to make requests which must be made prior to trial, at the time set by the court pursuant to subdivision (c), or prior to any extension thereof made by the court, shall constitute waiver thereof, but the court for cause shown may grant relief from the waiver.	**(e) Waiver of a Defense or Objection.** A party waives any defense or objection not raised or any pretrial request not made by the deadline the court sets under Rule 12(c) or by any extension the court provides. For good cause, the court may grant relief from the waiver.
(g) Records. A verbatim record shall be made of all proceedings at the hearing, including such findings of fact and conclusions of law as are made orally.	**(f) Records.** A verbatim record must be made of all proceedings at a motion hearing, including any findings of fact and conclusions of law that the court ~~states orally~~ makes or announces RP.

[103] The revised language based on this rule was moved to new 12(b)(2) The later sections have been relettered accordingly.

or that bail be continued

(h) Effect of Determination. If the court grants a motion based on a defect in the institution of the prosecution or in the indictment or information, it may also order that the defendant be continued in custody for a specified time pending the filing of a new indictment or information. Nothing in this rule shall be deemed to affect the provisions of any Act of Congress relating to periods of limitations.	**(g) Defendant's Continued Custody.**[104] If the court grants a motion to dismiss based on a defect in the institution of the prosecution, in the indictment, or in the information, it may order the defendant to remain in custody for a specified time until a new indictment or information is filed. This rule does not affect any ~~federal~~ statute ~~relating to~~ a period of limitations. (Ks)
(i) Production of Statements at Suppression Hearing. Rule 26.2 applies at a hearing on a motion to suppress evidence under subdivision (b)(3) of this rule. For purposes of this subdivision, a law enforcement officer is deemed a government witness.	**(h) Producing Statements at a Suppression Hearing.** Rule 26.2 applies at a suppression hearing under Rule 12(b)(1)(C). In a suppression hearing, a law-enforcement officer is considered a government witness.

Disagree with hyphenation (RP)

[104] The SSC thinks that the Advisory Committee should consider moving this subdivision into Rule 46.

Rule 12.1 Notice of Alibi	Rule 12.1. Alibi Defense[105]
(a) Notice by Defendant. Upon written demand of the attorney for the government stating the time, date, and place at which the alleged offense was committed, the defendant shall serve within ten days, or such different time as the court may direct, upon the attorney for the government a written notice of the defendant's intention to offer a defense of alibi. Such notice by the defendant shall state the specific place or places at which the defendant claims to have been at the time of the alleged offense and the names and addresses of the witnesses upon whom the defendant intends to rely to establish such alibi.	**(a) Notice by Defendant.** **(1)** ***Government's Demand.*** The government's attorney may demand in writing that the defendant notify the government's attorney of any intended alibi defense. The demand must state the time, date, and place of the alleged offense. **(2)** ***Defendant's Response.*** Within 10 days after the demand, or some other time the court directs, the defendant must serve written notice on the government's attorney of any intended alibi defense. The defendant's notice must state the specific places where the defendant claims to have been at the time of the alleged offense and the names and addresses of the alibi witnesses on whom the defendant intends to rely.
(b) Disclosure of Information and Witness. Within ten days thereafter, but in no event less than ten days before trial, unless the court otherwise directs, the attorney for the government shall serve upon the defendant or the defendant's attorney a written notice stating the names and addresses of the witnesses upon whom the government intends to rely to establish the defendant's presence at the scene of the alleged offense and any other witnesses to be relied upon to rebut testimony of any of the defendant's alibi witnesses.	**(b) Government Witnesses.** **(1)** ***Disclosure.*** If the defendant serves a Rule 12.1(a)(2) notice, the government's attorney must disclose in writing to the defendant, or the defendant's attorney, the names and addresses of the witnesses the government intends to rely on to establish the defendant's presence at the scene of the alleged offense, and any government rebuttal witnesses to the defendant's alibi witnesses. **(2)** ***Time to Disclose.*** Unless the court directs otherwise, the government's attorney must give notice under Rule 12.1(b)(1) within 10 days after the defendant serves notice of an intended alibi defense under Rule 12.1(a)(2), but no later than 10 days before trial.

Probably no more than a historical anomaly that 12.1 is government-triggered while 12.2 and 12.3 are defense-triggered. (RP)

[105] The SSC suggests that the Advisory Committee consider making the notice requirements in 12.1, 12 2, and 12.3 more uniform Rule 12.1(a)(2) and (b)(2) require ten days' notice. Rule 12.2(a) and (b) require notice "within the time provided for the filing a pretrial motion." Rule 12.3(a)(1) requires notice "within the time provided for filing a pretrial motion"; Rule 12.3(a)(3) requires a government response within ten days of the defendant's notice; and Rule 12.3(a)(4)(B) and (C) require action within seven days of the government's demand or defendant's response. Also, the SSC recommends that the Advisory Committee adopt a deadline for when the government's attorney should present the written demand that the defendant give notice of any intended alibi defense. A logical deadline would be "within the time provided for filing a pretrial motion" — this language appears in Rule 12.2(a) and (b) and in Rule 12 3(a(1). The SSC carefully considered the suggestion to combine Rules 12.1, 12.2, and 12.3, but after several drafting attempts, the SSC abandoned the effort as impracticable.

(c) Continuing Duty to Disclose. If prior to or during trial, a party learns of an additional witness whose identity, if known, should have been included in the information furnished under subdivision (a) or (b), the party shall promptly notify the other party or the other party's attorney of the existence and identity of such additional witness.	**(c) Continuing Duty to Disclose.** Both the government's attorney and the defendant or the defendant's attorney must promptly disclose in writing[106] to the other party the existence and identity of any additional witness if ~~the~~ ~~(1)~~ the disclosing party learns of the witness before or during trial, ~~and~~ ~~(2) the witness's identity should have been disclosed under Rule 12.1(a) or (b) if the disclosing party had earlier known it.~~
(d) Failure to Comply. Upon failure of either party to comply with the requirements of this rule, the court may exclude the testimony of any undisclosed witness offered by such party as to the defendant's absence from or presence at, the scene of the alleged offense. This rule shall not limit the right of the defendant to testify.	**(d) Failure to Comply.** If a party fails to comply with this rule, the court may exclude the testimony of any undisclosed witness regarding the defendant's alibi. This rule does not limit the defendant's right to testify.
(e) Exceptions. For good cause shown, the court may grant an exception to any of the requirements of subdivisions (a) through (d) of this rule.	**(e) Exceptions.** The court may for good cause grant an exception to any requirement of this rule.
(f) Inadmissibility of Withdrawn Alibi. Evidence of an intention to rely upon an alibi defense, later withdrawn, or of statements made in connections with such intention, is not, in any civil or criminal proceeding, admissible against the person who gave notice of the intention.	**(f) Withdrawal Not Admissible.** If the defendant withdraws an alibi defense, evidence that the defendant intended to offer the defense, and the defendant's statements relating to that offer, are not admissible against the defendant in any civil or criminal proceeding.

and any other information required under Rule 12.1(a) or (b) (KS)

and address (KS)

in subdivisions (a) through (d)

retain existing rule (KS) (RP)

Retain existing language. The present formulation was adopted to clear up an ambiguity in the rule as it previously existed, which ambiguity would be restored by the SSC's language. The ambiguity relates to whether the statement could be used against the defendant if he appeared as a witness in a case to which he was not a party. The current formulation makes plain that the statement cannot be used in that situation. (RP)

Original refers to "intention." Change may be substantive. Once the defendant's intention to rely on an alibi defense no longer exists, if the defendant talks about his prior intention, such a statement is admissible under the current Rule.

[106] *In writing* was added here to be consistent with 12.3(b).

Rule 12.2. Notice of Insanity Defense or Expert Testimony of Defendant's Mental Condition	Rule 12.2. Insanity Defense; Mental Examination[107]
(a) Defense of Insanity. If a defendant intends to rely upon the defense of insanity at the time of the alleged offense, the defendant shall, within the time provided for the filing of pretrial motions or at such later time as the court may direct, notify the attorney for the government in writing of such intention and file a copy of such notice with the clerk. If there is a failure to comply with the requirements of this subdivision, insanity may not be raised as a defense. The court may for cause shown allow late filing of the notice or grant additional time to the parties to prepare for trial or make such other order as may be appropriate.	**(a) Notice of an Insanity Defense.** A defendant who intends to rely on a defense of insanity at the time of the alleged offense must notify the government's attorney in writing within the time provided for filing a pretrial motion, or at any later time the court directs. The defendant must also file a copy of the notice with the clerk. A defendant who fails to comply with the requirements of this subdivision cannot rely on an insanity defense. The court may — for good cause — allow the defendant to file the notice late, grant additional trial-preparation time, or make other appropriate orders.
(b) Expert Testimony of Defendant's Mental Condition. If a defendant intends to introduce expert testimony relating to a mental disease or defect or any other mental condition of the defendant bearing upon the issue of guilt, the defendant shall, within the time provided for the filing of pretrial motions or at such later time as the court may direct, notify the attorney for the government in writing of such intention and file a copy of such notice with the clerk. The court may for cause shown allow late filing of the notice or grant additional time to the parties to prepare for trial or make such other order as may be appropriate.	**(b) Notice of Expert Testimony of a Mental Condition.** A defendant who intends to introduce expert testimony relating to a mental disease, mental defect, or any other mental condition bearing on the defendant's guilt must so notify the government's attorney in writing within the time provided for filing a pretrial motion, or at any later time the court directs. The defendant must also file a copy of the notice with the clerk. The court may — for good cause — allow the defendant to file the notice late, grant additional trial-preparation time, or make other appropriate orders.
(c) Mental Examination of Defendant. In an appropriate case the court may, upon motion of the attorney for the government, order the defendant to submit to an examination pursuant to 18 U.S.C. 4241 or 4242. No statement made by the defendant in the course of any examination for by this rule, whether the examination with or without the consent of the defendant, no testimony by the expert based upon such statement, and no other fruits of the statement shall be admitted in evidence against the defendant in any criminal proceeding except on an issue respecting mental condition on which the defendant has introduced testimony.	**(c) Mental Examination.** On the government's motion, the court may order the defendant to submit to an examination under 18 U.S.C. § 4241 or 4242. If the court orders this examination, the following are inadmissible in any criminal proceeding — whether or not the defendant consented to the examination — except on an issue concerning mental condition on which the defendant has introduced testimony: (1) the defendant's statements made during the examination; (2) the expert's testimony based on the defendant's statements; and (3) any other fruits of the defendant's statements.

[107] The SSC suggests that the Advisory Committee consider making the notice requirements in 12.1, 12 2, and 12 3 more uniform. See fn. 104

(d) Failure to Comply. If there is a failure to give notice when required by subdivision (b) of this rule or to submit to an examination when ordered under subdivision (c) of this rule, the court may exclude the testimony of any expert witness offered by the defendant on the issue of the defendant's guilt.	**(d) Failure to Comply.** If the defendant fails to give notice under Rule 12.2(b) or does not submit to an examination when ordered under Rule 12.2(c), the court may exclude the testimony of the defendant's expert witness on the issue of the defendant's mental disease, mental defect, or any other mental condition bearing on the defendant's guilt.
(e) Inadmissibility of Withdrawn Intention. Evidence of an intention as to which notice was given under subdivision (a) or (b), later withdrawn, is not, in any civil or criminal proceeding, admissible against the person who gave notice of the intention.	**(e) Withdrawal Not Admissible.** If the defendant gives notice under Rule 12.2(a) or (b) and later withdraws that notice, evidence of the ~~defendant's~~ intended defense or use of expert testimony is not ~~admissible against the defendant~~ in any civil or criminal proceeding.

Or punishment. (RP)

admissible against the person who gave notice of the intention (KS) (RP)

Rule 12.3. Notice of defense based upon public authority	Rule 12.3. Public-Authority Defense[108]
(a) Notice by defendant; government response; disclosure of witnesses. **(1) Defendant's Notice and Government's Response.** A defendant intending to claim a defense of actual or believed exercise of public authority on behalf of a law enforcement or Federal intelligence agency at the time of the alleged offense shall, within the time provided for the filing of pretrial motions or at such later time as the court may direct, serve upon the attorney for the Government a written notice of such intention and file a copy of such notice with the clerk. Such notice shall identify the law enforcement or Federal intelligence agency and any member of such agency on behalf of which and the period of time in which the defendant claims the actual or believed exercise of public authority occurred. If the notice identifies a Federal intelligence agency, the copy filed with the clerk shall be under seal. Within ten days after receiving the defendant's notice, but in no event less than twenty days before the trial, the attorney for the Government shall serve upon the defendant or the defendant's attorney a written response which shall admit or deny that the defendant exercised the public authority identified in the defendant's notice.	**(a) Notice of Defense and Disclosure of Witnesses.** who intends to (KS) **(1)** ***Notice in General.*** A defendant ~~may~~ assert a defense of actual or believed exercise of public authority on behalf of a law-enforcement agency or federal intelligence agency at the time of the alleged offense. ~~A defendant who intends to assert this defense~~ (KS) must so notify the government's attorney in writing within the time provided for filing a pretrial motion, or at any later time the court directs. The defendant must also file a copy of the notice with the clerk. The copy filed with the clerk must be under seal if the notice identifies a federal intelligence agency under whose authority the defendant claims to have acted. **(2)** ***Contents.*** The notice must contain the following information: (A) the law-enforcement agency or federal intelligence agency involved; agency member (KS) (B) the ~~agent~~ on whose behalf the defendant claims to have acted; and (C) the time during which the defendant claims to have acted with public authority. **(3)** ***Response to Notice.*** The government's attorney must serve a written response on the defendant or the defendant's attorney within 10 days after receiving the defendant's notice, but no later than 20 days before trial. The response must admit or deny that the defendant exercised the public authority identified in the defendant's notice.

By proclaiming a defendant's right "to assert a defense of actual or believed exercise of public authority," the first sentence may be read as purporting to establish these as defenses to all criminal prosecutions, which may exceed the limits of the Rules Enabling Act & intrude on substantive law. While this may reflect caselaw, it is clearly a substantive pronouncement rather than procedural. The criminal rules must not establish defenses to criminal charges. Retain original. (RP)

[108] The SSC suggests that the Advisory Committee consider making the notice requirements in 12.1, 12.2, and 12.3 more uniform. See fn. 104.

(2) Disclosure of Witnesses. At the time that the Government serves its response to the notice or thereafter, but in no event less than twenty days before trial, the attorney for the Government may serve upon the defendant or the defendant's attorney a written demand for the names and addresses of the witnesses, if any, upon whom the defendant intends to rely in establishing the defense identified in the notice. Within seven days after receiving the Government's demand, the defendant shall serve upon the attorney for the Government a written statement of the names and addresses of any such witnesses. Within seven days after receiving the defendant's written statement, the attorney for the Government shall serve upon the defendant or the defendant's attorney a written statement of the names and addresses of the witnesses, if any, upon whom the Government intends to rely in opposing the defense identified in the notice.	**(4)** ***Disclosing Witnesses.*** (A) *Government's Demand.* The government's attorney may demand in writing that the defendant disclose the names and addresses of any witnesses the defendant intends to rely on to establish a public-authority defense. The government's attorney may serve the demand when the government serves its response to the defendant's notice under Rule 12.3(a)(1), or later, but must serve the notice no later than 20 days before trial. (B) *Defendant's Response.* Within 7 days after receiving the government's demand, the defendant must serve on the government's attorney a written statement of the names and addresses of the witnesses. (C) *Government's Reply.* Within 7 days after receiving the defendant's statement, the government's attorney must serve on the defendant or the defendant's attorney a written statement of the names and addresses of any witnesses the government intends to rely on to oppose the defendant's public-authority defense.
(3) Additional Time. If good cause is shown, the court may allow a party additional time to comply with any obligation imposed by this rule.	**(5)** ***Additional Time.*** The court may for good cause allow a party additional time to comply with this rule.
(b) Continuing duty to disclose. If, prior to or during trial, a party learns of any additional witness whose identity, if known, should have been included in the written statement furnished under subdivision (a)(2) of this rule, that party shall promptly notify in writing the other party or the other party's attorney of the name and address of any such witness.	**(b) Continuing Duty to Disclose.** Both the government's attorney and the defendant or the defendant's attorney must promptly disclose in writing to the other party the name and address of any additional witness if: (1) the disclosing party learns of the witness before or during trial; and (2) the witness's identity should have been disclosed under Rule 12.3(a)(2) if the disclosing party had earlier known it.

(c) Failure to comply. If a party fails to comply with the requirements of this rule, the court may exclude the testimony of any undisclosed witness offered in support of or in opposition to the defense, or enter such other order as it deems just under the circumstances.[109] This rule shall not limit the right of the defendant to testify.	**(c) Failure to Comply.** If a party fails to comply with this rule, the court may exclude the testimony of any undisclosed witness regarding the public-authority defense. This rule does not limit the defendant's right to testify.
(d) Protective procedures unaffected. This rule shall be in addition to and not supersede the authority of the court to issue appropriate protective orders, or the authority of the court to order that any pleading be filed under seal.	**(d) Protective Procedures Unaffected.** This rule does not limit the court's authority to issue appropriate protective orders or to order that any pleading be sealed.
(e) Inadmissibility of withdrawn defense based upon public authority. Evidence of an intention as to which notice was given under subdivision (a), later withdrawn, is not, in any civil or criminal proceeding, admissible against the person who gave notice of the intention.	**(e) Withdrawal Not Admissible.** If the defendant gives notice of a public-authority defense under Rule 12.3(a) and later withdraws that notice, evidence of the defendant's intended defense is not admissible ~~against the defendant~~ in any civil or criminal proceeding.

[109] The SSC deleted the following language "or enter such other order as it deems just under the circumstances" from the restyled version because it seems unnecessary, and because deleting it makes this subdivision consistent with the parallel provisions in Rules 12.1(d) and 12.2(d)

Rule 13. Trial Together of Indictments or Informations	Rule 13. Joint Trial of Separate Cases
The court may order two or more indictments or informations or both to be tried together if the offenses, and the defendants if there is more than one, could have been joined in a single indictment or information. The procedure shall be the same as if the prosecution were under such single indictment or information.	The court may order that separate cases be tried together if all offenses and all defendants could have been joined in a single indictment or information. The ~~government must then proceed as though as it were prosecuting under~~ a single indictment or information. consolidated case must then be treated as if it were prosecuted [based] under [on]

Rule 14. Relief from Prejudicial Joinder	Rule 14. Relief from Prejudicial Joinder
If it appears that a defendant or the government is prejudiced by a joinder of offenses or of defendants in an indictment or information or by such joinder for trial together, the court may order an election or[110] separate trials of counts, grant a severance of defendants or provide whatever other relief justice requires. In ruling on a motion by a defendant for severance the court may order the attorney for the government to deliver to the court for inspection *in camera* any statements or confessions[111] made by the defendants which the government intends to introduce in evidence at the trial.	**(a) Relief.** If the joinder of offenses or defendants in an indictment, an information, or a consolidation for trial appears to prejudice the defendant or the government, the court may order separate trials of counts, sever the defendants' trials, or provide any other relief that justice requires. **(b) Defendants' Statements.** Before ruling on a defendant's motion to sever, the court may order the government's attorney to deliver to the court for in camera inspection any of the defendants' statements that the government intends to use as evidence.

The case must then be treated as if it were based on a single indictment or information. RP

[110] Professor Saltzburg says deletion of *an election or* is OK.

[111] Professor Saltzburg says deletion of *or confessions* is OK; the phrase is included in the word *statements*.

and in the interest of justice (KS)

Rule 15. Depositions	Rule 15. Depositions
(a) When Taken. Whenever due to exceptional circumstances of the case it is in the interest of justice that the testimony of a prospective witness of a party be taken and preserved for use at trial, the court may upon motion of such party and notice to the parties order that testimony of such witness be taken by deposition and that any designated book paper, document, record, recording, or other material not privileged, be produced at the same time and place. If a witness is detained pursuant to section 3144 of title 18, United States Code, the court on written motion of the witness and upon notice to the parties may direct the witness' deposition be taken. After the deposition has been subscribed the court may discharge the witness. I agree with intent to use a more inclusive term (Pauley suggests "records") but am not sure that either term (documents vs. records) is clearly more or less inclusive. (HM) Is electronic stored information covered? (HM)	**(a) When Taken.** (1) ***In General.*** To preserve testimony for trial, the court may in exceptional circumstances order that ~~in the interests of justice~~ a party's prospective witness be deposed. The party seeking the deposition must file a motion and notify the other parties. The court may then order the deposition to be taken and also require the deponent to produce at the deposition any designated unprivileged documents or materials. records (RP) (2) ***Detained Material Witness.*** A witness who is detained under 18 U.S.C. § 3144 may request to be deposed by filing a written motion and giving notice to the parties. The court may then order that the deposition be taken and may discharge the witness after the witness has signed the deposition transcript under oath[112].
(b) Notice of Taking. The party at whose instance a deposition is to be taken shall give to every party reasonable written notice of the time and place for taking the deposition. The notice shall state the name and address of each person to be examined. On motion of a party upon whom the notice is served, the court for cause shown may extend or shorten the time or change the place for taking the deposition. The officer having custody of a defendant shall be notified of the time and place set for the examination and shall, unless the defendant waives in writing the right to be present, produce the defendant at the examination and keep the defendant in the presence of the witness during the examination, unless, after being warned by the court that disruptive conduct will cause the defendant's removal from the place of the taking of the deposition, the defendant persists in conduct which is such as to justify exclusion from that place. A defendant not in custody shall have the right to be present at the examination upon request subject to such terms as may be fixed by the court, but a failure, absent good cause shown, to appear after notice and tender of expenses in accordance with subdivision (c) of this rule shall constitute a waiver of that right and of any objection to the taking and use of the deposition based upon that right.	**(b) Notice.** (1) ***In General.*** A party seeking to take a deposition must notify every other party in writing of the deposition's date and location. The notice must state the name and address of each deponent. If requested by a party receiving the notice, the court for good cause may change the deposition's date or location. (2) ***To the Custodial Officer.*** The party seeking to take the deposition must also notify the officer who has custody of the defendant of the scheduled date and location. (a)(1) A party may move that a prospective witness be deposed in order to preserve testimony for trial. The court may grant such motion only in exceptional circumstances and in the interest of justice. If the court orders the deposition to be taken, it may also.... (KS)

[112] Professor Saltzburg recommends *signed under oath.*

Does new structure allow exclusion of defendant ab initio for persisting in disruptive conduct (perhaps displayed at an earlier proceeding) when in the existing language the exclusion for disruptive conduct would seem to apply only to the continued presence of a defendant? (HM)	**(c) Defendant's Presence.**[113] (1) ***Defendant in Custody.*** The officer who has custody of the defendant must produce the defendant at the deposition and keep the defendant in the witness's presence during the examination, unless the defendant: (A) waives in writing the right to be present; or (B) persists in disruptive conduct justifying exclusion after the court has warned the defendant that disruptive conduct will result in the defendant's exclusion. (2) ***Defendant Not in Custody.*** A defendant who is not in custody has the right upon request to be present at the deposition, subject to any conditions fixed by the court. If the government tenders the defendant's expenses as provided in (d) below (RS) but the defendant still fails to appear, the defendant — absent good cause — waives both the right to appear and to object to the deposition or its use.
(RS) Change in substance **(c) Payment of Expenses.** Whenever a deposition is taken at the instance of the government, or whenever a deposition is taken at the instance of a defendant who is unable to bear the expenses of the taking of the deposition, the court may direct that the expense of travel and subsistence of the defendant and the defendant's attorney for attendance at the deposition and the cost of the transcript of the deposition shall be paid by the government.	**(d) Expenses.** If the deposition was requested by the government or by a defendant who is unable to bear the deposition expenses, the court may order the government to pay: (1) the travel and subsistence expenses of the defendant and the defendant's attorney to attend the deposition, and (2) the deposition transcript costs.

Seems Broader than existing language. (HM)

This is probably not a material Change. But does either phrasing adequately address Confrontation Clause and right to be present issues implicated? The existing comments include lengthy discussion of the addition of the govt's right to seek a deposition (which caused addition of provisions about defendant's presence + costs) but other than a reference to California v. Green, do not address Confrontation. (HM)

[113] Rule 15(b) involves notice. The subject of a defendant's right to be present should be the subject of a separate subdivision: Rule 15(c).

(d) How Taken. Subject to such additional conditions as the court shall provide, a deposition shall be taken and filed in the manner provided in civil actions except as otherwise provided in these rules, provided that (1) in no event shall a deposition be taken of a party defendant without that defendant's consent, and (2) the scope and manner of examination and cross-examination shall be such as would be allowed in the trial itself. The government shall make available to the defendant or the defendant's counsel for examination and use at the taking of the deposition any statement of the witness being deposed which is in the possession of the government and to which the defendant would be entitled at the trial.	**(e) How Taken.** Unless a rule or a court order provides otherwise, a deposition must be taken and filed in the same manner as a deposition in a civil ~~action~~ case, with the following differences: (1) A defendant may not be deposed without that defendant's consent. (2) The scope and manner of the deposition examination and cross-examination must be the same as would be allowed during trial. (3) The government must provide to the defendant or the defendant's attorney, for use at the deposition, any statement of the deponent in the government's possession to which the defendant would be entitled at trial.
(e) Use. At the trial or upon any hearing, a part or all of a deposition, so far as otherwise admissible under the rules of evidence, may be used as substantive evidence if the witness is unavailable, as unavailability is defined in Rule 804(a) of the Federal Rules of Evidence, or the witness gives testimony at the trial or hearing inconsistent with that witness' deposition. Any deposition may also be used by any party for the purpose of contradicting or impeaching the testimony of the deponent as a witness. If only a part of a deposition is offered in evidence by a party, an adverse party may require the offering of all of it which is relevant to the part offered and any party may offer other parts.	**(f) Use.** **(1)** ***Substantive Evidence.*** A party may use as substantive evidence at a trial or hearing all or part of a deposition admissible under the Federal Rules of Evidence if: (A) the witness is unavailable as defined in Federal Rule of Evidence 804(a); or (B) the witness testifies inconsistently with the deposition at the trial or hearing. **(2)** ***Impeachment Evidence.*** A party may use a deposition to impeach the deponent. (3) ***Parts of a Deposition.*** If a party offers only a part of a deposition, an adverse party may require the first party to offer other relevant parts, and any other party may offer other parts.

HM

Omits reference to "in evidence." Does "in evidence" mean "as substantive evidence" + thus use of part of a deposition for impeachment purposes only not trigger adverse party's right to require admission of remainder of deposition? HM

(f) Objections to Deposition Testimony. Objections to deposition testimony or evidence or parts thereof and the grounds for the objection shall be stated at the time of the taking of the deposition.	(g) **Objections.** A party who objects to deposition testimony or evidence must state the grounds for the objection during the deposition.
(g) Deposition by Agreement Not Precluded. Nothing in this rule shall preclude the taking of a deposition, orally or upon written questions, or the use of a deposition, by agreement of the parties with the consent of the court.	(h) **Agreed Depositions Permitted.** The parties may take and use a deposition as the court permits. By agreement, ~~the parties may take a deposition~~ either orally or on written questions. (KJ)

Calls for court permission as to the taking or use of a deposition, but allows parties to agree as to whether the deposition will be taken orally or on written questions. It is broader than current language. We can discuss whether to make the substantive change suggested by the original restyling (i.e. parties allowed to agree to the taking of a deposition, without requiring consent of the court). This is an issue where the increasingly popular victims' rights agenda is impacted. (HM)

Rule 16. Discovery and Inspection	Rule 16. Discovery and Inspection
(a) Governmental Disclosure of Evidence. **(1) Information Subject to Disclosure.** **(A) Statement of Defendant.** Upon request of a defendant the government must disclose to the defendant and make available for inspection, copying, or photographing: any relevant written or recorded statements made by the defendant, or copies thereof, within the possession, custody, or control of the government, the existence of which is known, or by the exercise of due diligence may become known, to the attorney for the government; that portion of any written record containing the substance of any relevant oral statement made by the defendant whether before or after arrest in response to interrogation by any person then known to the defendant to be a government agent; and recorded testimony of the defendant before a grand jury which relates to the offense charged. The government must also disclose to the defendant the substance of any other relevant oral statement made by the defendant whether before or after arrest in response to interrogation by any person then known by the defendant to be a government agent if the government intends to use that statement at trial. Upon request of a defendant which is an organization such as a corporation, partnership, association, or labor union, the government must disclose to the defendant any of the foregoing statements made by a person who the government contends (1) was, at the time of making the statement, so situated as a director, officer, employee or agent as to have been able legally to bind the defendant in respect to the subject of the statement, or (2) was, at the time of the offense, personally involved in the alleged conduct constituting the offense and so situated as a director, officer, employee, or agent as to have been able legally to bind the defendant in respect to that alleged conduct in which the person was involved.	**(a) Government's Disclosure.** **(1) *Disclosable Information.*** (A) *A Defendant's Oral Statement.* The government must disclose to the defendant the substance of any relevant ~~oral~~ statement made by the defendant, before or after arrest, in response to interrogation by a person the defendant knew was a government agent if the government intends to use the statement at trial. (B) *A Defendant's Written or Recorded Statement.* At the defendant's request, the government must also disclose to the defendant, and make available for inspection, copying, or photographing, all of the following: (i) any relevant written or recorded statement by the defendant if: (a) the statement is within the government's possession, custody, or control; and (b) the government's attorney knows — or through due diligence could know — that the statement exists; (ii) the portion of any written record containing the substance of any relevant ~~oral~~ statement made before or after arrest if the defendant made the statement in response to interrogation by a person the defendant knew was a government agent; and (iii) the defendant's recorded testimony before a grand jury relating to the charged offense.

RP KS HM

organization

assuming definition in Rule 1(c) KS	(C) *Organizational Defendant.* If the defendant is an ~~entity such as a corporation, partnership, association, or labor union~~, the government must disclose to the defendant any statement described in Rule 16(a)(1)(A) and (B) if the government contends that the person making the statement:
	(a) was legally able to bind the defendant regarding ~~that~~ KS the subject of the statement because of that person's position as the defendant's director, officer, employee, or agent; or
Any substantive change from original? HM	(b) KS Constituting was personally involved in the alleged conduct ~~underlying~~ the offense and was legally able to bind the defendant regarding that conduct because of that person's position as the defendant's director, officer, employee, or agent.
(B) Defendant's Prior Record. Upon request of the defendant, the government shall furnish to the defendant such copy of the defendant's prior criminal record, if any, as is within the possession, custody, or control of the government, the existence of which is known, or by the exercise of due diligence may become known, to the attorney for the government.	(D) *Defendant's Prior Record.* Upon request, the government must furnish a defendant with a copy of that defendant's prior criminal record that is within the government's possession, custody, or control if the government's attorney knows — or through due diligence could know — that the record exists.
(C) Documents and Tangible Objects. Upon request of the defendant the government shall permit the defendant to inspect and copy or photograph books, papers, documents, photographs, tangible objects, buildings or places, or copies or portions thereof, which are within the possession, custody or control of the government, and which are material to the preparation of the defendant's defense or are intended for use by the government as evidence in chief at the trial, or were obtained from or belong to the defendant.	(E) *Documents and Objects.* At the defendant's request, the government must permit the defendant to inspect, copy, and KS or photograph KS photographs documents, ~~other~~ tangible objects, buildings, or places (or copies or portions of any of these items) if:
in its KS case-in-chief	(i) the item is within the government's possession, custody, or control;
	(ii) the item is material to the preparation of the defendant's defense, or the government intends to use the item at trial; or
	(iii) the item was obtained from or belongs to the defendant.

Parallel provision in (b)(1)(A) does not omit "book, paper." Should be consistent. HM

(D) Reports of Examinations and Tests. Upon request of a defendant the government shall permit the defendant to inspect and copy or photograph any results or reports of physical or mental examinations, and of scientific tests or experiments, or copies thereof, which are within the possession, custody, or control of the government, the existence of which is known, or by the exercise of due diligence may become known, to the attorney for the government, and which are material to the preparation of the defense or are intended for use by the government as evidence in chief at the trial. The restyled version expands "case-in-chief" to any use at trial, eg., rebuttal. This is a substantive change. (RP)	(F) *Reports of Examinations and Tests.* Upon request, the government must permit a defendant to inspect, copy, or photograph the results or reports of any physical or mental examination and of any scientific test or experiment if: (i) the item is within government's possession, custody, or control; (ii) the government's attorney knows — or through due diligence could know — that the item exists; and (iii) the item is material to the preparation of the defendant's defense, or the government intends to use the item in its case-in-chief at trial.
(E) Expert Witnesses. At the defendant's request, the government shall disclose to the defendant a written summary of testimony the government intends to use under Rules 702, 703, or 705 of the Federal Rules of Evidence during its case in chief at trial. This summary must describe the witnesses' opinions, the bases and the reasons therefor, and the witnesses' qualifications.	(G) *Expert Testimony.* Upon request, the government must give the defendant a written summary of any testimony the government intends to use in its case-in-chief at trial under Federal Rules of Evidence 702, 703, or 705. The summary must describe the witness's opinions, the bases and reasons for these opinions, and the witness's qualifications. not parallel with (E)(ii) (RP HM)
(2) Information Not Subject to Disclosure. Except as provided in paragraphs (A), (B), (D), and (E) of subdivision (a)(1), this rule does not authorize the discovery or inspection of reports, memoranda, or other internal government documents made by the attorney for the government or other government agents in connection with the investigation or prosecution of 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.[114] *	(2) ***Nondisclosable Information.*** Except as Rule 16(a)(1) provides otherwise, this rule does not authorize the discovery of reports, memoranda, or other internal government documents made by the government's attorney or other government agent in connection with the case's investigation or prosecution.
(3) Grand Jury Transcripts. Except as provided in Rules 6, 12(i) and 26.2, and subdivision (a)(1)(A) of this rule, these rules do not relate to discovery or inspection of recorded proceedings of a grand jury.	(3) ***Grand Jury Transcripts.*** Except as Rules 6, 12(i), 16(a)(1)(A), and 26.2 provide otherwise, this rule does not apply to the discovery or inspection of a grand jury's recorded proceedings.
[(4) Failure to Call Witness.] (Deleted Dec. 12, 1975)	

and (KS)

(KS)

* It seems to me that we intend Rule (a)(1)(E) [as well as (C), (D), (F), + (G)] to supercede the Jencks Act, right? (KS)

The ~~thrust~~ purpose of the existing sentence in (a)(1) [referring to Jencks Act] is to prevent any use, whether by amendment or interpretation, of Rule 16 to overcome the Jencks Act. The thrust of the deleted sentence should be restored. (RP) If no change is intended, some language could be included. However, since the existing Rule 16 now does authorize some discovery of govt witness' statements, contrary to the language at issue, if it remains, it should include some "except as provided herein ...." language. (HM)

[114] On Professor Saltzburg's recommendation, the SSC deleted this sentence from the restyled version

Is this clearer than original? HM

(b) The Defendant's Disclosure of Evidence. **(1) Information Subject to Disclosure.** **(A) Documents and Tangible Objects.** If the defendant requests disclosure under subdivision (a)(1)(C) or (D) of this rule, upon compliance with such request by the government, the defendant, on request of the government, shall permit the government to inspect and copy or photograph books, papers, documents, photographs, tangible objects, or copies or portions thereof, which are within the possession, custody, or control of the defendant and which the defendant intends to introduce as evidence in chief at the trial. I agree with the govt. that listing all the items (books, papers, photos, etc.) is needed -- but I would do that in 16(a)(1)(E). KS RP	**(b) Defendant's Disclosure.** **(1) *Disclosable Information.*** (A) *Documents and Objects.* If the defendant requests the government to disclose information under Rule 16(a)(1)(E) and the government complies, then the government may request the defendant to disclose ~~similar~~ Corresponding information. Upon request, the defendant must permit the government to inspect, copy, or photograph any book, paper, document, tangible object, or copy or portion of any of these items, if: KS (i) the item is within the defendant's possession, custody, or control; and (ii) the defendant intends to use the item at trial.
(B) Reports of Examinations and Tests. If the defendant requests disclosure under subdivision (a)(1)(C) or (D) of this rule, upon compliance with such request by the government, the defendant, on request of the government, shall permit the government to inspect and copy or photograph any results or reports of physical or mental examinations and of scientific tests or experiments made in connection with the particular case, or copies thereof, within the possession or control of the defendant, which the defendant intends to introduce as evidence in chief at the trial or which were prepared by a witness whom the defendant intends to call at the trial when the results or reports related to that witness' testimony.	(B) *Reports of Examinations and Tests.* If the defendant requests the government to disclose information under Rule 16(a)(1)(F), and the government complies, then the government may request the defendant to disclose similar information. Upon request, the defendant must permit the government to inspect, copy, or photograph the results or reports of any physical or mental examination and of any scientific test or experiment if: (i) the item is within the defendant's possession, custody, or control; and (ii) the defendant intends to use the item at trial, or intends to call the witness who prepared the report and the report relates to the witness's testimony.[115]

[115] I'd favor combining (A) and (B). The wording of (B) is identical to (A) except for the heading and the last four lines. — JFS. I'd like to try, too. KS

(C) Expert Witnesses. If the defendant requests disclosure under subdivision (a)(1)(E) of this rule and the government complies, 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 describe the opinions of the witnesses, the bases and reasons therefor, and the witnesses' qualifications.	(C) *Expert Testimony.* If the defendant requests the government to disclose information under Rule 16(a)(1)(G), and the government complies, then the government may request the defendant to disclose similar information. Upon request, the defendant must give the government a written summary of any testimony the defendant intends to use as evidence at trial under Federal Rules of Evidence 702, 703, or 705. The summary must describe the witness's opinions, the bases and reasons for these opinions, and the witness's qualifications.
(2) Information Not Subject To Disclosure. Except as to scientific or medical reports, this subdivision does not authorize the discovery or inspection of reports, memoranda, or other internal defense documents made by the defendant, or the defendant's attorneys or agents in connection with the investigation or defense of the case, or of statements made by the defendant, or by government or defense witnesses, or by prospective government or defense witnesses, to the defendant, the defendant's agents or attorneys. Saltzburg suggests that the use of "scientific and medical reports" is too narrow, since all expert summaries are subject to disclosure. He suggests the following: "This rule does not require a defendant to disclose any other information." (HM)	(2) ***Nondisclosable Information.***[116] Except for scientific or medical reports, Rule 16(b)(1) does not authorize discovery or inspection of the following: (A) reports, memoranda, or other documents made by the defendant, or the defendant's attorney or agent, during the case's investigation or defense; or (B) a statement made to the defendant, or the defendant's attorney or agent, by: (i) the defendant; (ii) a government or defense witness; or (iii) a prospective government or defense witness.
[(3) Failure to Call Witness.] (Deleted Dec. 12, 1975)	
(c) Continuing Duty to Disclose. If, prior to or during trial, a party discovers additional evidence or material previously requested or ordered, which is subject to discovery or inspection under this rule, such party shall promptly notify the other party or that other party's attorney or the court of the existence of the additional evidence or material. Is this repetitive? Saltzburg suggests no. (HM)	**(c) Continuing Duty to Disclose.** A party who discovers additional evidence or material before or during trial must promptly disclose its existence to the other parties, their attorneys, or the court if: (1) the evidence or material may be discovered or inspected under this rule; and (2) another party previously requested, or the court ordered, its production.

(Alternative) – The only items the defendant is required to disclose are those items discoverable under Rule 16(b)(1). (RS)

[116] The SSC recommends that Rule 16(b)(2) be shortened to the following: "Except for the ~~things~~ items (RS) discoverable under Rule 16(b)(1), a defendant is not required to disclose any other information." } I prefer this one. (RS)

Note change from original. (HM)

(d) Regulation of Discovery. **(1) Protective and Modifying Orders.** Upon a sufficient showing the court may at any time order that the discovery or inspection be denied, restricted, or deferred, or make such other order as is appropriate. Upon motion by a party, the court may permit the party to make such showing, in whole or in part, in the form of a written statement to be inspected by the judge alone. If the court enters an order granting relief following such an ex parte showing, the entire text of the party's statement shall be sealed and preserved in the records of the court to be made available to the appellate court in the event of an appeal.	**(d) Regulating Discovery.** **(1)** ***Protective and Modifying Orders.*** At any time the court may for good cause deny, restrict, or defer discovery or inspection, or grant other appropriate relief. The court may permit a party to show good cause by a written statement that the court will inspect ex parte. If relief is granted, the court must preserve the entire text of the party's statement under seal in the court's records in ~~case~~ the event an appeal occurs. (KS)
(2) Failure To Comply With a Request. If at any time during the course of proceedings it is brought to the attention of the court that a party has failed to comply with this rule, the court may order such party to permit the discovery or inspection, grant a continuance, or prohibit the party from introducing evidence not disclosed, or it may enter such other order as it deems just under the circumstances. The court may specify the time, place and manner of making the discovery and inspection and may prescribe such terms and conditions as are just.	**(2)** ***Failure to Comply.*** If a party fails to comply with Rule 16, the court may: (A) order the disobedient party to permit the discovery or inspection; specify its time, place, and manner; and prescribe other just terms and conditions; (B) grant a continuance; (C) prohibit the disobedient party from introducing the undisclosed evidence; or (D) enter any other order that is just under the circumstances.
(e) Alibi Witnesses. Discovery of alibi witnesses is governed by Rule 12.1.[117]	

[117] The SSC deleted this section because it's duplicative of Rule 12.1 Professor Saltzburg concurred.

include the seal of the court, (KS)

Rule 17. Subpoena	Rule 17. Subpoena
(a) For Attendance of Witnesses; Form; Issuance. A subpoena shall be issued by the clerk under the seal of the court. It shall state the name of the court and the title, if any, of the proceeding, and shall command each person to whom it is directed[118] to attend and give testimony at the time and place specified therein. The clerk shall issue a subpoena, signed and sealed but otherwise in blank to a party requesting it, who shall fill in the blanks before it is served. A subpoena shall be issued by a United States magistrate judge in a proceeding before that magistrate judge, but it need not be under the seal of the court.	**(a) Witness's Attendance.** ~~The clerk must issue a subpoena under the court's seal.~~ The subpoena must state the court's name and the title of the proceeding, and ~~must~~ command the witness to attend and testify at the time and place the subpoena specifies. The clerk must issue a blank subpoena — signed and sealed — to the party requesting it and that party must fill in the blanks before the subpoena is served. When a magistrate judge issues a subpoena in a proceeding before the magistrate judge, the subpoena need not contain the court's seal. (KS) (KS) (DW)
(b) Defendants Unable to Pay. The court shall order at any time that a subpoena be issued for service on a named witness upon an ex parte application of a defendant upon a satisfactory showing that the defendant is financially unable to pay the fees of the witness and that the presence of the witness is necessary to an adequate defense. If the court orders the subpoena to be issued, the costs incurred by the process and the fees of the witness so subpoenaed shall be paid in the same manner in which similar costs and fees are paid in case of a witness subpoenaed in behalf of the government.	**(b) Defendant Unable to Pay.** Upon a defendant's ex parte application, the court must order that a subpoena be issued for a named witness if the defendant shows an inability to pay the witness's fees and the necessity of the witness's presence for an adequate defense. If the court orders a subpoena to be issued, the process costs and witness fees will be paid in the same manner as those paid for witnesses the government subpoenas.
(c) For Production of Documentary Evidence and of Objects. A subpoena may also command the person to whom it is directed to produce the books, papers, documents or other objects designated therein. The court on motion made promptly may quash or modify the subpoena if compliance would be unreasonable or oppressive.[119] The court may direct that books, papers, documents or objects designated in the subpoena be produced before the court at a time prior to the trial or prior to the time when they are to be offered in evidence and may upon their production permit the books papers, documents or objects or portions thereof to be inspected by the parties and their attorneys.	**(c) Producing Documents and Objects.** (1) A subpoena may order the witness to produce any document or other object the subpoena designates. The court may direct the witness to produce the designated items in court before trial or before they are to be offered in evidence. When the items arrive, the court may permit the parties and their attorneys to inspect them. all or part of (DW) (2) On motion made promptly, the court may quash or modify the subpoena if compliance would be unreasonable.

Is this Adequate to cover the listed items in the original? Maybe it can be handled in the Notes. (DW)

[118] Professor Saltzburg approved substituting *witness* for *each person to whom it is directed*

[119] Professor Saltzburg approved deleting *or oppressive*

(d) Service. A subpoena may be served by the marshal, by a deputy marshal or by any other person who is not a party and who is not less than 18 years of age. Service of a subpoena shall be made by delivering a copy thereof to the person named and by tendering to that person the fee for 1 day's attendance and the mileage allowed by law. Fees and mileage need not be tendered to the witness upon service of a subpoena issued in behalf of the United States or an officer or agency thereof.	**(d) Service.** A marshal, deputy marshal, or any nonparty who is at least 18 years old may serve a subpoena. The server must deliver a copy of the subpoena to the witness and must tender to the witness one day's witness-attendance fee and the legal mileage allowance. The server need not tender the attendance fee or mileage allowance when the United States, a federal officer, or a federal agency has requested the subpoena.
(e) Place of Service. **(1) In United States.** A subpoena requiring the attendance of a witness at a hearing or trial may be served at any place within the United States. **(2) Abroad.** A subpoena directed to a witness in a foreign country shall issue under the circumstances and in the manner and be served as provided in Title 28, U.S.C., § 1783.	**(e) Place of Service.** **(1)** ***In the United States.*** A subpoena requiring a witness to attend a hearing or trial may be served at any place within the United States. **(2)** ***In a Foreign Country.*** Title 28 U.S.C. § 1783[120] governs the subpoena's service if the witness is in a foreign country. DW
(f) For Taking Depositions; Place of Examination. **(1) Issuance.** An order to take a deposition authorizes the issuance by the clerk of the court for the district in which the deposition is to be taken of subpoenas for the persons named or described therein. **(2) Place.** The witness whose deposition is to be taken may be required by subpoena to attend at any place designated by the trial court, taking into account the convenience of the witness and the parties.	**(f) Deposition Subpoena.** **(1)** ***Issuance.*** A court order to take a deposition authorizes the clerk in the district where the deposition is to be taken to issue a subpoena for any witness named or described in the order. **(2)** ***Place.*** After considering the convenience of the witness and the parties, the court may order — and the subpoena may require — the deponent to appear anywhere the court designates.
(g) Contempt. Failure by any person without adequate excuse to obey a subpoena served upon that person may be deemed a contempt of the court from which the subpoena issued or of the court for the district in which it issued if it was issued by a United States magistrate judge.	**(g) Contempt.** The district court may hold in contempt a witness who, without adequate excuse, disobeys a subpoena issued by that court or by a magistrate judge of that district.
(h) Information Not Subject to Subpoena. Statements made by witnesses or prospective witnesses may not be subpoenaed from the government or the defendant under this rule but shall be subject to production only in accordance with the provisions of Rule 26.2.	**(h) Information Not Subject to a Subpoena.** No party may subpoena a statement of a witness or a prospective witness under this rule. Rule 26.2 governs the production of those statements.

Either "witness" or "deponent" should be used consistently in this subdivision. Although deponent is more accurate, you may wish to use witness to be consistent throughout the rule.

ambiguous: a) statement of witness
b) prospective witness
is what it sounds like but not what current rule says. KS

[120] Consider substituting *Federal law* or *A federal statute* for the U.S. Code reference.

For example, 17(g) concerning contempt might be misconstrued to exclude contempt of deponents.

Consider rewriting like Rule 17(f)(2), i.e.:
After considering the convenience of the defendant and the witnesses and the prompt administration of justice, the court must.... DW

Rule 17.1 Pretrial Conference	Rule 17.1. Pretrial Conference
At any time after the filing of the indictment or information[121] the court upon motion of any party or upon its own motion may order one or more conferences to consider such matters as will promote a fair and expeditious trial. At the conclusion of a conference the court shall prepare and file a memorandum of the matters agreed upon. No admissions made by the defendant or the defendant's attorney at the conference shall be used against the defendant unless the admissions are reduced to writing and signed by the defendant and the defendant's attorney. This rule shall not be invoked in the case of a defendant who is not represented by counsel.	On its own, or on a party's motion, the court may hold one or more pretrial conferences to promote a fair and expeditious trial. When a conference ends, the court must prepare and file a memorandum of any matters agreed to during the conference. The government may not use any statement[122] made during the conference by the defendant or the defendant's attorney unless it is in writing and signed by the defendant and the defendant's attorney. The court may not hold a pretrial conference if the defendant is unrepresented.[123]

V. VENUE	Title V. Venue
Rule 18. Place of Prosecution and Trial	**Rule 18. Place of Prosecution and Trial**
Except as otherwise permitted by statute or by these rules, the prosecution shall be had in a district in which the offense was committed. The court shall fix the place of trial within the district with due regard to the convenience of the defendant and the witnesses and the prompt administration of justice.	Unless a statute or these rules permit otherwise, the government must prosecute an offense in the district in which the offense was committed. The court must fix the place of trial within the district with due regard for the convenience of the defendant and the witnesses, and the prompt administration of justice. DW

Since no statute can trump the Constitution (e.g. venue provision), the purpose of the introductory language in the rule may only be to alert the reader that such statutes and waiver rules exist. Query whether this is something which the Note could do instead. RP
Consider leaving it, however, to avoid potential confusion w.th Rules 20 & 21. DW

[121] Professor Saltzburg approved deleting *at any time after the filing of the indictment or information.*

[122] Professor Saltzburg recommended this change from the word *admission.*

[123] Professor Saltzburg notes that this rule was adopted before the Supreme Court's decision in *Faretta v California*, which recognized the right of self-representation. He urges that the rule be rethought substantively, and he recommends that self-represented defendants be allowed to attend pretrial conferences. If the Advisory Committee agrees, the rule's last sentence should be deleted. I agree RP DW

Rule 19. Rescinded.	Rule 19. [Rescinded.]

DW see R. 21

Rule 20. Transfer From the District for Plea and Sentence	Rule 20. Transfer ~~From the District~~ for Plea and Sentence
(a) Indictment or Information Pending. A defendant arrested, held, or present in a district other than that in which an indictment or information is pending against that defendant may state in writing a wish to plead guilty or nolo contendere, to waive trial in the district in which the indictment or information is pending, and to consent to disposition of the case in the district in which that defendant was arrested, held, or present, subject to the approval of the United States attorney for each district. Upon receipt of the defendant's statement and of the written approval of the United States attorneys, the clerk of the court in which the indictment or information is pending shall transmit the papers in the proceeding or certified copies thereof to the clerk of the court for the district in which the defendant is arrested, held, or present, and the prosecution shall continue in that district.	**(a) Indictment or Information Pending.** **(1)** ***Consent to Transfer.*** A defendant who is arrested, held, or present in a district other than the one where an indictment or information is pending may consent to the transfer of the proceeding to the transferee district, where the prosecution will continue if: (A) the defendant states in writing a wish to plead guilty or nolo contendere and to waive trial in the district where the indictment or information is pending, and consents in writing to the court's disposing of the case in the transferee district, and files the statement in the transferee district[124]; and (B) the United States attorneys for both districts approve the transfer in writing. **(2)** ***Clerk's Duties.*** After receiving the defendant's statement and the required approvals,[125] the clerk where the indictment or information is pending must send the file, or a certified copy, to the clerk in the transferee district.

DW

In lieu of: (1) Consent to Transfer. A prosecution will be transferred from the district where the indictment or information is pending to the district where the defendant is arrested, held, or present, if:

RCS

[124] Adding *and files the statement in the transferee district* makes this rule parallel to Rule 20(b)(1)(A).

[125] The SSC added this introductory language (*After receiving the defendant's statement and the required approvals*) to show when the clerk must act. The existing rule says *upon receipt*.

(b) Indictment or Information Not Pending. A defendant arrested, held, or present, in a district other than the district in which a complaint is pending against that defendant may state in writing a wish to plead guilty or nolo contendere, to waive venue and trial in the district in which the warrant was issued, and to consent to disposition of the case in the district in which that defendant was arrested, held, or present, subject to the approval of the United States attorney for each district. Upon filing the written waiver of venue in the district in which the defendant is present, the prosecution may proceed as if venue were in such district.	**(b) Complaint Pending (No Indictment or Information).** **(1)** ***Consent to Transfer.*** A defendant who is arrested, held, or present in a district other than the one where a complaint is pending may ~~waive venue and~~[126] consent to the transfer of the proceeding to the transferee district, where the prosecution will continue if: (A) the defendant states in writing a wish to plead guilty or nolo contendere and to waive trial in the district where the warrant was issued, consents in writing to the court's disposing of the case in the transferee district, and files the statement in the transferee district; and (B) the United States attorneys for both districts approve the transfer in writing.[127] **(2) Clerk's Duties.** After receiving the defendant's statement and the required approvals, the clerk where the complaint is pending must send the file, or a certified copy, to the clerk in the transferee district.[128]
(c) Effect of Not Guilty Plea. If after the proceeding has been transferred pursuant to subdivision (a) or (b) of this rule the defendant pleads not guilty, the clerk shall return the papers to the court in which the prosecution was commenced, and the proceeding shall be restored to the docket of that court. The defendant's statement that the defendant wishes to plead guilty or nolo contendere shall not be used against that defendant.	**(c) Effect of Not Guilty Plea.** If the defendant pleads not guilty after the case has been transferred under Rule 20(a) or (b), the clerk must return the papers to the court where the prosecution began, and that court must restore the proceeding to its docket. The government cannot use against the defendant the statement that the defendant wished to plead guilty or nolo contendere.

In lieu of:

A prosecution will be transferred from the district where the complaint is pending to the district where the defendant is arrested, held, or present if:

(KS)

This may be narrower than present language - why not use same language as in 12.1, 12.2, or 12.3? Even more on point is Rule 11(e)(6) [11(e)(5) in restyled rules] (KS) (RP)

[126] Professor Saltzburg recommends deleting this language. Although existing Rule 20(b) refers to waiving venue, Rule 20(a) does not. There seems to be no reason for the lack of parallelism.

[127] The SSC added the phrase *in writing* to make this paragraph parallel with Rule 20(a). Also, Professor Saltzburg says this language was intended even though not explicitly stated

[128] Professor Saltzburg recommended adding this "Clerk's Duties" paragraph to Rule 20(b) and to 20(d) to make them parallel to Rule 20(a).

(d) Juveniles. A juvenile (as defined in 18 U.S.C. § 5031) who is arrested, held, or present in a district other than that in which the juvenile is alleged to have committed an act in violation of a law of the United States not punishable by death or life imprisonment may, after having been advised by counsel and with the approval of the court and the United States attorney for each district, consent to be proceeded against as a juvenile delinquent in the district in which the juvenile is arrested, held, or present. The consent shall be given in writing before the court but only after the court has apprised the juvenile of the juvenile's rights, including the right to be returned to the district in which the juvenile is alleged to have committed the act, and of the consequences of such consent.

insert "juvenile" It is not appropriate to refer to the non-government party in a juvenile proceeding as a "defendant" since this is a non-criminal proceeding. See 18 U.S.C. § 5031 et seq.

(d) Juveniles.

(1) ***Consent to Transfer.*** A ~~defendant~~ juvenile may be prosecuted as a juvenile ~~delinquent~~ in the district where the ~~juvenile~~ defendant is arrested, held, or present, if:

(A) the defendant meets the definition of a juvenile under federal law;[129]

(B) the alleged offense that occurred in the other district is not punishable by death or life imprisonment;

(C) ~~the defendant has received an attorney~~ an attorney has advised the juvenile's ~~advice~~;

(D) the court has informed the defendant of the defendant's rights — including the right to be returned to the district where the offense ~~allegedly~~ occurred — and the consequences of waiving those rights;

(E) the defendant, after receiving the court's information about rights, consents in writing to be ~~prosecuted~~ proceeded against in the transferee district, and files the consent in the transferee district;

(F) the United States attorneys for both districts approve the transfer in writing; and

(G) the transferee court enters an order approving the transfer.

(2) ***Clerk's Duties.*** After receiving the defendant's written consent and the required approvals, the clerk in the district where the alleged offense occurred must send the file, or a certified copy, to the clerk in the transferee district.[130]

Consider whether Rule 20(a)(2), (b)(2), and (d)(2) concerning clerk's duties could be consolidated, e.g., 20(e) as follows: "... the clerk where the indictment or information or complaint is pending or where the alleged offense occurred must send ...." If so delete heading "(1)" because no heading "(2)" will exist.

[129] The SSC substituted *federal law* for the U S. Code citation because "juvenile" may be defined under statutes other than 18 U.S.C § 5031 if Congress enacts any of the pending bills relating to juvenile offenses.

[130] The SSC has added this paragraph on Professor Saltzburg's suggestion.

Rule 21. Transfer From The District for Trial.	Rule 21. Transfer for Trial
(a) For Prejudice in the District. The court upon motion of the defendant shall transfer the proceeding as to that defendant to another district whether or not such district is specified in the defendant's motion if the court is satisfied that there exists in the district where the prosecution is pending so great a prejudice against the defendant that the defendant cannot obtain a fair and impartial trial at any place fixed by law for holding court in that district.	**(a) For Prejudice.** Upon the defendant's motion, the court must transfer the proceeding to another district if the court is satisfied that so ~~great a~~ much prejudice against the defendant exists in the transferring district that the defendant cannot obtain a fair and impartial trial ~~in the transferring district~~ there.
(b) Transfer in Other Cases. For the convenience of parties and witnesses, and in the interest of justice, the court upon motion of the defendant may transfer the proceeding as to that defendant or any one or more of the counts thereof to another district.	**(b) For Convenience.** Upon a defendant's motion, the court may transfer the proceeding as to that defendant ~~or any count~~ — to another district for the convenience of the parties and witnesses and in the interest of justice.
(c) Proceedings on Transfer. When a transfer is ordered the clerk shall transmit to the clerk of the court to which the proceeding is transferred all papers in the proceeding or duplicates thereof and any bail taken, and the prosecution shall continue in that district.	**(c) Proceedings on Transfer.** When the court orders a transfer, the clerk must send to the transferee district the original or a copy of all papers in the case and any bail taken. The prosecution will ~~then~~ continue in the transferee district.
Note that Rule 20 says: "the file" and requires that the copy be "certified."	**(d) Time to File a Motion to Transfer.** A motion to transfer may be made at or before arraignment or at any other time ~~prescribed by~~ the court or these rules.[131] prescribe

Rule 22. Time of Motion to Transfer	Rule 22. Time to File a Motion to Transfer[132]
A motion to transfer under these rules may be made at or before arraignment or at such other time as the court or these rules may prescribe.	Does this mean Rule 22 will be blank?

, or one or more counts,

[131] This paragraph is old Rule 22, which the SSC suggests abrogating as a separate rule and including here because it is a subpart of Rule 21 — transfer for trial.

[132] This rule has now become Rule 21(d). See fn. 130.

MEMO TO: **Members, Subcommittee B;**
Criminal Rules Advisory Committee

FROM: **Professor Dave Schlueter, Reporter**

RE: **Proposed Changes to Rule 11 re Withdrawal of Pleas**

DATE: **May 17, 1999**

I am attaching some suggested language for addressing the issue of the ability of a defendant to withdraw his or her plea. I had worked on this issue at the time the Committee several years ago when the Committee considered whether to amend Rule 11 to address the question of when a defendant could withdraw a plea of guilty if the judge ultimately rejected a plea agreement between the defendant and the government. As the the circulated memos indicate, the issue had arisen as a result of *United States v. Hyde*, 82 F.3d 319 (9th Cir. 1996), where the court indicated that the "plea agreement and the plea are inextricably bound up together," and that a decision to postpone a decision on whether to accept the agreement also postpones a decision to accept the plea. When the Supreme Court reversed the Ninth Circuit — leaving intact the current rule — the Committee decided not to take any action in amending Rule 11 on that point.

Aside from the specific question of whether to say something in the Rule about the *Hyde* issue, it would seem appropriate to tackle the question of withdrawal of pleas and set out in one location, what the practice is or should be.

Rule 11. Pleas

* * *

(--) WITHDRAWAL OF PLEAS. A defendant may withdraw a plea of guilty or nolo contendre as follows:

(1) Before the court accepts a plea of guilty or a plea of nolo contendre, the defendant may withdraw the plea for any, or no, reason.

(2) After the court accepts a plea of guilty or nolo contendre, but before it imposes sentence, the defendant may withdraw the plea if (i) the court rejects a plea agreement between the defendant and the government, as provided in (e)(4) or (ii) the defendant can show fair and just reasons for requesting the withdrawal as provided in Rule 32(d). If the court has accepted a plea of guilty or nolo contendre but has deferred a decision on whether to accept or reject a plea agreement, the defendant may request to withdraw the plea only on a showing of fair and just reasons for doing so.

(3) After the court imposes a sentence the defendant may not withdraw a plea of guilty or nolo contendre. A plea may be set aside only on direct appeal or by motion under 28 U.S.C. § 2255.

RESEARCH QUESTIONS POSED BY JUDGE PARKER

UNITED STATES DISTRICT COURT
DISTRICT OF NEW MEXICO
POST OFFICE BOX 566
ALBUQUERQUE, NEW MEXICO 87103

JAMES A. PARKER
Judge

September 11, 1998

John K. Rabiej, Esq.
Chief, Rules Committee Support Office
Administrative Office of the United States Courts
Washington, DC 20544

Re: ***Research - Criminal Rules 1 through 17.1 (Titles I through IV)***

Dear John:

Enclosed is a list of items to be researched in regard to language in Rules 1 through 17.1 (Titles I through IV) of the Criminal Rules.

In many instances, there is a question whether certain language can be substituted for the existing language of a rule or whether existing language can be deleted or changed . In these instances, research must be done to determine whether the existing language, that is proposed to be changed, has been interpreted by a court and whether it appears in a statute or regulation.

Also enclosed is a May 14, 1998 letter to me from Judge Wilson setting forth the results of his research of certain language appearing in Criminal Rules 1 through 9. Judge Wilson's research is most valuable and a copy of his May 14, 1998 letter should be provided to Professor Saltzburg. Many of the subjects researched by Judge Wilson also appear in the enclosed list of language in Rules 1 through 17.1 that should be researched.

Sincerely,

JAMES A. PARKER

JAP:dm

cc: Members, Style Subcommittee

Rule 9(c)(2)

1. Can "shall make return thereof" that appears in the first sentence be changed to "must return it"?

2. Can the words "shall make return thereof" that appear in the third sentence be changed to "must be brought back"? This would avoid using "return" in a different sense from the sense of the word "return" that appears elsewhere in Rule 9(c)(2).

3. Is the word "shall" as it appears in the second sentence mandatory ("must") or predictive ("will")?

4. Can the words "person to whom a summons was delivered for service" that appear in the third sentence be changed to "person who was to serve a summons"?

5. The last sentence of Rule 9(c)(2) states that an unexecuted warrant or summons on an indictment or an information "may be delivered by the clerk" to the Marshal. The last sentence of Rule 4(d)(4) states that an arrest warrant or summons may be delivered by the "magistrate judge" to the marshal. Is there a reason for this difference? Can only a magistrate judge deliver an arrest warrant and only a clerk deliver a warrant or summons issued on an indictment or information?

6. Do the words "duplicate thereof" that appear in the last sentence of Rule 9(c)(2) modify only "summons" or also "warrant"?

7. Does the last sentence of Rule 9(c)(2) mean that the marshal or other person must try again to make execution or service?

Rule 10

1. Can "calling on" be changed to "asking" and can "called upon" be changed to "asked"?

Rule 11(c)

1. Rule 11(c) has five subparagraphs – (1) through (5) – describing what a judge must tell a defendant before accepting a plea of guilty. Some of these paragraphs include more than one subject that must be discussed with the defendant. In fact, there appear to be twelve different subjects (including a new provision approved by the Standing Committee for transmission to the Judicial Conference relating to waiving right to appeal or collaterally attack a sentence). If it can be done without creating significant problems, Rule 11(c) should have twelve paragraphs, each of which covers a separate subject. Would such renumbering be problematic? This may depend on how many times courts have interpreted the current five paragraphs of Rule 11(c).

Rule 11(d)

1. Can the last sentence be deleted? It apparently resulted from the opinion in Santobello v. New York, 404 U.S. 257, 261-262 (1971). There obviously are "prior discussions" that lead to every plea agreement. It would seem that the reference to "promises apart from the plea agreement" in the preceding sentence addresses the same subject.

Rule 11(f)

1. Is the language "notwithstanding the acceptance of a guilty plea" meaningful and a necessary part of Rule 11(f)?

Rule 12(a)

1. The beginning of the second sentence "All other pleas and demurrers and motions to quash are abolished" seems obsolete. Can this be deleted?

Rule 12(d)(1)

1. Has the word "government" that appears in Rule 12(d)(1) been interpreted by a court? Does it mean any government agent or only "the government's attorney"?

Rule 12.2(d)

1. Rule 12.2(d) addresses the failure to give the required notice under Rule 12.2(b) regarding expert testimony about "mental disease, mental defect or any other mental condition." However, Rule 12.2(d) says that failure to comply with Rule 12.2(b) could result in exclusion of expert testimony "on the issue of the defendant's guilt." Should "guilt" be changed to "mental disease, mental defect, or other mental condition" in Rule 12.2(d)? Has the word "guilt" that appears in Rule 12.2(d) been interpreted by a court?

Rule 14

1. The first sentence states that a court may order "an election or separate trials" of counts. Can "election or" be omitted? Has any court interpreted this language?

2. The last sentence refers to "statements or confessions." Would the word "statements" include any "confessions" so that "confessions" could be deleted? Has this language been interpreted by any court?

Rule 15(b)

1. The third sentence begins with "The officer having custody of a defendant shall be notified . . ." Who is responsible for notifying the officer having custody of a defendant? Has any court explained this?

Rule 16(a)(1)(E)

1. The first sentence says the government must disclose certain information the government intends to use in "its case in chief." Does this mean the government need not disclose such information if it intends to use it only in rebuttal? Has any court interpreted this?

Rule 16(b)(1)(A)

1. Does the language "upon compliance with such request by the government" specify a time for the defendant to deliver the described items or does it set a condition precedent? Has any court interpreted this?

Rule 16(c)

1. The phrasing "additional evidence or material" seems unduly repetitive. Can "evidence or" be deleted? Has any court interpreted this language?

Rule 16(e)

1. Rule 16(e) seems to state the obvious because Rule 12.1 has already provided for discovery of alibi witnesses. Can Rule 16(e) be omitted?

Rule 17(a)

1. Can the words "person to whom it is directed" that appear in the second sentence be changed to "recipient"?

Rule 17(b)

1. Can the words "at any time" be deleted from the first sentence?

2. Is the word "shall" that appears in the first sentence mandatory ("must") or predictive ("will")?

Rule 17(c)

1. Can the words "person to whom it is directed" that appear in the first sentence be changed to "recipient"?

Rule 17.1

1. Does the last sentence mean that a court cannot order a pretrial conference in a case in which a defendant is not represented by an attorney? Or, does it mean that the government cannot use any admissions from the conference if the defendant is not represented by an attorney? Or, does it mean that the requirement of reducing the admissions to writing and getting them signed does not apply? Or, does it simply mean that there is no need to obtain an attorney's signature if there is no attorney?

UNITED STATES DISTRICT COURT
DISTRICT OF NEW MEXICO
POST OFFICE BOX 566
ALBUQUERQUE, NEW MEXICO 87103

JAMES A. PARKER
Judge

September 18, 1998

John K. Rabiej, Esq.
Chief Rules Committee Support Office
Administrative Office of the United States Courts
Washington, DC 20544

RE: Research–Rules 18 through 39 (Titles V through VIII)

Dear John:

Enclosed is a list of items to be researched in regard to language in Rules 18 through 39 (Titles V through VIII) of the Criminal Rules. (There are no research projects involving Rules 18 and 19 or Rule 39).

I hope to have the final list of items to be researched in regard to Rules 40 through 60 in the mail to you next week.

Sincerely,

JAMES A. PARKER

JAP/cb

cc: Members, Style Subcommittee

Rule 20(d)

1. Does "the court and the United States Attorney for each district" which appears in the first sentence mean that the court for each district as well as the United States Attorney for each district must approve the transfer? In other words, what do the words "for each district" modify? The second sentence of Rule 20(d) states that the juvenile must consent in writing "before the court" which apparently refers to the transferring court and "only after the court has apprised the juvenile of the juvenile's rights." It would seem that it would be the transferring court which would apprise the juvenile of the rights. What is the meaning of this language under Rule 20(d)?

Rule 25(a)

1. The language "any other judge regularly sitting in or assigned to the court" could be read to refer to both district judges and magistrate judges. Magistrate judges are authorized to preside over jury trials in certain misdemeanor cases, but not in felony cases. Is the language of Rule 25 ambiguous when it states that "any other judge regularly sitting in or assigned to the court" may finish a trial when the presiding judge becomes disabled?

2. What are the meanings of a judge "regularly sitting in" and a judge "assigned to" the court?

Rule 25(a) and (b)

1. Rule 25(a) is, by its language, limited to substitution of a judge in a case being tried by a jury. Rule 25(b) seems to apply to both jury trials and non-jury trials. Is this the way courts have interpreted Rule 25(a) and (b)? If so, what is the reason for this distinction?

Rule 25(b)

1. Does "verdict" refer only to a jury's verdict? Does "finding of guilt" refer only to a court's finding in a nonjury trial?

Rule 26.1

1. The first sentence states that a party who intends to raise an issue about foreign law "shall give reasonable written notice." To whom must the party give notice? Has any court ever answered that question?

PROFESSOR SALTZBURG's RESPONSES TO JUDGE PARKER's RESEARCH QUESTIONS

UNITED STATES DISTRICT COURT
DISTRICT OF NEW MEXICO
333 LOMAS N.E., SUITE 760
ALBUQUERQUE, NEW MEXICO 87102

JAMES A. PARKER
JUDGE

December 23, 1998

(VIA FACSIMILE TRANSMISSION)

To: ***John Rabiej, Esq.,***
Chief, Rules Committee Support Office

Re: ***Additional Research -- Criminal Rules 5(a)(1); 6(b)(1); 7(a); 7(c)(2); 31(e); 11(e)(2) and (4); 15(h); and 40(a)(2)(B)***

Dear John:

During the meeting in Dallas on December 14 and 15, the Style Subcommittee identified additional research issues, many of which were discussed by telephone with Prof. Saltzburg. Although Prof. Saltzburg has already given us his comments by phone on most of these, the Style Subcommittee would like to have Prof. Saltzburg's answers and comments in writing to make certain that the Style Subcommittee understood them correctly and to document them for future use.

Enclosed is a list of the additional research projects.

Sincerely,

JAMES A. PARKER

JAP:dm

enclosures as indicated

cc-w/enc: Members, Style Subcommittee

Rule 5(a)(1)

Can the language "an arrest without a warrant" be changed to "a warrantless arrest"?

Rule 6(b)(1)

What is the meaning of the last sentence which reads "challenges shall be made before the administration of the oath to the jurors and shall be tried by the court"? Does this refer to the oath taken by the petit jurors? How can an unindicted suspect challenge the prospective grand jury or prospective individual grand juror who has not yet been sworn?

Rule 7(a)

Does the last sentence refer only to an information that charges a misdemeanor offense? Can a felony information be filed without leave of court?

Rule 7(c)(2) (Also Rule 31(e))

Does the language "interest or property" mean "interest in property"? Can "property interest" be substituted in these rules in place of "interest or property"?

Rule 11(e)(2) and (4)

Is there an inconsistency in the language of Rule 11(e)(2) and (4) regarding the court advising that a defendant may not withdraw a plea made under Rule 11(e)(1)(B) – language of Rule 11(e)(2) – and the requirement that the court "afford the defendant the opportunity to then withdraw the plea" – the language of Rule 11(e)(4) – if the plea agreement is rejected? Are the Style Subcommittee's proposed changes, that are intended to resolve inconsistent language, appropriate? Should the Style Subcommittee recommend to the Criminal Rules Advisory Committee that it address this concern and the Eighth Circuit ruling in United States v. Harris, 70 F.3d 1001 (8th Cir. 1995) in Committee Notes? (A copy of John Rabiej's memo dated December 16, 1998 about this was sent to Prof. Saltzburg and the members of the Style Subcommittee).

Rule 11(e)(5)

Can this be moved into Rule 11(e)(2) as a new Rule 11(e)(2)(A) and changed to read as Judge Wilson proposed?

Rule 11(e)(6)

Can Rule 11(e)(6) be replaced by a single sentence stating "The admissibility or inadmissibility of plea discussions and related statements is governed by Rule 410 of the Federal Rules of Evidence"? If so, should the heading of Rule 11(e)(6) be changed by inserting at its beginning the words "admissibility and" even though those words will not appear in the heading of Rule 410 of the Federal Rules of Evidence? Would this change in Criminal Rule 11(e)(6) be one of substance because Rule 410 of the Federal Rules of Evidence contains the language "or comparable state procedure" that does not appear in existing Criminal Rule 11(e)(6)?

Rule 15(e)

Rule 15(e) states that part of a deposition may be used as "substantive" evidence in certain circumstances. Is omission of the word "substance" in the proposed revision a *substantive* change?

Rule 15(h)

What does the language "with the consent of the court" modify – both the agreement of the parties to take a deposition as well as subsequent use of the deposition or only use of the deposition? It seems that the parties should be able to agree to take a deposition without court permission, which would be needed only in regard to the use of the deposition.

Rule 40(a)(2)(B)

Can "electronic transmission of either" be substituted in place of "facsimile transmission"?

UNITED STATES DISTRICT COURT
DISTRICT OF NEW MEXICO
333 LOMAS N.W. SUITE 760
ALBUQUERQUE, NEW MEXICO 87102

JAMES A PARKER
JUDGE

January 19, 1999

To: John Rabiej, Esq.,
Chief, Rules Committee Support Office

Re: Additional Research - Criminal Rules 12.3(c); 15(h); 16(b)(2); 17(a)(c); 17(c); 17(g); 17.1; 20(a); 20(b); and 20(d)

Dear John:

During the meeting of the Style Subcommittee on January 7th and 8th following conclusion of the Standing Committee meeting, the Style Subcommittee members identified additional research questions for Professor Saltzburg while agreeing to final edits of Rules 12 through 22. Enclosed is a list of these research projects. If possible, the Style Subcommittee would like to have Professor Saltzburg's research results in advance of the next Style Subcommittee meeting on Monday, February 1, 1999, in Washington, D.C.

Sincerely,

JAMES A. PARKER

JAP:dw

enclosures as indicated

cc-w/enc: Members, Style Subcommittee

Rule 12.3(c)

The SSC would like to delete from Rule 12.3(c) "or enter such other order as it deems just under the circumstances." which appears at the end of the first sentence. The parallel provisions of Rules 12.1(d) and 12.2(d) do not contain this language. The language seems to be unnecessary and its omission would make Rule 12.3(c) consistent with the language of parallel provisions in Rules 12.1(d) and 12.2(d). Has any court interpreted this language? Can it be deleted?

Rule 15(g) [re-lettered as stylized Rule 15(h)]

The SSC proposes dividing Rule 15(g) – which will become stylized Rule 15(h) – into two sentences:

> "The parties may by agreement take a deposition either orally or on written questions. The parties may use the deposition as the court permits."

This would allow the parties to take a deposition without court permission, but use of the deposition would be as the court permits. The language of existing Rule 15(g) seems to require the court "to consent" to both the taking of the deposition and the use of the deposition. Has any court interpreted existing Rule 15(g)? Would the SSC proposal be a substantive change?

Rule 16(b)(2)

Can Rule 16(b)(2) be shortened to read:

> "Except for the scientific or medical reports discoverable under Rule 16(b)(1), a defendant is not required to disclose any other information."

When considering this Rule, the members of the SSC could not think of anything else a defendant could be made to disclose. However, the SSC members felt that the Department of Justice may be concerned about the language being broadened to this extent. Has any court interpreted Rule 16(b)(2)? Would the SSC proposal be a substantive change?

Rule 17(a) and (c)

Brian Garner's stylized version refers to the "recipient" of a subpoena. Existing Rules 17 (a) and (c) refer to the "person to whom it is directed." Professor Saltzburg previously had suggested using "the person subpoenaed." The SSC proposes using the word "witness" but since Professor Saltburg has already suggested other language, the SSC wanted to know if he agrees with "witness."

Rule 17(c)

The second sentence of existing Rule 17(c)states that a court may quash a subpoena if compliance would be "unreasonable or oppressive." The SSC suggests deleting "or oppressive" on the ground that if it is "oppressive" it certainly must be "unreasonable." Has any court interpreted this language? Can "or oppressive" be deleted?

Rule 17(g)

The SSC suggests changing this to:

> "The district court may hold in contempt a witness who, without adequate excuse, disobeys a subpoena issued by that court or by a magistrate judge of that district."

This language would make it clear that only a district court judge could hold a witness in contempt. Existing Rule 17 (g) does not specify who may hold a witness in contempt. Does a magistrate judge have contempt authority? (The SSC assumed that a magistrate judge does not have contempt authority when the SSC proposed this new language).

Rule 17.1

Professor Saltzburg previously commented on Rule 17.1. However, he had not been asked whether the introductory language "at any time after the filing of the indictment or information..." can be deleted as the SSC proposes. Has a court interpreted this introductory language? Is there any reason it should not be deleted?

Rule 20(a)

Can the language "to waive trial" in existing Rule 20(a) be changed to "to waive venue"?

Rule 20(b)

The last sentence of Rule 20(a) requires the clerk of a transferor court to send the file, or a certified copy of the file, to the transferee court after the transferor court receives the consents to transfer. Rule 20(b) contains no similar requirement that the clerk of the transferor court send anything to the transferee court after the requisite consent to transfer has been given. Should Rule 20(b) have a provision about the clerk's duties that is parallel to the provision in Rule 20(a)?

Rule 20(d)

1. Existing Rule 20(d) states that a juvenile may consent to a transfer "with the approval of the court and the United States attorney for each district ..." Which court must approve the transfer – the transferor court or the transferee court? Must the court approval be in writing?

2. Should Rule 20(d) contain a provision about duties of the clerk of the transferor court that is parallel to the provision about the clerk's duties in Rule 20(a)?

October 23, 1998

MEMORANDUM

TO: **JOHN RABIEJ**

FOR: **JUDGE PARKER, JUDGE DAVIS**

RE: **STYLE CHANGES**

FROM: **STEVE SALTZBURG**

Rule 11 (c)

1. This subdivision can be broken down into 12 sections without doing harm and improving the clarity of the language. It makes sense to address maximum penalties even though the rule does not now do it. I question whether the paragraphs numbered 6, 10, and 11 should begin with "if." Why not simply eliminate the first clause in 6? It would not change the meaning. In (10), I would say "the defendant's waiver of the right to trial by the court's acceptance of a plea of guilty or nolo contendere." I would say in (11) "any false answer given by the defendant to the court's questions about . . . counsel may be used ...."

Rule 11 (d)

1. I think that the last sentence of the subdivision can be deleted, but I would suggest adding in Rule 11 (e)(2) a sentence saying something like: The court shall inquire into whether the defendant agreed to the plea agreement as disclosed."

Rule 11 (f)

1. The language "notwithstanding the acceptance of a guilty plea" is unnecessary as a matter of law, but cannot be deleted without substituting language. The suggested change may be substantive. As I understand it, the court may permit a defendant to plead guilty and subsequently make the factual determination. Thus, the language could be changed to "Before entering a judgment upon a plea of guilty, . . ."

Rule 12 (a)

1. The first sentence can be deleted. It is redundant. I would give serious thought also to abolishing the entire section that is rewritten as (a)(2). The section on motions in (b) to provide for motions and to mandate certain motions. I don't think a cross-reference is necessary.

Rule 12 (d)(1)

1. It is unclear whether the "government" is meant to be "attorney for the government," and there is little case law on the point, probably because as a matter of practice it is the prosecutor who makes disclosure. I would abolish this subdivision. It is poorly placed and wordy. I would simply make the five motions under (b) fall under a new (b)(1) which would begin: "The following motions must be raised before trial:" Then I would (b)(2) to read: "The defendant may request the government to disclose its intention to use in its case-in-chief any evidence discoverable by the defendant under Rule 16 in order to give the defendant an opportunity to file a motion under (b)(i)(3), and the attorney for the government may disclose its intention to offer this or any other specified evidence at trial." I do not think it is necessary to do more. I would use "attorney for the government" generally to refer to who makes disclosure.

Rule 12.2(d)

1. The word "guilt" should be changed to "mental disease, mental defect or other mental condition of the defendant bearing on the issue of guilt" to be compatible with Rule 12.2 (b). The defendant is not required by this particular rule to give notice as to intention to offer expert testimony at sentencing or at a hearing on competency for self-representation or other preliminary matters.

Rule 14

1. The word election can be omitted. I say this even though there is no judicial interpretation on the point. The rule now permits the court to allow the party who is prejudiced to make a choice of which count or counts to proceed upon. Since the court need not permit an election, the court has the right to choose the order if it desires. I would remove the words concerning an election. This would not prohibit the court from inquiring from the prejudiced party the order it would prefer, but it leaves the final decision with the court as the current rule does.

2. The word statement has been read as being broader the confession, which is not surprising. I would eliminate confession since there is authority for the proposition that statements include confessions. Thus, confessions are redundant. Moreover, the Supreme Court has recognized in the *Williamson* case that some statements are arguably not "against interest" for purposes of Rule 804 (b)(3) while others are. The judge must make the determination not only whether statements run foul of *Bruton* but also whether they are admissible as declarations against interest and therefore do not require separate trials. Use of the word statement sends the right message, which is that all statements of defendants must be disclosed to the court. This is the law, and elimination of confessions does not change the law.

October 26, 1998

MEMORANDUM

TO: **JOHN RABIEJ**

FOR: **JUDGE PARKER, JUDGE DAVIS**

RE: **STYLE CHANGES**

FROM: **STEVE SALTZBURG**

Rule 15 (b)

1. Given the paucity of depositions in federal criminal cases, the question of who must give the notice to the officer who has custody of the defendant is not spelled out in cases. Logic requires that it be the party seeking the deposition. That party bears the burden of notice under the rule, and bears the consequences of not giving notice. I suggest, however, that it would make more sense to put the notice requirement in redrafted (1) in the first sentence so that the party seeking the deposition must "notify every party and the officer who has custody of a defendant in writing of the deposition's date and location." You could add in the second sentence that the notice to a party must state the name and address. Then rewritten (2) could be titled Production of Defendant in Custody.

Rule 16 (a)(1)(e)

1. The use of the "case-in-chief" language strongly suggests that the disclosure requirement does not extend to experts who are rebuttal witnesses only. This is what Wright & Miller conclude, but the cases they cite are not on point. What we know is that by changing the words from case in chief we are changing the rule. Of course, the government is not permitted to cheat by holding back witnesses and then offering them when rebuttal is either unnecessary or impermissible.

Rule 16 (b)(1)(A)

1. The language in the rule sets a condition precedent. There is no time limit, but there is also nothing to restrict the district court from requiring the government to comply by a specified date and for the defense to comply by another specified date.

Rule 16 (c)

1. I think both "evidence" and "material" are needed. Some requests are to examine material which may not be evidence. Other requests are for items intended to be used at trial, including testimony, which sounds like "evidence" but not "material." Material might be broad

enough to cover everything, but it is a word no usually thought of as encompassing a summary of expected testimony.

Rule 16 (e)

1. I think that Rule 16 (e) can be deleted. It says nothing more than is in Rule 12.1, and that rule sets forth a procedure to be followed by both government and defendant.

Rule 17 (a)

1. Changing "each person to whom it is directed" to "recipient" might be little confusing, because it is not until later in the rule we know who the recipient is. What about changing the words to "the person subpoenaed." I know that the witness is not bound by the subpoena until it is served, but the remainder of the rule makes this clear.

Rule 17 (b)

1. The words "at any time" may be deleted. The rule means the same thing with or without them.

2. The word "shall" in the first line means "must," and the Supreme Court's Compulsory Process decisions would indicate that this is constitutionally based.

Rule 17 (c)

1. Changing "each person to whom it is directed" to "recipient" still poses the possibility of confusion, because it is not until (d) in the rule we know who the recipient is. What about changing the words to "the person subpoenaed."

III-D

December 10, 1998

MEMORANDUM

TO: **JOHN RABIEJ**

FOR: **JUDGE PARKER, JUDGE DAVIS**

RE: **STYLE CHANGES**

FROM: **STEVE SALTZBURG**

Rule 4 (a)

1. The magistrate judge, referred to in Rule 3, issues the warrant. The magistrate judge also issues the summons, but only on request of the attorney for the government.

Rule 4 (d)(4)(C)

1. I would not delete this, because without it a defendant might argue that a new warrant must be issued.

Rule 7 (f)

1. The rule as written and as redrafted is miserable. My belief is that Judge Wilson's second suggestions is close to the mark. The intent seems to be: "The government must amend a bill of particulars upon discovery that it is inaccurate, incomplete or misleading."

Rule 15 (a)(2)

1. I am not certain whether "signed under oath" is the same as subscribed, but I prefer " signed under oath" because it makes clear what is required.

Rule 16 (d)

1. Since "sufficient showing" must mean the same as "good cause," there is not reason why the latter cannot be used. It is a more familiar term to judges and lawyers.

Rule 16 (a)(2)

1. The omission of the Jencks Act reference does not change the meaning of the rule. The Jencks Act is essentially codified in Rule 26.1. Nothing in Rule 16 purports to cover witness statements. That subject is left to Rule 26.2.

Rule 17.1

1. The Advisory Committee Note states that the rule was intended to promote pretrial conferences with counsel. Thus, the intent seems to be not to have such conferences when the defendant is not represented by counsel. It should be noted that the rule was adopted ini 1966 before the Supreme Court decided Faretta v. California and recognized the right of self-representation. This is a rule that probably needs to be rethought substantively. It seems to me that, with standby counsel appointed regularly in self-representation cases, there should be no bar to pretrial conferences. It also seems like a bad idea to bar a self-represented defendant from participating in ai pretrial conference that might help explain the proceedings. I also think that the word "statements" should be used instead of "admissions."

Rules 20 (a) & (b)

1. I think that the absence of the written approval requirement was a drafting error in (b). It seems clear that the drafters wanted a formal record of the defendant's request and of both U.S. Attorneys' approval. Similarly, I think that (d) intended that the approval be in writing as well.

Rule 48 (b)

1. The language "against a defendant who has been held to answer" applies a defendant who has waived indictment or who need not be indicted. I would suggest deletion of this subdivision, since the Speedy Trial Act provides more specific guidance. 18 U.S.C.A. 3161. It might be preferable to say "The court may dismiss an indictment, information, or complaint as a result of impermissible delay in charging or bringing a defendant to trial."

Rule 49 (c)

1. The change of "notice" to "copy" would not be substantive. Nor would it be necessary. Notice does not require an original. But, I think copy is, on balance, is a better term. A party should get a copy of an order.

Rule 49 (e)

1. I see no reason for continuing to list the abrogated section.

Rule 50 (a) & (b)

1. There is no law governing this rule. It's original purpose was to assure that a defendant received a speedy trial. Subdivision (b) was added when the Speedy Trial Act was enacted. I think this rule could now be deleted. The Speedy Trial Act provides enforcement mechanisms.

Rule 51

January 21, 1999

MEMORANDUM

TO: **JOHN RABIEJ**

FOR: **JUDGE PARKER, JUDGE DAVIS**

RE: **STYLE CHANGES**

FROM: **STEVE SALTZBURG**

Rule 12.3 (c)

1. The issue of whether the language "or enter such other order as it deems just under the circumstances" is more complicated than it looks. Compare, for example 12.2. It absolutely forbids an insanity defense under (a) if notice is not given. Thus, the provision excluding witnesses is a supplement to the exclusion under (a). I believe that you can eliminate the words if you say that "the court may exclude that party's evidence regarding the public-authority defense." I think that the word "evidence" is important because it prevents a defendant from failing to give any notice and then relying on documents to support a defense. The term "evidence" will cover witnesses as well.

Rule 15 (h)(relettered)

1. There is a good argument that the change proposed in this rule is substantive. At the current time, I think that Rule 15 requires the consent of the court to take or use a deposition. While I cannot believe the court is likely to deny permission when the parties agree, it is not impossible to foresee that a witness will move to quash a subpoena for a deposition. The change would seem to give the parties a right to take one as long as they agree, even if the court might be inclined to deny permission if the witness objects. Certainly the two sentences could be changed to read: "The parties may take and use a deposition as the court permits. The parties may agree to take a deposition orally or on written questions."

Rule 16 (b)(2)

1. You did not ask the question, but I think that in 16 (a)(2), the rule could begin by eliminating the opening language and beginning with the words "This rule." The point is that work product is not required to be produced. At the current time, the rule is internally contradictory since documents could be "material to the preparation of the defendant's defense" and also be work product. My understanding is that they do not have to be produced unless Brady requires their production as a constitutional matter.

2. I don't think the rule as rewritten should refer to "a party," since (b) is confined to the defendant's discovery. My wording would be "This rule does not require a defendant to disclose

any other information." Why refer back to scientific or medical reports, especially when all expert summaries are also covered by the rule?

Rule 17(a) and (c)

1. I like "witness," especially since the word also appears in the title of (a). I wish I had suggested this first.

2. The word "oppressive" is redundant. Any oppressive subpoena must be unreasonable. The cases indicate that a subpoena may be quashed simply because the court concludes there is insufficient likelihood that it seeks relevant material. The decisions also suggest that reasonableness involves an examination of both relevance and burdensomeness.

Rule 17.1

1. The language "at any time . . ." can be deleted. There are no parties until there is a case. There is no case until there is an indictment.

Rule 20 (a)

1. The change "to waive venue" can be made, but why not eliminate the words "may waive venue and" so that the rule provides that a defendant may consent to the transfer.

Rule 20 (b)

1. There should be a requirement in (b) regarding transfer of documents. Subdivision (c) assumes that the documents have been transferred.

Rule 20 (d)

1. This is a badly written rule. The logic of it is as follows. The juvenile is held in a district other than the one in which he is alleged to have committed an offense. It is the court in the place the juvenile is held that must advise the juvenile of his/her rights, including the right to be returned to the place of the offense. Since that court must advise of rights, it is pretty clear that it is that court which must decide whether to approve a transfer (considering among other things the juvenile's ability to make a decision). The juvenile must consent in writing. Rule 20 (a) requires the U.S. Attorneys to consent in writing. Rules 20 (b) and (d) do not so require. I think this is simply an omission. It seems preferable to require consent of the U.S. Attorneys in writing throughout the rule. It does not appear that the court must enter a written approval. As a practical matter, the court will enter some kind of transfer order. Subparagraph (7) could be changed to cover U.S. Attorneys and to impose a writing requirement, and we could add (8) to read: "and the court enters an order approving the transfer."

2. The clerk of the transferor court should be required to submit the papers to the transferee court. There is every reason to do so, and no reason not to treat this like the transfer of an adult.

EDITS TO RULE 11 SUGGESTED BY PROFESSOR STITH AND ROGER PAULEY

U.S. Department of Justice

Criminal Division

Washington, DC 20530-0001

May 28, 1999

MEMORANDUM

To: Professor David A. Schlueter

From: Roger A. Pauley RAP

Re: Rule 11

Here are my thoughts on your Rule 11 redraft and the suggestion of Judge Sedwick.

1. 11(a). Fine except that in (a)(2) the redraft doesn't incorporate the change agreed upon by Subcommittee B, namely to have the introductory clause read "With the consent of the court and the government."

Also, I probably do little more than display my ignorance, but looking anew at (a)(4)(formerly (a)(1)), what is the purpose of requiring that a not guilty plea be entered if an organization (but not an individual) fails to appear? Does it have something to do with non-fugitivity? Or is it to allow the case to be advanced to the point of trial? Under Rule 43, the trial still cannot proceed unless the defendant is "initially present," unless the organization's attorney is present. But if the organization doesn't want to appear, it will instruct its attorney not to appear. If the court then wishes to hold someone in contempt, it would seem more appropriate to target the organization's officers than the attorney. I'm not sure what benefit follows from entering a ng plea for the non-appearing organization (as opposed to e.g., issuing an order to show cause why it shouldn't be held in contempt for failing to appear and rescheduling the appearance proceeding.

2. 11(b). "Contendere" in the heading is misspelled. "Stage" in (1)(C) is misspelled. In (1)(F) the Subcommittee agreed on "each charge" rather than "the charge."

In 11(b)(2), the Subcommittee agreed to "and determine" rather than "to determine," an important difference.

In 11(b)(3), I suggest striking "whether a factual basis for the plea exists" and inserting "that a factual basis for the plea exists." The reason is the same as that underlying the Subcommittee's change in (b)(2), i.e., the court mustn't enter judgment until it determines that the plea has a factual basis.

3. 11(c). In (1), remove the "'s" from "government's attorney." Also, in the fourth line of that paragraph "guilty" is misspelled.

In (2)(A) I like the original version (formerly (e)(5)) which you've reproduced as opposed to the SSC version, but per Bob Josefsberg's request am soliciting views from AUSAs whether this provision serves any useful purpose.

In (B), the comma after "cause" should be stricken.

In (4), strike "and sentence" after "judgment." I thought this had been accepted by the Subcommittee though it isn't reflected in the latest Rabiej draft (May 27). The judgment is the sentence in a criminal case.

In (5), add a sentence at the beginning to the effect: "The court may reject any plea agreement." Otherwise, there's an implication that a court may not reject an (e)(1)(B) type agreement. That's not so. If the court finds it not in the public interest it can reject it, even though it contains merely a recommendation or request.

4. 11(d). In the introductory language and in (1) "contendere" is misspelled.

In (d)(2)(A), strike ", as provided in (c)(1)(A) or (C)". As previously indicated, the court may reject any kind of plea agreement, and if it does the defendant must be given the chance to withdraw the plea.

In (d)(3), strike "a" before "sentence". Also, and more importantly, I would end the sentence with "contendere" (which is misspelled). I would leave in Rule 32 the following: "After the court imposes sentence, a plea of guilty or nolo contendere may be set aside only on direct appeal or by motion under 28 U.S.C. § 2255."

5. 11(e). In (e)(4), strike "attorney for the government" and insert "government attorney." Judge Sedwick's suggestion is relevant here. In my view, the judge describes a real (though very occasional) problem, but the recommended solution is much broader than the problem since it would allow the use for entitlement to an acceptance of responsibility even where the defendant didn't go to trial. To address the specific scenario described by the judge,

the additional exception could read: "or (iii) if the statement consists of an offer by the government of a conditional guilty plea where relevant at sentencing to a defendant's claim, after a trial, of entitlement to acceptance of responsibility."

6. 11(g). The Subcommittee adopted the following preferential version (in lieu of the draft): "A variance from the requirements of this rule is harmless error if it does not affect substantial rights."

MEMORANDUM

To: **Criminal Rules Subcommittee "B"**

From: **Kate Stith**

***Re*:** **Rule 11**

Date: **June 8, 1999**

There are many stylistic improvements in Dave Schlueter's draft of Rule 11. I continue to be confused as to several issues, however, as stated below. I also suggest a simplification of several provisions.

QUESTIONS

11(b)(3) *[present 11(f))]*: Did not we agree at the meeting that "[b]efore entering judgement on a guilty plea, the court must determine *that* a factual basis for the plea exists"?

11(c)(4) *[present 11(e)(3)]*: This provides that the court must inform the defendant that if it accepts the plea, "the disposition stated in the plea agreement will be included in the judgment". Isn't this only true of an type (C) plea? (Of course, the court *may* end up accepting the recommendations of an type (B) plea–but it may not; and it is simply inaccurate to tell the defendant that if the court accepts a type (B) plea, then the disposition there stated will be in the judgment.)

11(c)(5) *[present 11(e)(2)]*: I agree that we should say "The court may reject any plea agreement." It is highly confusing to state this clearly and separately with respect to (A) and (C) agreements and only by implication for (B) agreements. I would suggest, however, that this clear statement of the court's role and powers should come earlier in the Rule.

11(c)(5)(B) *[present 11(e)(4)]*: What does it mean to advise the defendant with respect to a type (A) or a type (B) agreement that if the court rejects the agreement, "the court is not bound"? The issue is whether *the government* is nonetheless bound. (Note, I do not attempt to answer this question in my proposal below.)

11(d)(2)(A) *[present 11(e) (4)]*: I would agree with Roger that the limiting language (specifying (A) and (C) agreements only) should be deleted.

PROPOSAL

Putting this all together, and just more generally trying to make these provisions in Rule 11 flow more clearly, would it make more sense to reword Dave's 11(c)(3) through 11(c)(5) into two simpler subsections, as follows?

> **(3) Judicial Consideration of a Plea Agreement.** The court may accept or reject any plea agreement, or may defer a decision until the court has reviewed the presentence report. **[Reformulated former 11(e)(2)]**
>
> (A) If the agreement is of the type specified in Rule 11(c)(1)(B), the court must advise the defendant that the defendant has no right to withdraw the plea if the court accepts the plea agreement but does not follow the recommendation or request. **[Former 11(e)(2)]**
>
> (B) If the agreement is of the type specified in 11(c)(1)(C), the court must inform the defendant that if the court accepts the agreement, the disposition stated in the plea agreement will be included in the judgment. **[Reformulated former 11(e)(3)]**
>
> **(4) Rejecting a Plea Agreement**. If the court rejects a plea agreement **[note–any type]**, the court must do the following on the record:
>
> (A) inform the parties that the court rejects the plea agreement;
>
> (B) advise the defendant personally in open court–or, for good cause, in camera–that the court is not bound by the plea agreement and give the defendant an opportunity to withdraw the plea; and
>
> (C) advise the defendant that if the plea is not withdrawn, the court may dispose of the case less favorably toward the defendant that the plea agreement contemplated. **[Reformulated for 11(e)(4)].**

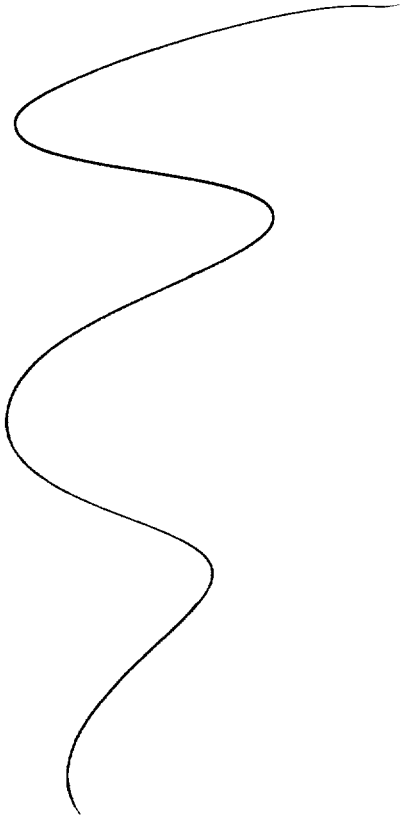
End

Supplemental

Agenda

Book

Materials



Advisory Committee on Federal Rules of Criminal Procedure
Restyling Project

Status Report

Rule	Major Changes	Status & Comments
Rule 1. Scope	Completely revised; includes portions of Rule 54 Changes in Definitions of "Court," "Government Attorney", "Judge," "Magistrate Judge,"	Subcommittee A Reviewed by Committee (4-22-99) Notes—First Draft (6-10-99) Q—Should rule include definition of Indian Tribe?
Rule 2. Purpose and Construction	Words "are intended" have been substituted with are to be interpreted"	Subcommittee A Reviewed by Committee (4-22-99) Notes—First Draft (6-10-99)
Rule 3. Complaint	Rule now specifies that complaint must be sworn to before Magistrate Judge and if none is available, before a state or local officer.	Subcommittee A Reviewed by Committee (4-22-99) Notes—First Draft (6-10-99)
Rule 4. Arrest Warrant or a Summons on a Complaint	Rule now includes element of discretion where defendant fails to respond to summons; if government attorney does not request warrant, then judge may decide whether to issue one. Reference to hearsay removed. Words "nearest available magistrate" have been	Subcommittee A Reviewed by Committee (4-22-99) Notes—First Draft (6-10-99)

	replaced with "brought promptly" Rule 4(c)(3)(C) is former Rule 9(c)(1). Rule 4(c)(4)(A) now provides that unexecuted warrant may be returned to any magistrate judge.	
Rule 5. Initial Appearance	Rule 5(a)(1)--Words "nearest available magistrate" have been replaced with "brought promptly" Rule 5(b)(4) —added to make clear that a defendant may only be called upon to make plea under Rule 10. Rule 5(c)—current provision moved to Rule 5.1	Subcommittee A Reviewed by Committee (4-22-99) Notes—First Draft (6-10-99)
Rule 5.1 Preliminary Hearing in a Felony Case Prior to Indictment or Information	Title has been changed Rule 5.1(b) —former Rule 5(c); includes change to ability of magistrate to grant continuance over objection of defendant. Rule 5.1(f)—revised version of current 5.1(c); detailed guidance replaced with reference to Judicial Conference Guidelines.	Subcommittee A Reviewed by Committee (4-22-99) Notes—First Draft (6-10-99) Q — use of term "court" vs. "magistrate"
Rule 6. The Grand Jury	Rule 6(b)(1) —removed reference to challenges to jurors before oath	Subcommittee A Reviewed by Committee (4-22-99) Notes—First Draft (6-10-99) Q —whether words "otherwise prohibited by rules" should be omitted from 6(e)(3) Q —Rule 6(i), whether to include definition of "Indian Tribe" in Rule 1.

Rule 7. The Indictment and the Information	References to "Hard Labor" have been removed. Rule 7(c)(3) —title changed	Subcommittee A Reviewed by Committee (4-22-99) Notes—First Draft (6-10-99)
Rule 8. Joinder of Offenses or Defendants	No substantive changes	Subcommittee A Reviewed by Committee (4-22-99) Notes—First Draft (6-10-99)
Rule 9. Arrest Warrant or Summons on an Indictment or Information	Rule changed to more clearly reflect relationship to Rule 4, rather than repeating information, simply cites to Rule 4 provisions. Rule 9(a) —judge would have discretion whether to issue arrest warrant if defendant fails to appear for summons and government does not request warrant. Current Rule 9(c)(1) —language re service of summons on organization has been moved to Rule 4.	Subcommittee A Reviewed by Committee (4-22-99) Notes—First Draft (6-10-99)
Rule 10. Arraignment		Subcommittee B Rules—First Draft (6-8-99) Subcommittee (Judge Roll) is studying issue of videoteleconferencing and possible substantive amendments
Rule 11. Pleas		Subcommittee B Rules—First Draft (6-8-99)

Rule 12. Pleadings and Motions Before Trial; Defenses and Objections		Subcommittee B Rules—First Draft (6-8-99)
Rule 12.1. Notice of Alibi		Subcommittee B Rules—First Draft (6-8-99)
Rule 12.2 Notice of Insanity Defense or Expert Testimony of Defendant's Mental Condition		Subcommittee B Rules—First Draft (6-8-99)
Rule 12.3. Notice of Defense Based Upon Public Authority		Subcommittee B Rules—First Draft (6-8-99)
Rule 13. Trial Together of Indictments or Informations		Subcommittee B Rules—First Draft (6-8-99)
Rule 14. Relief From Prejudicial Joinder		Subcommittee B Rules—First Draft (6-8-99)
Rule 15. Depositions		Subcommittee B Rules—First Draft (6-8-99)
Rule 16. Discovery and Inspection		Subcommittee B Rules—First Draft (6-8-99)

Rule 17. Subpoena		Subcommittee B Rules—First Draft (6-8-99)
Rule 17.1 Pretrial Conference		Subcommittee B Rules —First Draft (6-8-99)
Rule 18. Place of Prosecution and Trial		Subcommittee B Rules— First Draft (6-8-99)
Rule 19. Transfer Within the District		Subcommittee B Rules—First Draft (6-8-99)
Rule 20. Transfer From the District for Plea and Sentence		Subcommittee B Rules—First Draft (6-8-99)
Rule 21. Transfer From the District for Trial		Subcommittee B Rules—First Draft (6-8-99)
Rule 22. Time of Motion to Transfer		Subcommittee B Rules—First Draft (6-8-99)

6-21-99

TO: JUDGE DOWD
FM: B. WILSON

RE: PACE OF RESTYLING

I SHARE YOUR DISCOMFORT, BUT ~~AS~~, BASED UPON MY EXPERIENCE ON THE STYLE SUBCOMMITTEE I DON'T KNOW HOW TO SPEEDUP THE PROCESS (SAVE HAVING THE LIAISON MEMBER DEMONSTRATE MORE RETICENCE).

SINCE I WAS CALLED TO THE BAR ~~IN~~ IN '65 (THIS CENTURY) I HAVE STRUGGLED WITH THE FEDERAL RULES OF CRIMINAL PROCEDURE. THEY ARE SO MUCH IN NEED OF [redacted] CLARIFICATION ("CLEAR-UH-FYIN" IN SCOTT CO.) IN SO MANY PLACES IT SEEMS THAT SLOW SLEDDING IS INEVITABLE.

I MADE A TALK AT AN ARK. BAR ASSN. MEETING RE THE NEED TO MAKE JURY INSTRUCTIONS SO PLAIN THAT "CIVILIANS" CAN EASILY UNDERSTAND THEM. SOME WAG LAWYER IN THE AUDIENCE SAID, "ON TOP OF THAT, WE NEED TO MAKE 'EM SO CLEAR THAT EVEN JUDGES CAN UNDERSTAND THEM." DITTO THE FEDERAL RULES OF CRIM. PROC.

Bill

P.S. I THINK I RECALL THAT YOU ONCE CALLED UPON THE OLD ADAGE, "THE DEVIL IS IN THE DETAILS." THIS IS MOST APT RE THIS PROJECT.

xc: Judge Davis, Chair, & others as appropriate