ADVISORY COMMITTEE
ON
CRIMINAL RULES

San Diego, California
October 19-20, 2000

CRIMINAL RULES COMMITTEE MEETING

October 19-20, 2000
San Diego, California

I PRELIMINARY MATTERS

A. Remarks, Introductions, and Administrative Announcements by the Chair.

B. Review/Approval of Minutes of April 2000, Meeting in New York, NY

C. Criminal Rules Agenda Docketing.

II. CRIMINAL RULES UNDER CONSIDERATION

A. Rules Pending Before Congress (No Memo).

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 32.2. Criminal Forfeitures (New Rule).

5. Rule 54. Application and Exception (Conforming Amendment).

B. Report on Status of Restyling Project–Rules Approved by Standing Committee for Publication

1. In General.

2. "Restyled Rules" Package.

3. "Substantive Change" Package.

C. Review of Suggested Changes by Style Subcommittee to Style Package of Rules (Memo).

D. Other Rules Pending Before Advisory Committee

1. Rule 1. Issue of Whether Reference to § 1784 Should be Restored to Rule 1(a)(5). (Memo).

2. Rules 29, 33 & 34. Issue of Whether Rules Should be Amended to Change Times for Filing Motions (Memo).

3. Rule 35. Issue of Whether the term "Sentencing" Should be Defined and Issue of Amendment Concerning Rule 35(b) (Memo).

4. Rule 41. Proposed Amendments re Installation and Monitoring of Tracking Devices (Memo).

5. Rules 45 & 56. Proposed Amendment to Change Designation of Presidents' Day to Washington's Birthday in Rules (Memo).

6. Rules Governing § 2254 and § 2255 Proceedings (Memo).

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

A. Financial Disclosure Rules.

B. Rules Governing Attorney Conduct.

C. Status Report on Legislation Concerning Affecting Federal Rules of Criminal Procedure.

1. Grand Jury Reform

2. Other Issues

D. Technology Subcommittee of Standing Committee

1V. DESIGNATION OF TIME AND PLACE FOR FUTURE MEETINGS

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I-B

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

April 25-26, 2000
New York City, New York

The Advisory Committee on the Federal Rules of Criminal Procedure met at New York City, New York on April 25 and 26, 2000. 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 Tuesday April 25, 2000. The following persons were present for all or a part of the Committee's meeting:

Hon. W. Eugene Davis, Chair
Hon. David D. Dowd, Jr.
Hon. Edward E. Carnes
Hon. Paul E. Friedman
Hon. John M. Roll
Hon. Susan C. Bucklew
Hon. Tommy E. Miller
Hon. Daniel E. Wathen
Prof. Kate Stith
Mr. Robert C. Josefsberg
Mr. Darryl W. Jackson
Mr. Lucien B. Campbell, Esq.
Mr. Laird Kirkpatrick, designate of the Asst. Attorney General for the Criminal Division, Department of Justice
Prof. David A. Schlueter, Reporter

Also present at the meeting were: Hon. Anthony J. Scirica, Chair of the Standing Committee, Hon. A. Wallace Tashima, member of the Standing Committee and liaison to the Criminal Rules Committee; Mr. Roger Pauley of the Department of Justice; Mr. Peter McCabe of the Administrative Office of the United States Courts, Mr. John Rabiej and Mr. Mark Shapiro from the Rules Committee Support Office of the Administrative Office of the United States Courts; Professor Joseph Kimble and Mr. Joseph Spaniol, consultants to the Standing Committee, Hon. James Parker, former member of the Standing Committee and past-chair of that Committee's Subcommittee on Style, Ms. Lynn Rzonca, briefing attorney for Judge Scirica, and Ms. Laurel Hooper, of the Federal Judicial Center.

Judge Davis, the Chair, welcomed the attendees and noted the presence and assistance of Judges Parker and Tashima, and the new consultant on style to the Standing Committee, Professor Joe Kimble.

II. APPROVAL OF MINUTES

Mr. Jackson moved that the minutes of the Committee's special style meeting in Orlando, Florida in January 2000, be approved. The motion was seconded by Justice Wathen and carried by a unanimous vote.

III. STATUS OF PENDING AMENDMENTS BEFORE THE SUPREME COURT

Mr. Rabiej informed the Committee that the Supreme Court had approved the amendments to Rules 6, 7, 11, 24(c), 32.2, and 54 on April 17, 2000 and had forwarded them to Congress. Barring any additional action by Congress, those changes will go into effect on December 1, 2000.

IV. REPORT ON STATUS OF RESTYING PROJECT: PROPOSED PUBLICATION OF TWO PACKAGES OF RULES

Judge Scirica informed the Committee that he and Professor Cocquillette had met with the Chief Justice and provided a status report on the criminal rules restyling project. Judge Davis added that as a result of discussions between Judge Scirica, Professor Coquillette, Mr. Rabiej, and the Reporter, that it was decided that it would be best to publish the proposed rules changes in two packages. That process was further explained by the Reporter who informed the Committee that the first package would be referred to as the "Style" package and would consist of all of the criminal rules. That package would include changes in style and any other changes resulting from conforming the rules to practice or clarifying ambiguous provisions in the existing rules. He added that a "Reporter's Note" would accompany a number of the rules that would be published separately in a second package. The second package for publication, he continued, would be referred to as the "Substantive" package. He noted that that package would consist of approximately 10 rules that included substantive amendments that had been under consideration by the Committee apart from the restyling project. It could also include, he stated, any rules that involved major or controversial changes. The secondary purpose of this package would be to draw the public's attention to those rules containing significant changes in current practice.

Mr. Pauley questioned whether certain rules, such as the proposed amendment to Rule 35 would have to be included in the substantive package. The Reporter responded that that particular rule had been included because the amendment to that rule had been

under consideration for some time, before the restyling project began. Again, each of the rules in the substantive package would be a restyled version of the rule and would be accompanied by a Committee Note and Reporter's Note that would explain that two versions of the rule were being published separately but simultaneously.

Mr. Rabiej added that a letter of explanation would be included in the publication packages to set out the purposes for duplicate sets of rules.

Judge Dowd moved that the Committee approve the format of using two separate packages for publication, with the understanding that a rule might be added, or removed, from the substantive package. The motion was seconded by Judge Miller and carried by a unanimous vote.

V. UNRESOLVED OR NEW ISSUES IN RULES 1-60*

Judge Davis indicated that the priority for the meeting would be to review any unresolved, or new, issues that remained in Rules 1 to 60, following the subcommittee meetings in February and March.

A. Rule 5. Initial Appearance.

Mr. Pauley pointed out that the restyled Rule 5 included a gap for extraterritorial jurisdiction. The revised rule sets out where officers are to take defendants who have been arrested within a district and outside a district. But the rule does not address what is to happen if a defendant is arrested outside the United States. Judge Miller added that in his district the courts handle a number of initial appearances involving arrests occurring outside the United States. Following additional discussion, Mr. Pauley moved that Rule 5(a)(1)(B) be amended. Judge Miller seconded the motion, which carried by a unanimous vote.

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

Mr. Pauley also pointed out that two sentences in Rule 5.1(e) were out of place. Following some discussion, Mr. Campbell moved that the rule be amended. Judge Carnes seconded the motion, which carried by a unanimous vote.

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

Several committee members noted that in restyling Rule 12.2 a reference to mental examinations had been inadvertently omitted from the revised rule. The Reporter

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* The discussion concerning the rules follows their numerical order rather than the order they were discussed at the meeting.

later informed the Committee that Mr. Pauley, Mr. Campbell and the Reporter had drafted some appropriate language--for both the restyled version of Rule 12.2 and the "substantive" version of Rule 12.2.

D. Rule 26.

Judge Carnes reported that in reviewing the proposed changes to new Rule 26(b)(3), which provides for remote transmission of live testimony, the Subcommittee had initially referred to unavailability provisions in Federal Rule of Evidence 804(a)(1) to (4) in an attempt to avoid a possible conflict with Rule 804(a)(5)'s requirement that a proponent must first show a reasonable attempt to obtain a witness's actual presence in court before offering prior testimony under Rule 804(b)(1). He noted however that for purposes of Rule 26, the only reasonable grounds for unavailability are those listed in Rule 804(a)(4) and (5). The Committee discussed the matter and ultimately agreed to the change, with the recognition that the Evidence Committee might wish to visit the issue.

E. Rule 32. Sentencing and Judgment.

Judge Dowd, the chair of Subcommittee B, informed the Committee that the Subcommittee had addressed the provision in Rule 32(h)(3) concerning whether the sentencing judge must decide all unresolved objections to the presentence report. He noted that on one hand, the Subcommittee recognized that the accuracy of the presentence report was often of assistance to the Bureau of Prisons in deciding administrative disposition of a defendant in the prison system. On the other hand, he noted, the Subcommittee was concerned that requiring a judge to rule on every unresolved objection could be time consuming and inefficient if in fact the factor in question was not material to a sentencing decision. Finally, he stated that Mr. Pauley had suggested an amendment to the rule that would address the problem.

Mr. Campbell added that his research indicated that the Bureau of Prisons depends on the presentence reports in making certain administrative decisions. He noted that the report might actually affect the length of the sentence to be served. Judge Friedman stated that the rule may not go far enough and that perhaps the rule should set out what constitutes "material" information in the report. Judge Carnes observed that trial judges should not be called upon to do the work of the Bureau of Prisons; the role of the trial judge is to determine the sentence. Mr. Pauley stated that the rule, which seemingly requires the judge to resolve all objections, even if they will not affect the sentence, does not reflect current practice in all courts. He explained that in his view, a material matter in a presentence report would be where the defendant has admitted drug addiction in hopes that he or she would be eligible for certain rehabilitation programs while in prison. In that instance, it would be important for the judge to resolve any disputes about whether the defendant in fact was addicted to drugs.

Following additional discussion, Judge Dowd ultimately moved that the Committee adopt Mr. Pauley's suggested change to Rule 32(h)(3), which would require

the sentencing judge to decide unresolved objections to material matters. Judge Roll seconded the motion, which carried by a vote of 6 to 4. Members of the Committee suggested that the Note indicate the purpose of the change and that counsel should be prepared to take a greater role in insuring that the Bureau of Prisons was presented with accurate information.

Several members suggested that in light of the substantive change to Rule 32, it should be included in the "substantive" package of amendments. The Committee ultimately voted to do so.

F. Rule 32.1. Revoking or Modifying Probation or Supervised Release.

Judge Dowd noted that he had identified a potential problem in the wording of Rule 32.1 and the accompanying note, that might be read to preclude magistrate judges from preparing reports and recommendations on whether to revoke or modify probation or supervised release. Mr. Campbell responded that he had done some additional research on the issue and proposed language for both the rule and the note to address the issued raised by Judge Dowd. The Committee agreed to the changes suggested by Mr. Campbell.

Mr. Pauley expressed concern about language in Rule 32.1(b)(2)(C) that might be interpreted to provide an absolute right to a person to examine adverse witnesses in connection with a revocation hearing. Following additional discussion, Mr. Pauley moved, and Judge Miller seconded, a motion to make minor changes in the language of the rule that reflects that the right to cross-examination exists unless the court determines that the interests of justice do not require the witness to appear at the hearing. The Committee approved the amendment by a vote of 9 to 0 with 1 abstention.

G. Rule 38. Stay of Execution.

Judge Dowd noted that at the Committee's meeting in Orlando, a question was raised about Rule 38(e)(2)(D) and whether the term "surety bond" could be substituted for the term "performance bond." He indicated that after further consideration he recommended that the reference to "bond" in the restyled version be retained, and so moved. Judge Roll seconded his motion. The motion carried by a unanimous vote.

I. Rule 41. Search and Seizure.

Professor Stith informed the Committee of Subcommittee A's proposed revision of Rule 41, in particular the reference in the definitions section, Rule 41(a)(2) to "intangibles." The Committee discussed the issue and concluded that the term was difficult to define; in its place the Committee agreed to substitute the word "information." She also noted that there had been a great deal of discussion about Rule 41(b)(1), which would provide for issuing warrants for covert entries. Mr. Pauley indicated that the courts have already approved such entries and that the rule could be amended to indicate

that such entries are non-continuous, as opposed to entries approved under Title III, which may involve continuous monitoring. Following some additional discussion, Professor Stith moved that the section be amended to note explicitly that these types of intrusions are non-continuous. Judge Friedman seconded the motion, which carried by a vote of 9 to 2 with 1 abstention.

Professor Stith also noted that the subcommittee had discussed the question of whether to include the covert entry provision in the published amendments. Mr. Pauley reiterated that the courts have already approved these intrusions so that the rule is not really creating a new type of fourth amendment intrusion. He added that it would be important that the rule address this investigative technique and establish procedural mechanisms for its implementation.

Judge Friedman responded that this issue was one for Congress to address and that only two circuits have addressed the question of covert searches. In particular he was concerned about the open-ended nature of these intrusions, noting that under proposed Rule 41(f)(5), the government could obtain multiple 30-day extensions of time in which to inform the property owner that a covert entry has occurred. Following additional discussion, the Committee agreed by a vote of 11 to 1 to modify that language to reflect that the court could grant a "reasonable" extension of time to deliver the warrant. By the same margin of approval, additional amendments were made to the rule.

Judge Wathen raised the question of whether even the amended version of Rule 41 should be published for comment. Several members indicated a concern that the amendment was not really procedural in nature and that until there was more caselaw on the subject, the issue of covert searches should not be included in the rule. Judge Wathen moved that the substantive amendments regarding covert searches be removed from the rule. Judge Dowd seconded the motion; it failed by a vote of 6 to 7, with Judge Davis casting the tie-breaking vote.

J. Rule 46. Release from Custody; Supervising Detention.

Judge Carnes informed the Committee that Subcommittee A had discussed the language in Rule 46(i), dealing with forfeiture of property if a defendant fails to appear. He noted that the subcommittee had concluded that the language in that provision had been included by Congress and the subcommittee was initially reluctant to change the language. However, he recommended "restyled" language that would retain the essence of the provision and make it clearer that a court may dispose of a charged offense by ordering forfeiture under 18 U.S.C. § 3146(b), if a fine in the amount of the property's value would be an appropriate sentence. Judge Dowd moved that the suggested language be adopted and Judge Bucklew seconded the motion. The motion carried by a unanimous vote.

K. Rule 48. Dismissal.

Judge Dowd indicated that at the Committee's Orlando meeting, a question had been raised about whether to retain Rule 48(b), which permits a court to dismiss an indictment for delays. It had been pointed out at that meeting that the rule had preceded enactment of the Speedy Trial Act and that there was a risk that re-promulgating the rule might be viewed as an attempt to supersede that Act. The Subcommittee had considered an amendment offered by Mr. Pauley but had ultimately decided not to change the rule because it believed that Rule 48(b) still had utility apart from the Speedy Trial Act. Following some additional discussion the Committee decided to retain Rule 48(b) and suggested some modifications to the accompanying Note that would simply reflect that the Committee had considered the relationship between the Speedy Trial Act and Rule 48 and that it intended to make no change in that relationship.

L. Rule 49. Serving and Filing of Papers.

The Reporter informed the Committee that the Civil Rules Committee had published for comment an amendment to Civil Rule 77 concerning electronic service of a court's orders or judgments. He noted that Criminal Rule 49 currently cross-references the civil rules regarding service of papers and recommended that similar language be adopted regarding notice of a court order in Rule 49(c). Following discussion Judge Miller moved that Rule 49(c) be so amended. Mr. Campbell seconded the motion, which carried by a unanimous vote.

VI. VIDEO TELECONFERENCING—RULES 5 & 10

Judge Roll reported that in his circuit there was a great deal of interest in being able to use teleconferencing for initial appearances and arraignments. He also noted, however, that there was also a feeling that if those procedures were dependent upon obtaining the defendant's consent that they would not be used. Following additional discussion, the Committee voted by a margin of 10 to 2 to publish alternate versions of Rule 5—one that would require the defendant to consent to video teleconferencing and one that would not. The Committee also voted by a margin of 11 to 1 to publish similar alternate versions of Rule 10.

VII. ADDITIONAL STYLE CHANGES TO RULES 1 - 60

Judge Davis indicated that additional suggested style changes had been submitted by several parties and that they would be submitted to the Standing Committee's Style Subcommittee, which would be conducting a review of the rules during the public comment period. Any minor, purely mechanical, corrections or changes could be incorporated into the two packages to be sent to the Standing Committee. The Reporter added that if time permitted, any changes or corrections could be considered at the Committee's Fall 2000 meeting, while the rules were still out for public comment.

VIII. FINANCIAL DISCLOSURE RULES

Judge Scirica provided some background information on proposed financial disclosure rules. He indicated that the Judicial Conference was very interested in the topic and that each of the rules committees would hopefully agree on some standard language for their particular rules to be published in August 2000. He noted that there had been considerable discussion about whether these proposed rules were even procedural in nature; some were of the view that this is really a matter of professional ethics and not the rules process. In response, others had noted that the Appellate Rules already included a disclosure provision, that Congress apparently expected the Judicial Conference to address the issue, and finally, the Code of Conduct Committee had requested assistance from the rules committees. Judge Scirica also stated that there had been a good deal of debate over just what should be disclosed. A review of the district and appellate courts had indicated a wide variety of approaches to the problem. For now, he said, there appeared to be a consensus to address the topic in a more limited fashion in the rules themselves but to include a cross-reference to the fact that the Judicial Conference might develop a standard form that could be used; that form in turn might require information beyond the basic financial disclosure envisioned at this time.

Judge Davis indicated that he and the Reporter had discussed the issue and that the Reporter, using Appellate Rule 26.1, had drafted a new Rule 12.4 that would parallel that Rule. The Reporter added that eventually the Reporters of the various rules committees would probably work further to standardize the language.

Following additional discussion regarding disclosure of information concerning organizational victims, the Committee approved the draft.

IX. APPROVAL OF HABEAS RULES FOR PUBLICATION

The Reporter presented copies of proposed amendments and committee notes to the Habeas Corpus Rules (Rules Governing § 2254 and § 2255 Proceedings) to the Committee for its consideration. He noted that the Committee had already approved the substance of the changes at the Fall 1998 and Fall 1999 meetings. Judge Carnes and Judge Miller briefly addressed the purpose of the amendments. Judge Friedman questioned the proposed language in Rules 2 and 3 that would change the current practice of receiving and reviewing habeas actions. In his experience, one judge reviews all of the habeas actions that are received and then decides whether they should actually be filed. Other judges noted that the amendment conforms to Civil Rule 5(e) that indicates that the clerk is to file the papers and then refers them to the court for a determination of whether there are any defects in the papers.

Judge Miller moved that the rules be approved and forwarded with a recommendation that they be published for comment. Mr. Pauley seconded the motion, which carried by a unanimous vote.

X. APPROVAL OF PUBLICATION OF LOCAL RULES ON INTERNET

Mr. Rabiej asked the Committee to consider a proposal to publish all of the local rules on the internet. He noted that some concerns had been raised that publication might lead to unnecessary cross-analysis of some of the rules. Following brief discussion, Judge Dowd moved that the Committee approve publication of the local rules on the internet. Judge Miller seconded the motion, which carried unanimously.

XI. APPROVAL OF RULES 1 – 60 FOR SUBMISSION TO STANDING COMMITTEE FOR PUBLICATION

Judge Miller moved that the Committee forward restyled Rules 1 through 60 the Standing Committee for publication and comment. Judge Wathen seconded the motion, which carried by a unanimous vote. Judge Davis thanked the Committee members for all of their dedicated efforts in the restyling project.

XII. DESIGNATION OF TIME AND LOCATION OF NEXT MEETINGS

Judge Davis recommended that the Committee hold its Fall 2000 meeting in San Diego. The tentative dates for that meeting are October 23 to 24.

Respectfully submitted,

David A. Schlueter
Reporter, Criminal Rules Committee

I-C

AGENDA DOCKETING

ADVISORY COMMITTEE ON CRIMINAL RULES

Proposal	Source, Date, and Doc #	Status
[CR 4] — Require arresting officer to notify pretrial services officer, U.S. Marshal, and U.S. Attorney of arrest	Local Rules Project	10/95 — Subc appointed 4/96 — Rejected by subc **COMPLETED**
[CR 5] — Video Teleconferencing of Initial Appearances and Arraignments	Judge Fred Biery 5/98; Judge Durwood Edwards 6/98	5/98 — Referred to chair and reporter for consideration 10/98 — Referred to subcmte 10/99 — Approved for publication by advisory cmte 1/00 — Considered by comte as part of style package 4/00 — Considered; request to publish 6/00 — Stg Comte approves request to publish 8/00 — Published **PENDING FURTHER ACTION**
[CR 5(a)] — Time limit for hearings involving unlawful flight to avoid prosecution arrests	DOJ 8/91; 8/92	10/92 — Subc appointed 4/93 — Considered 6/93 — Approved for publication 9/93 — Published for public comment 4/94 — Revised and forwarded to ST Cmte 6/94 — Approved by ST Cmte 9/94 — Approved by Jud Conf 4/95 — Approved by Sup Ct 12/95 — Effective **COMPLETED**
[CR 5.1(d)] — Eliminate consent requirement for magistrate judge consideration	Judge Swearingen 10/28/96 (96-CR-E)	1/97 — Sent to reporter 4/97 — Recommends legislation to ST Cmte 6/97 — Recommitted by ST Cmte 10/97—Adv. Cmte declines to amend provision. 3/98 — Jud Conf instructs rules cmtes to propose amendment 4/98 — Approves amendment, but defers until style project completed 6/98 — Stg Cmte concurs with deferral 6/99 — Considered 10/99 — Approved for publication by advisory cmte 1/00 — Considered by comte 4/00 — Considered; request to publish 6/00 — Stg Comte approves request to publish 8/00 — Published **PENDING FURTHER ACTION**

Proposal	Source, Date, and Doc #	Status
[CR 5.1] — Extend production of witness statements in CR26.2 to 5.1.	Michael R. Levine, Asst. Fed. Defender 3/95	10/95 — Considered 4/96 — Draft presented and approved 6/96 — Approved by ST Cmte 8/96— Published for public comment 4/97— Forwarded to ST Cmte 6/97 — Approved by ST Cmte 9/97—Approved by Jud Conf 4/98 — Approved by Supreme Court 12/98 — Effective **COMPLETED**
[CR 6] — Statistical reporting of indictments	David L. Cook AO 3/93	10/93 — Cmte declined to act on the issue **COMPLETED**
[CR6(a)] — Reduce number of grand jurors	H.R. 1536 introduced by Cong Goodlatte	5/97 — Introduced by Congressman Goodlatte, referred to CACM with input from Rules Cmte 10/97—Adv Cmte unanimously voted to oppose any reduction in grand jury size. 1/98—ST Cmte voted to recommend that the Judicial Conference oppose the legislation. 3/98 — Jud Conf concurs **COMPLETED**
[CR 6(d)] — Allow witness to be accompanied into grand jury by counsel	Omnibus Approp. Act (P.L.105-277)	10/98 — Considered; Subcomm. Appointed 1/99 — Stg Cmte approved subcomm rec. not to allow representation 3/99 — Jud Conf approves report for submission to Congress **COMPLETED**
[CR 6(d)] — Interpreters allowed during grand jury	DOJ 1/22/97 (97-CR-B)	1/97 — Sent directly to chair 4/97 — Draft presented and approved for request to publish 6/97 — Approved by ST Cmte for publication 8/97— Published for public comment 4/98— Approved and forwarded to St Cmte 6/98 — Approved by Stg Cmte 9/98 — Approved by Jud Conf 4/99 — Approved by Sup. Ct. 12/1— Effective **COMPLETED**
[CR 6(e)] — Intra-Department of Justice use of Grand Jury materials	DOJ	4/92 — Rejected motion to send to ST Cmte for public comment 10/94 — Discussed and no action taken **COMPLETED**
[CR 6(e)(3)(C)(iv)] — Disclosure of Grand Jury materials to State Officials	DOJ	4/96 — Cmte decided that current practice should be reaffirmed 10/99 — Approved for publication by advisory cmte **COMPLETED**
[CR 6(e)(3)(C)(iv)] — Disclosure of Grand Jury materials to State attorney discipline agencies	Barry A. Miller, Esq. 12/93	10/94 — Considered, no action taken **COMPLETED**

Proposal	Source, Date, and Doc #	Status
[CR6(f)] — Return by foreperson rather than entire grand jury	DOJ 1/22/97 (97-CR-A)	1/97 — Sent directly to chair 4/97— Draft presented and approved for publication 6/97 — Approved by ST Cmte for publication 8/97— Published for public comment 4/98— Approved and forwarded to St Cmte 6/98 — Approved by Stg Cmte 9/98 — Approved by Judicial Conference 4/99 — Approved by Sup. Ct. 12/1— Effective **COMPLETED**
[CR7(b)] — Effect of tardy indictment	Congressional constituent 3/21/00 (00-CR-B)	5/00— Referred to chair and reporter **PENDING FURTHER ACTION**
[CR7(c)(2)] — Reflect proposed new Rule 32.2 governing criminal forfeitures		4/97— Draft presented and approved for publication 6/97 — Approved by ST Cmte for publication 8/97— Published for public comment 4/98— Approved and forwarded to St Cmte 6/98 — Withdrawn in light of R. 32.2 rejection by Stg. Cmte 10/98 — revised and resubmitted to stg cmte for transmission to conference — 1/99— Approved by Stg Cmte 3/99— Approved by Jud Conf 4/00— Approved by Supreme Court **COMPLETED**
[CR 10] — Arraignment of detainees through video teleconferencing; Defendant's presence not required	DOJ 4/92	4/92 — Deferred for further action 10/92 — Subc appointed 4/93 — Considered 6/93 — Approved for publication by ST Cmte 9/93 — Published for public comment 4/94 — Action deferred, pending outcome of FJC pilot programs 10/94 — Considered 4/98 —Draft amendments considered, but subcmte appointed to further study 10/98 — Considered by cmte; reporter to redraft and submit at next meeting 4/99 — Considered 10/99— Approved for publication by advisory cmte 1/00 — Considered by comte as part of style package 4/00 — Considered; request to publish 6/00 — Stg Comte approves request to publish 8/00 — Published **PENDING FURTHER ACTION**
[CR 10] — Guilty plea at an arraignment	Judge B. Waugh Crigler 10/94	10/94 — Suggested and briefly considered **DEFERRED INDEFINITELY**
[CR 11] — Magistrate judges authorized to hear guilty pleas, and inform accused of possible deportation	James Craven, Esq. 1991	4/92 — Disapproved **COMPLETED**

Proposal	Source, Date, and Doc #	Status
[CR 11] — Advise defendant of impact of negotiated factual stipulation	David Adair & Toby Slawsky, AO 4/92	10/92 — Motion to amend withdrawn **COMPLETED**
[CR 11(c)] — Advise defendant of any appeal waiver provision which may be contained in plea agreement	Judge Maryanne Trump Barry 7/19/96 (96-CR-A)	10/96 — Considered, draft presented 4/97 — Draft presented and approved for request to publish 6/97 — Approved for publication by ST Cmte 8/97— Published for public comment 4/98 — Approved and forwarded to Stg Cmte 6/98 — Approved by Stg Cmte 9/98 — Approved by Jud Conf 4/99 — Approved by Sup. Ct. 12/99— Effective **COMPLETED**
[CR 11(d)] — Examine defendant's prior discussions with a government attorney	Judge Sidney Fitzwater 11/94 & 3/99	4/95 — Discussed and no motion to amend **COMPLETED** 3/99 — Sent to chair and reporter 4/00 — Considered; request to publish 6/00 — Stg Comte approves request to publish 8/00 — Published **PENDING FURTHER ACTION**
[CR 11(e)] — Judge, other than the judge assigned to hear case, may take part in plea discussions	Judge Jensen 4/95	10/95 — Considered 4/96 —Tabled as moot, but continued study by subcmte on other Rule 11 issues **DEFERRED INDEFINITELY**
[CR 11(e)(4) — Binding Plea Agreement (Hyde decision)	Judge George P. Kazen 2/96	4/96 — Considered 10/96 — Considered 4/97 — Deferred until Sup Ct decision **COMPLETED**
[CR 11(e)(1) (A)(B) and (C)] — Sentencing Guidelines effect on particular plea agreements	CR Rules Committee 4/96	4/96 — To be studied by reporter 10/96 — Draft presented and considered 4/97 — Draft presented and approved for request to publish 6/97 — Approved for publication by ST Cmte 8/97— Published for public comment 4/98 — Approved and forwarded to Stg Cmte 6/98 — Approved by Stg Cmte 9/98 — Approved by Jud Conf 4/99 — Approved by Sup. Ct. 12/99 — Effective **COMPLETED**
[CR 11]—Pending legislation regarding victim allocution	Pending legislation 97-98	10/97—Adv Cmte expressed view that it was not opposed to addressing the legislation and decided to keep the subcmte in place to monitor/respond to the legislation. **COMPLETED**

Proposal	Source, Date, and Doc #	Status
[CR 11(e)(6) — Court required to inquire whether the defendant is entitled to an adjustment for acceptance of responsibility	Judge John W. Sedwick 10/98 (98-CR-C)	**PENDING FURTHER ACTION**
[CR 12] — Inconsistent with Constitution	Paul Sauers 8/95	10/95 — Considered and no action taken **COMPLETED**
[CR 12(b)] — Entrapment defense raised as pretrial motion	Judge Manuel L. Real 12/92 & Local Rules Project	4/93 — Denied 10/95 — Subcmte appointed 4/96 — No action taken **COMPLETED**
[CR 12(i)] — Production of statements		7/91 — Approved by ST Cmte for publication 4/92 — Considered 6/92 — Approved by ST Cmte 9/92 — Approved by Jud Conf 4/93 — Approved by Sup Ct 12/93 — Effective **COMPLETED**
[CR12.2] — Authority of trial judge to order mental examination.	Presented by Mr. Pauley on behalf of DOJ at 10/97 meeting.	10/97—Adv Cmte voted to consider draft amendment at next meeting. 4/98 — Deferred for further study of constitutional issues 10/98 — Considered draft amendments, continued for further study 4/99 — Considered 10/99 — Considered by comte 1/00 — Considered by comte as part of style package 4/00 — Considered; request to publish 6/00 — Stg Comte approves request to publish 8/00 — Published **PENDING FURTHER ACTION**
[CR 12.4] — Financial disclosure	Stg Comte, 1/00	4/00 — Considered; request to publish 6/00 — Stg Comte approves request to publish 8/00 — Published **PENDING FURTHER ACTION**
[CR 16] — Disclosure to defense of information relevant to sentencing	John Rabiej 8/93	10/93 — Cmte took no action **COMPLETED**
[CR 16] — Prado Report and allocation of discovery costs	'94 Report of Jud Conf	4/94 — Voted that no amendment be made to the CR rules **COMPLETED**
[CR 16] — Prosecution to inform defense of intent to introduce extrinsic act evidence	CR Rules Committee '94	10/94 — Discussed and declined **COMPLETED**

Proposal	Source, Date, and Doc #	Status
[CR 16(a)(1)] — Disclosure of experts		7/91 — Approved by for publication by St Cmte 4/92 — Considered 6/92 — Approved by ST Cmte 9/92 — Approved by Jud Conf 4/93 — Approved by Sup Ct 12/93 — Effective **COMPLETED**
[CR 16(a)(1)(A)] — Disclosure of statements made by organizational defendants	ABA	11/91 — Considered 4/92 — Considered 6/92 — Approved by ST Cmte for publication, but deferred 12/92 — Published 4/93 — Discussed 6/93 — Approved by ST Cmte 9/93 — Approved by Jud Conf 4/94 — Approved by Sup Ct 12/94 — Effective **COMPLETED**
[CR 16(a)(1)(C)] — Government disclosure of materials implicating defendant	Prof. Charles W. Ehrhardt 6/92 & Judge O'Brien	10/92 — Rejected 4/93 — Considered 4/94 — Discussed and no motion to amend **COMPLETED**
[CR 16(a)(1)(E)] — Require defense to disclose information concerning defense expert testimony	Jo Ann Harris, Asst. Atty. Gen., CR Div., DOJ 2/94; clarification of the word "complies" Judge Propst (97-CR-C)	4/94 — Considered 6/94 — Approved for publication by ST Cmte 9/94 — Published for public comment 7/95 — Approved by ST Cmte 9/95 — Rejected by Jud Conf 1/96 — Discussed at ST meeting 4/96 — Reconsidered and voted to resubmit to ST Cmte 6/96 — Approved by ST Cmte 9/96 — Approved by Jud Conf 4/97 — Approved by Sup Ct 12/97 — Effective **COMPLETED** 3/97 — Referred to reporter and chair 10/98 — Incorporated in proposed amendments to Rule 12.2 1/00 — Considered by comte as part of style package 4/00— Comte decided not to take action **COMPLETED**

Proposal	Source, Date, and Doc #	Status
[CR 16(a) and (b)] — Disclosure of witness names and statements before trial	William R. Wilson, Jr., Esq. 2/92 5/18/99 (99-CR-D)	2/92 — No action 10/92 — Considered and decided to draft amendment 4/93 — Deferred until 10/93 10/93 — Considered 4/94 — Considered 6/94 — Approved for publication by ST Cmte 9/94 — Published for public comment 4/95 — Considered and approved 7/95 — Approved by ST Cmte 9/95 — Rejected by Jud Conf **COMPLETED** 5/99— Sent to chair and reporter **PENDING FURTHER ACTION**
[CR 16(d)] — Require parties to confer on discovery matters before filing a motion	Local Rules Project & Mag Judge Robert Collings 3/94	10/94 — Deferred 10/95 — Subcmte appointed 4/96 — Rejected by subcmte **COMPLETED**
[CR23(b)] — Permits six-person juries in felony cases	S. 3 introduced by Sen Hatch 1/97	1/97 — Introduced as § 502 of the Omnibus Crime Prevention Act of 1997 10/97—Adv. Cmte voted to oppose the legislation 1/98— ST Cmte expressed grave concern about any such legislation. **COMPLETED**
[CR 24(a)] — Attorney conducted voir dire of prospective jurors	Judge William R. Wilson, Jr. 5/94	10/94 — Considered 4/95 — Considered 6/95 — Approved for publication by ST Cmte 9/95 — Published for public comment 4/96 — Rejected by advisory cmte, but should be subject to continued study and education; FJC to pursue educational programs **COMPLETED**
[CR 24(b)] — Reduce or equalize peremptory challenges in an effort to reduce court costs	Renewed suggestions from judiciary; Judge Acker (97-CR-E); pending legislation S-3.	2/91 — ST Cmte, after publication and comment, rejected CR Cmte 1990 proposal 4/93 — No motion to amend 1/97 — Omnibus Crime Control Act of 1997 (S.3) introduced [Section 501] 6/97 — Stotler letter to Chairman Hatch **COMPLETED** 10/97—Adv. Cmte decided to take no action on proposal to randomly select petit and venire juries and abolish peremptory challenges. 10/97—Adv. Cmte directed reporter to prepare draft amendment equalizing peremptory challenges at 10 per side. 4/98 — Approved by 6 to 5 vote and will be included in style package 10/99 — Rejected inclusion in style package **COMPLETED**

Proposal	Source, Date, and Doc #	Status
[CR 24(c)] — Alternate jurors to be retained in deliberations	Judge Bruce M. Selya 8/96 (96-CR-C)	10/96 — Considered and agreed to in concept; reporter to draft appropriate implementing language 4/97 — Draft presented and approved for request to publish 6/97 — Approved for publication by ST Cmte 8/97— Published for public comment 4/98 — Approved and forwarded to Stg Cmte 6/98 — Approved by Stg Cmte 9/98 — Approved by Jud Conf 4/99 — Approved by Sup. Ct. **COMPLETED**
[CR 26] — Questioning by jurors	Prof. Stephen Saltzburg	4/93 — Considered and tabled until 4/94 4/94 — Discussed and no action taken **COMPLETED**
[CR 26] — Expanding oral testimony, including video transmission	Judge Stotler 10/96	10/96 — Discussed 4/97 — Subcmte will be appointed 10/97—Subcmte recommended amendment. Adv Cmte voted to consider a draft amendment at next meeting. 4/98 — Deferred for further study 10/98 — Cmte approved, but deferred request to publish until spring meeting or included in style package 4/99 — Considered 10/99 — Approved for publication by advisory cmte 1/00 — Considered by comte as part of style package 4/00 — Considered; request to publish 6/00 — Stg Comte approves request to publish 8/00 — Published **PENDING FURTHER ACTION**
[CR 26] — Court advise defendant of right to testify	Robert Potter	4/95 — Discussed and no motion to amend **COMPLETED**
[CR 26.2] — Production of statements for proceedings under CR 32(e), 32.1(c), 46(i), and Rule 8 of § 2255		7/91 — Approved for publication by ST Cmte 4/92 — Considered 6/92 — Approved by ST Cmte 9/92 — Approved by Jud Conf 4/93 — Approved by Sup Ct 12/93 — Effective **COMPLETED**
[CR 26.2] — Production of a witness' statement regarding preliminary examinations conducted under CR 5.1	Michael R. Levine, Asst. Fed. Defender 3/95	10/95 — Considered by cmte 4/96 — Draft presented and approved 6/96 — Approved by ST Cmte 8/96 — Published for public comment 4/97— Forwarded to ST Cmte 6/97 — Approved by ST Cmte 9/97—Jud Conf approves 4/98 — Approved by Supreme Court 12/98 — Effective **COMPLETED**

Proposal	Source, Date, and Doc #	Status
[CR26.2(f)] — Definition of Statement	CR Rules Cmte 4/95	4/95 — Considered 10/95 — Considered and no action to be taken **COMPLETED**
[CR 26.3] — Proceedings for a mistrial		7/91 — Approved for publication by ST Cmte 4/92 — Considered 6/92 — Approved by ST Cmte 9/92 — Approved by Jud Conf 4/93 — Approved by Sup Ct 12/93 — Effective **COMPLETED**
[CR 29(b)] — Defer ruling on motion for judgment of acquittal until after verdict	DOJ 6/91	11/91 — Considered 4/92 — Forwarded to ST Cmte for public comment 6/92 — Approved for publication, but delayed pending move of RCSO 12/92 — Published for public comment on expedited basis 4/93 — Discussed 6/93 — Approved by ST Cmte 9/93 — Approved by Jud Conf 4/94 — Approved by Sup Ct 12/94 — Effective **COMPLETED**
[CR 30] — Permit or require parties to submit proposed jury instructions before trial	Local Rules Project	10/95 — Subcmte appointed 4/96 — Rejected by subcmte **COMPLETED**
[CR 30] — discretion in timing submission of jury instructions	Judge Stotler 1/15/97 (97-CR-A)	1/97 — Sent directly to chair and reporter 4/97 — Draft presented and approved for request to publish 6/97 — Approved for publication by ST Cmte 8/97— Published for public comment 4/98 — Deferred for further study 10/98 — Considered by cmte, but deferred pending Civil Rules Cmte action on CV 51 1/00 — Considered by comte as part of style package 4/00 — Considered; request to publish 6/00 — Stg Comte approves request to publish 8/00 — Published **PENDING FURTHER ACTION**
[CR 31] — Provide for a 5/6 vote on a verdict	Sen. Thurmond, S.1426, 11/95	4/96 — Discussed, rulemaking should handle it **COMPLETED**

Proposal	Source, Date, and Doc #	Status
[CR 31(d)] — Individual polling of jurors	Judge Brooks Smith	10/95 — Considered 4/96 — Draft presented and approved 6/96 — Approved by ST Cmte 8/96 — Published for public comment 4/97 — Forwarded to ST Cmte 6/97 — Approved by ST Cmte 9/97—Approved by Jud Conf 4/98 — Approved by Supreme Court 12/98 — Effective **COMPLETED**
[31(e)] — Reflect proposed new Rule 32.2 governing criminal forfeitures		4/97— Draft presented and approved for publication 6/97 — Approved for publication by ST Cmte 8/97— Published for public comment 4/98— Approved and forwarded to St Cmte 6/98 — Withdrawn in light of rejection of R. 32.2 by Stg Cmte 10/98 — revised and resubmitted to stg cmte for transmission to conference 1/99— Approved by Stg Cmte 3/99 — Approved by Jud Conf 4/00 — Approved by Supreme Court **COMPLETED**
[CR 32] — Amendments to entire rule; victims' allocution during sentencing	Judge Hodges, before 4/92; pending legislation reactivated issue in 1997/98.	10/92 — Forwarded to ST Cmte for public comment 12/92 — Published 4/93 — Discussed 6/93 — Approved by ST Cmte 9/93 — Approved by Jud Conf 4/94 — Approved by Sup Ct 12/94 — Effective **COMPLETED** 10/97—Adv Cmte expressed view that it was not opposed to addressing the legislation and decided to keep the subcmte in place to monitor/respond to the legislation. **PENDING FURTHER ACTION**
[CR 32]—findings on controverted matters in presentence report		3/00 — considered by subcomte as part of style package 4/00 — Considered; request to publish 6/00 — Stg Comte approves request to publish 8/00 — Published **PENDING FURTHER ACTION**
[CR 32]—release of presentence and related reports	Request of Criminal Law Committee	10/98 — Reviewed recommendation of subcomm and agreed that no rules necessary **COMPLETED**
[CR 32(c)(5)] — clerk required to file notice of appeal	Clerk, 7th Circuit 4/11/00 (00-CR-A)	3/00 — Sent directly to chair 5/00 — referred to reporter **PENDING FURTHER ACTION**

Proposal	Source, Date, and Doc #	Status
[CR 32(d)(2) — Forfeiture proceedings and procedures reflect proposed new Rule 32.2 governing criminal forfeitures	Roger Pauley, DOJ, 10/93	4/94 — Considered 6/94 — Approved by ST Cmte for public comment 9/94 — Published for public comment 4/95 — Revised and approved 6/95 — Approved by ST Cmte 9/95 — Approved by Jud Conf 4/96 — Approved by Sup Ct 12/96 — Effective **COMPLETED** 4/97— Draft presented and approved for publication 6/97 — Approved for publication by ST Cmte 8/97— Published for public comment 4/98— Approved and forwarded to St Cmte 6/98 — Withdrawn in light of rejection of R. 32.2 by Stg Cmte 10/98 — revised and resubmitted to stg cmte for transmission to conference 1/99— Approved by Stg Cmte 3/99 — Approved by Jud Conf 4/00 — Approved by Supreme Ct **COMPLETED**
[CR 32(e)] — Delete provision addressing probation and production of statements (later renumbered to CR32(c)(2))	DOJ	7/91 — Approved by ST Cmte for publication 4/92 — Considered 6/92 — Approved by ST Cmte 9/92 — Approved by Judicial Conference 4/93 — Approved by Supreme Court 12/93 — Effective **COMPLETED**
[CR 32.1] — Production of statements		7/91 — Approved for publication by ST Cmte 4/92 — Considered 6/92 — Approved by ST Cmte 9/92 — Approved by Jud Conf 4/93 — Approved by Sup Ct 12/93 — Effective **COMPLETED**
[CR 32.1]— Technical correction of "magistrate" to "magistrate judge."	Rabiej (2/6/98)	2/98—Letter sent advising chair & reporter 4/98 — Approved, but deferred until style project completed 1/00 — considered by comte as part of style package 4/00 — Considered; request to publish 6/00 — Stg Comte approves request to publish 8/00 — Published **PENDING FURTHER ACTION**
[CR 32.1]—pending victims rights/allocution litigation	Pending litigation 1997/98.	10/97—Adv Cmte expressed view that it was not opposed to addressing the legislation and decided to keep the subcmte in place to monitor/respond to the legislation. **PENDING FURTHER ACTION**

Proposal	Source, Date, and Doc #	Status
[CR 32.2] — Create forfeiture procedures	John C. Keeney, DOJ, 3/96 (96-CR-D)	10/96 — Draft presented and considered 4/97 — Draft presented and approved for request to publish 6/97 — Approved for publication by ST Cmte 8/97— Published for public comment 4/98— Approved and forwarded to St Cmte 6/98 — Rejected by Stg Cmte 10/98 — revised and resubmitted to stg cmte for transmission to conference 1/99 — Approved by Stg Cmte 3/99 — Approved by Jud Conf 4/00 — Approved by Supreme Ct **COMPLETED**
[CR 33] — Time for filing motion for new trial on ground of newly discovered evidence	John C. Keeney, DOJ 9/95	10/95 — Considered 4/96 — Draft presented and approved 6/96 — Approved for publication by ST Cmte 8/96 — Published for public comment 4/97 — Forwarded to ST Cmte 6/97 — Approved by ST Cmte 9/97—Approved by Jud Conf 4/98 — Approved by Supreme Court 12/98 — Effective **COMPLETED**
[CR 35(b)] — Recognize combined pre-sentencing and post-sentencing assistance	Judge T. S. Ellis, III 7/95	10/95 — Draft presented and considered 4/96 — Forwarded to ST Cmte 6/96 — Approved for publication by ST Cmte 8/96 — Published for public comment 4/97 — Forwarded to ST Cmte 6/97 — Approved by ST Cmte 9/97—Approved by Jud Conf 4/98 — Approved by Supreme Court 12/98 — Effective **COMPLETED**
[CR 35(b)] To permit sentence reduction when defendant assists government before or within 1 year after sentence	Judge Ed Carnes 3/99 (99-CR-A); Asst. Attorney Gen./ Crim. Div. 4/99 (99-CR-C)	3/99— Referred to chair and reporter 1/00 — Considered by comte as part of style package 6/00 — Stg Comte approves request to publish 8/00 — Published **PENDING FURTHER ACTION**
[CR 35(b)] — Recognize assistance in any offense	S.3, Sen Hatch 1/97	1/97 — Introduced as § 602 and 821 of the Omnibus Crime Prevention Act of 1997 6/97 — Stotler letter to Chairman Hatch **COMPLETED**

Proposal	Source, Date, and Doc #	Status
[CR 35(c)] — Correction of sentence, timing	Jensen, 1994 9th Cir. decision	10/94 — Considered 4/95 — No action pending restylization of CR Rules 4/99 — Considered 4/00— Considered and included in request to publish 6/00 — Stg Comte approves request to publish 8/00 — Published **PENDING FURTHER ACTION**
[CR 38(e)] — Conforming amendment to CR 32.2		4/97— Draft presented and approved for publication 6/97 — Approved by ST Cmte for publication 8/97— Published for public comment 4/98— Approved and forwarded to St Cmte 6/98 — Withdrawn in light of rejection of R. 32.2 by Stg Cmte 10/98 — revised and resubmitted to stg cmte for transmission to conference 1/99— Approved by Stg Cmte 3/99 — Approved by Jud Conf 4/00— Approved by Supreme Ct **COMPLETED**
[CR 40] — Commitment to another district (warrant may be produced by facsimile)		7/91 — Approved for publication by ST Cmte 4/92 — Considered 6/92 — Approved by ST Cmte 9/92 — Approved by Jud Conf 4/93 — Approved by Sup Ct 12/93 — Effective **COMPLETED**
[CR 40] —Treat FAX copies of documents as certified	Mag Judge Wade Hampton 2/93	10/93 — Rejected **COMPLETED**
[CR 40(a)] — Technical amendment conforming with change to CR5	Criminal Rules Cmte 4/94	4/94 — Considered, conforming change no publication necessary 6/94 — Approved by ST Cmte 9/94 — Approved by Jud Conf 4/95 — Approved by Sup Ct 12/95 — Effective **COMPLETED**
[CR 40(a)] —Proximity of nearest judge for removal proceedings	Mag Judge Robert B. Collings 3/94	10/94 — Considered and deferred further discussion until 4/95 10/96 — Considered and rejected **COMPLETED**
[CR 40(d)] — Conditional release of probationer; magistrate judge sets terms of release of probationer or supervised release	Magistrate Judge Robert B. Collings 11/92	10/92 — Forwarded to ST Cmte for publication 4/93 — Discussed 6/93 — Approved by ST Cmte 9/93 — Approved by Jud Conf 4/94 — Approved by Sup Ct 12/94 — Effective **COMPLETED**

Proposal	Source, Date, and Doc #	Status
[CR 41] — Search and seizure warrant issued on information sent by facsimile		7/91 — Approved for publication by ST Cmte 4/92 — Considered 6/92 — Approved by ST Cmte 9/92 — Approved by Jud Conf 4/93 — Approved by Sup Ct 12/93 — Effective **COMPLETED**
[CR 41] — Warrant issued by authority within the district	J.C. Whitaker 3/93	10/93 — Failed for lack of a motion **COMPLETED**
[CR 41(c)(2)(D)] — recording of oral search warrant	J. Dowd 2/98	4/98 — Tabled until study reveals need for change **DEFERRED INDEFINITELY**
[CR 41(c)(1) and (d) — enlarge time period	Judge B. Waugh Crigler 11/98 (98-CR-D)	6/00 — Stg Comte approves request to publish 8/00 — Published (rejects expansion of time period) **PENDING FURTHER ACTION**
[CR 41(d)] — covert entry for purposes of observation only	DOJ 9/2/99	10/99 — Considered 1/00 — Considered by comte as part of style package 4/00 — Considered; request to publish 6/00 — Stg Comte approves request to publish 8/00 — Published **PENDING FURTHER ACTION**
[CR 43(b)] —Sentence absent defendant	DOJ 4/92	10/92 — Subcmte appointed 4/93 — Considered 6/93 — Approved for publication by ST Cmte 9/93 — Published for public comment 4/94 — Deleted video teleconferencing provision & forwarded to ST Cmte 6/94 — Approved by ST Cmte 9/94 — Approved by Jud Conf 4/95 — Approved by Sup Ct 12/95 — Effective **COMPLETED**
[CR 43(b)] — Arraignment of detainees by video teleconferencing		10/98 — Subcmte appointed 4/99 — Considered 1/00 — Considered by comte as part of style package 4/00— Considered; request to publish 6/00 — Stg Comte approves request to publish 8/00 — Published **PENDING FURTHER ACTION**

Proposal	Source, Date, and Doc #	Status
[CR 43(c)(4)] — Defendant need not be present to reduce or change a sentence	John Keeney, DOJ 1/96	4/96 — Considered 6/96 — Approved for publication by ST Cmte 8/96 — Published for public comment 4/97 — Forwarded to ST Cmte 6/97 — Approved by ST Cmte 9/97—Approved by Jud Conf 4/98 — Approved by Supreme Court 12/98 — Effective **COMPLETED**
[CR 43(c)(5) — Defendant to waive personal arraignment on subsequent, superseding indictments and enter plea of not guilty in writing	Judge Joseph G. Scoville, 10/16/97 (97-CR-I) and Mario Cano 97---	10/97 — Referred to reporter and chair 4/98 —Draft amendments considered, subcmte appointed 10/98 — Cmte considered; reporter to submit draft at next meeting 4/00— Considered; request to publish 6/00 — Stg Comte approves request to publish 8/00 — Published **PENDING FURTHER ACTION**
[CR 46] — Production of statements in release from custody proceedings		6/92 — Approved by ST Cmte 9/92 — Approved by Jud Conf 4/93 — Approved by Sup Ct 12/93 — Effective **COMPLETED**
[CR 46] — Release of persons after arrest for violation of probation or supervised release	Magistrate Judge Robert Collings 3/94	10/94 — Defer consideration of amendment until rule might be amended or restylized 4/00 — Considered; request to publish 6/00 — Stg Comte approves request to publish 8/00 — Published **PENDING FURTHER ACTION**
[CR 46] — Requirements in AP 9(a) that court state reasons for releasing or detaining defendant in a CR case	11/95 Stotler letter	4/96 — Discussed and no action taken **COMPLETED**
[CR 46 (e)] — Forfeiture of bond	H.R. 2134	4/98 — Opposed amendment **COMPLETED**
[CR 46(i)] — Typographical error in rule in cross-citation	Jensen	7/91 — Approved for publication by ST Cmte 4/94 — Considered 9/94 — No action taken by Jud Conf because Congress corrected error **COMPLETED**
[CR 47] — Require parties to confer or attempt to confer before any motion is filed	Local Rules Project	10/95 — Subcmte appointed 4/96 — Rejected by subcmte **COMPLETED**
[CR 49] — Double-sided paper	Environmental Defense Fund 12/91	4/92 — Chair informed EDF that matter was being considered by other cmtes in Jud Conf **COMPLETED**

Proposal	Source, Date, and Doc #	Status
[CR 49(c)] — Fax noticing to produce substantial cost savings while increasing efficiency and productivity	Michael E. Kunz, Clerk of Court 9/10/97 (97-CR-G)	9/97 — Mailed to reporter and chair 4/98 — Referred to Technology Subcmte 4/99 — Considered 4/00— Considered; request to publish 6/00 — Stg Comte approves request to publish 8/00 — Published **PENDING FURTHER ACTION**
[CR49(c)] — Facsimile service of notice to counsel	William S. Brownell, 10/20/97 (CR-J)	11/97 — Referred to reporter and chair, pending Technology Subcmte study 4/99 — Considered 4/00 — Considered; request to publish 6/00 — Stg Comte approves request to publish 8/00 — Published **PENDING FURTHER ACTION**
[CR 49(e)] —Delete provision re filing notice of dangerous offender status — conforming amendment	Prof. David Schlueter 4/94	4/94 — Considered 6/94 — ST Cmte approved without publication 9/94 — Jud Conf approved 4/95 — Sup Ct approved 12/95 — Effective **COMPLETED**
[CR53] — Cameras in the courtroom		7/93 — Approved by ST Cmte 10/93 — Published 4/94 — Considered and approved 6/94 — Approved by ST Cmte 9/94 — Rejected by Jud Conf 10/94 — Guidelines discussed by cmte **COMPLETED**
[CR54] — Delete Canal Zone	Roger Pauley, minutes 4/97 mtg	4/97 — Draft presented and approved for request to publish 6/97 — Approved for publication by ST Cmte 8/97— Published for public comment 4/98 — Approved and forwarded to Stg Cmte 6/98 —Approved by Stg Cmte 9/98 — Approved by Jud Conf 4/99 — Approved by Sup. Ct. 12/99— Effective **COMPLETED**
[CR 57] — Local rules technical and conforming amendments & local rule renumbering	ST meeting 1/92	4/92 — Forwarded to ST Cmte for public comment 6/93 — Approved for publication by ST Cmte 9/93 — Published for public comment 4/94 — Forwarded to ST Cmte 12/95 — Effective **COMPLETED**
[CR 57] — Uniform effective date for local rules	Stg Cmte meeting 12/97	4/98 — Considered an deferred for further study **PENDING FURTHER ACTION**

Proposal	Source, Date, and Doc #	Status
[CR 58] — Clarify whether forfeiture of collateral amounts to a conviction	Magistrate Judge David G. Lowe 1/95	4/95 — No action **COMPLETED**
[CR 58 (b)(2)] — Consent in magistrate judge trials	Judge Philip Pro 10/24/96 (96- CR-B)	1/97 — Reported out by CR Rules Cmte and approved by ST Cmte for transmission to Jud Conf without publication; consistent with Federal Courts Improvement Act 4/97 — Approved by Sup Ct 12/97 — Effective **COMPLETED**
[CR 59] — Authorize Judicial Conference to correct technical errors with no need for Supreme Court & Congressional action	Report from ST Subcommittee on Style	4/92 — Considered and sent to ST Cmte 6/93 — Approved for publication by ST Cmte 10/93 — Published for public comment 4/94 — Approved as published and forwarded to ST Cmte 6/94 — Rejected by ST Cmte **COMPLETED**
[Megatrials] — Address issue	ABA	11/91 — Agenda 1/92 — ST Cmte, no action taken **COMPLETED**
[Rule 8. Rules Governing §2255] — Production of statements at evidentiary hearing		7/91 — Approved for publication by ST Cmte 4/92 — Considered 6/92 — Approved by ST Cmte 9/92 — Approved by Jud Conf 4/93 — Approved by Sup Ct 12/93 — Effective **COMPLETED**
[Rules Governing Habeas Corpus Proceedings]— miscellaneous changes to Rule 8 & Rule 4 for §2255 & §2254 proceedings	CV Cmte	10/97 — Subcmte appointed 4/98 — Considered; further study 10/98 — Cmte approved some proposals and deferred others for further consideration 4/00 — Considered; request to publish 6/00 — Stg Comte approves request to publish 8/00 — Published **PENDING FURTHER ACTION**
[Hab Corp R8(c)] — Apparent mistakes in Federal Rules Governing § 2255 and § 2254	Judge Peter Dorsey 7/9/97 (97-CR-F)	8/97 — Referred to reporter 10/97 — Referred to subcmte 4/98 — Cmte considered 10/98 — Cmte considered 4/00 — Considered; request to publish 6/00 — Stg Comte approves request to publish 8/00 — Published **PENDING FURTHER ACTION**

Proposal	Source, Date, and Doc #	Status
[Modify the model form for motions under 28 U.S.C. § 2255]	Robert L. Byer, Esq. & David R. Fine, Esq. 8/11/00 (00-CR-C)	8/00 — Referred to reporter & chair **PENDING FURTHER ACTION**
[U.S. Attorneys admitted to practice in Federal courts]	DOJ 11/92	4/93 — Considered **COMPLETED**
[Restyling CR Rules]		10/95 — Considered 4/96 — On hold pending consideration of restyled AP Rules published for public comment 4/98 — Advised that Style Subc intends to complete first draft by the end of the year 12/98 — Style subcmte completes its draft 4/99 — Considered Rules 1-9 6/99 — Considered Rules 1-22 4/00— Rules 32-60 approved by comte; request to publish Rules 1-60 6/00 — Stg Comte approves request to publish 8/00 — Published **PENDING FURTHER ACTION**

II-C

MEMO TO: Members, Criminal Rules Advisory Committee

FROM: Professor Dave Schlueter, Reporter

RE: Proposed Style Changes by Style Subcommittee

DATE: September 18, 2000

After the "Style" package of the rules was finished in August, the Style Subcommittee, of the Standing Committee, was asked to review the package for any inconsistencies, etc. in the final product.

As a result of that review, the Style Subcommittee has submitted a fairly exhaustive list of proposed changes to the "style" package. The suggestions were coordinated by Professor Joe Kimble, using in part, suggestions offered by Mr. Spaniol.

The agenda for the October meeting is relatively light and the current plan is to spend some time at that meeting reviewing the proposed changes and disposing of those suggestions that require little or no discussion. For others, additional research or thinking may be involved and in those instances, the matter can be deferred to the April 2001 meeting. The Subcommittee Chairs (Judge Dowd and Judge Carnes) have been asked to coordinate whatever comments their members might have on the rules that they have worked on.

What follows is a list of each of the rules that appears to be affected by the proposed changes along with some brief recommendations on whether to accept or reject the proposed changes. I approached the project with the presumption that what the Committee had proposed, and what the Standing Committee approved for publication, was fine.

The purpose of this memo is to provide a starting point for discussion in the subcommittee responsible for that rule. In some areas, I have provided a brief note on why I believe the change should be rejected. For example, in some of the changes, the Committee had previously discussed adoption or rejection of particular language. Where I am able to recall that discussion, I have attempted to note it in the recommendations. In others, I simply recommend rejection of the proposed change (with no particular reason given) because I believe the current language is appropriate.

While many of the proposed changes are noncontroversial and make an improvement on the rules, others are bound to generate some discussion.

Several areas deserve some attention because they may result in "global" changes throughout the rules:

- The Committee had decided on a method for using Arabic numerals for any number less than 10 (ten) unless the number was "1." It seemed awkward to write the number 1 in those instances. The Style Subcommittee has proposed a different system. I recommend that we continue the system adopted by the Committee.

- The Committee should probably address the question of whether to specifically identify any cross-references to other provisions within each rule, or whether to simply to refer to "this rule." As the project progressed, we were not always consistent on that point. That issue is raised a number of times in the Style Subcommittee's suggested changes.

- The Style Subcommittee has recommended that we use the word "attorney" rather than "counsel." The Committee may wish to discuss that point. I am not sure that we are wedded to use only one of those terms. I recommend that we retain the word "counsel," especially when we are referring to the traditional and familiar "right to counsel" or the "assistance of counsel."

- The Style Subcommittee has recommended a number of additions and changes to the titles of subdivisions and paragraphs. They note the preference for using the "ing" form of the word. I believe the Committee had already made some of those changes in the restyling project. In some areas, I believe, that the title originally chosen by the Committee is the preferred language.

- A number of rules have deleted over the years, including several as a result of the restyling effort. At one point during the project the Committee decided to keep the rule numbers in place and indicate in brackets that the rule has been abrogated. The Style Subcommittee has recommended that the word "reserved" be used instead. In the transition, it might be better to retain the current word, "abrogated," to make it clear to the readers (Judicial Conference and Supreme Court) that a rule has been removed from the list.

The Rules affected and my comments on the proposed changes are as follows:

Rule 1.

Recommendation: Adopt all suggested changes

Rule 4

Recommendation: Reject suggested changes in Rules 4(a), (b). Although the proposed abbreviated language for finding probable cause is not incorrect, it seems clearer to require a two-step analysis that

focuses on both the alleged crime and the defendant's alleged commission of that crime. (That is the way I teach it to law students). Also, the current order of the sentences in 4(a) seems fine the way it is.

Accept suggested changes in Rule 4(c). No listing is necessary for Rule 4(c)(4)(C).

Rule 5.

Recommendation: Accept all recommended changes in Rule 5(a), (b).

Re Rule 5(c): Some study should be done on whether to accept the proposed changes in 5(c). The proposed changes raise questions about use of the term "magistrate" and "judge" interchangeably in the rule. As I recall we used the general rule that the first reference in the rule should be to "magistrate judge" and all later references would be to "judge." Also, the Committee might wish to discuss whether in Rule 5(c)(2)(F) the reference should be to "court" or to the "clerk."

Rule 5(d). I recommend that we retain the term "counsel" in this rule. Although the terms counsel and attorney are interchangeable, we normally speak of the "right to counsel."

Rule 5.1.

Recommendation: Rule 5(b), (d). Accept recommended changes.

Rule 5(e), (f). As noted in Rule 4, *supra*, although the proposed language is not incorrect, it seems clearer to require a two-step analysis that focuses on both the alleged crime and the defendant's alleged commission of that crime.

Rule 5(g), (h). Accept recommended changes and attempt to conform similar provisions in other rules.

Rule 6.

Recommendation: Rule 6(a), (b). Accept proposed changes

Rule 6(c). Reject deletion of word "district" because it clarifies rule. The term "district clerk" is, I believe, used throughout rules. As I recall, the Committee specifically discussed use of that term to ensure that it was uniformly used throughout all of the rules.

Rule 6(e). Reject proposal to break subdivision (e) into two separate subdivisions. Rule 6(e) is a familiar rule and as in several other rules, there is much to be said for retaining the familiar structure.

In Rule 6(e)(3)(B), the Committee needs to discuss whether cross-references in the rules should refer generically to "this rule" or to the specific subsection, etc.

Rule 6(e)(F). Accept proposed change.

Rule 6(f)-(i) Accept proposed changes.

Rule 7.

Recommendation: Accept proposed change.

Rule 8.

Recommendation: Accept proposed punctuation changes

Committee should decide what to do with Arabic numbers, etc. It had already decided to use Arabic numbers for any number any 10 (ten) unless it was awkward to do so.

Rule 9.

Recommendation: Rule 9(a). These changes should conform to whatever changes are made to Rule 4, *supra*, regarding use of term "court" and what probable cause must show.

Rule 9(b). As I recall, the Committee specifically selected the words "is to be" rather than "must" to avoid awkward language—in one of the first meetings on the project, I believe.

Rule 10

Recommendation: Accept proposed change

Rule 11.

Recommendation: Rule 11(a). Accept proposed change.

Rule 11(b). Reject proposed change and proposed change in order. Committee specifically placed this provision at head of list because the defendant needs to understand at the outset the importance of providing truthful answers to judge.

Rule 11(c)(1)-(4). Accept proposed changes.

Rule 11(c)(5). Reject proposed changes. I am not sure that the proposed reorganization clarifies the provision.

Rule 11(d), (e). Accept proposed changes.

Rule 11(f). Reject proposed changes. The Committee decided not to restyle this subdivision because it tracked Federal Rule of Evidence 410, which was drafted by Congress.

Rule 12.

Recommendation: Rule 12(a). Accept change

Rule 12(b). It is not clear whether changing the term "during the proceeding" is the same as "while the case is pending." Also, the Committee should review interchangeable use of term "objection" and "motion to suppress" in the rule.

Rule 12(e). Reference should be to Rule 12(b)(2) (motions to be made before trial).

Rule 12(f)-(g). Accept changes

Rule 12.1.

Recommendation: Rule 12.1(a). Accept changes

Rule 12.1(b). Accept change in (1) and change "notice" to disclosure"; retain cross-references to other sections of Rule 12.1.

Rule 12.1(c)-(f). Accept changes.

Rule 12.2.

Recommendation: Rule 12.2(a). Accept proposed change of adding word "so." Reject deletion of m-dash. Committee decided at one point to use m-

dashes for emphasis. It is not clear to me that we must either use all m-dashes or comments throughout the rules whenever we use the words "good cause.".

Rule 12.2(b). Accept changes, except make no change to last sentence regarding "good cause"

Rule 12.2(d)-(e). Accept changes.

Rule 12.3.

Recommendation: Rule 12.3(a). Accept changes except--some decision needs to be made regarding whether to refer to "the" or "an" attorney for the government. As I recall, Mr. Pauley has pointed out in the past that the reference should be to "an attorney for the government" The reference to (a)(1) should probably be (a)(3) (referring to the government's response).

Rule 12.3(b). This needs to be conformed to 12.1(c) regarding duty to disclose--i.e. does defense counsel have duty?

Rule 12.3(e). Accept changes.

Rule 14.

Recommendation: Accept recommended changes

Rule 15

Recommendation: Rule 15(a). Check insertion of word "unprivileged." Appears to modify preceding list when intent was probably to expand the list of producible materials, assuming that they were not privileged.

Rule 15(b)-(h). Accept changes.

Rule 16.

Recommendation: Accept changes.

Note reference to Rule 16 instead of "this rule." Conforming global changes may be necessary as noted, *supra*.

Rule 17.

Recommendation: Rule 17(a). Reject suggested new title for subdivision. The current title is more accurate. Accept other changes.

Rule 17(c). Accept recommended changes.

Rule 17(f). Reject suggested change to title.

Rule 17 (g). Reject suggested change; reference to "federal court" was intentional; issue was briefed, I believe, in 1999 as part of restyling effort, etc.

Rule 17(h). Accept change.

Rule 17.1.

Recommendation: Accept change

Rule 18.

Recommendation: Accept change.

Rule 20.

Recommendation: Rule 20(c). Note cross-reference to specific rule number; Committee should address whether to maintain these specific cross-references or simply refer to "this rule."

Rule 20(d). Accept change.

Rule 21.

Recommendation: Rule 21(a), (b). Accept changes.

Rule 21(c). Accept changes (Committee may wish to leave the title for this subdivision as it is and change the one for 20(b) and 20(d)(2).

Rule 24.

Recommendation: Rule 24(c)(1), (2). Reject changes.

Rule 24(c)(3)-(4). Accept changes.

Rule 25.

Recommendation: Accept changes

Rule 26.

Recommendation: Accept changes.

Rule 26.1

Recommendation: Reject suggested change; current title is appropriate. Comma is Optional.

Rule 26.2

Recommendation: Rule 26.2(a). Reject suggestion to refer to attorney for the government as "the" attorney. Accept other changes.

Rule 26.2(e). Reject proposed changes; there is a difference between producing and delivering an object.

Rule 29.

Recommendation: Accept changes.

Rule 30.

Recommendation: Reject change. Current language refers to "grounds" for objection, which recognizes that there may be more than one ground for an objection--it also tracks the current rule's language.

Committee Note needs to be corrected; Civil Rule has not yet been amended to change the time for submitting instructions.

Rule 32.

Recommendation: Rule 32(a)-(f). Accept changes

Rule 32(g). Reject proposed change; there may be multiple grounds for objections.

Rule 32(h)(2). Reject proposed changes; "disobeys" sounds awkward.

Rule 32(h)(3). Reject proposed change; proposed title does not capture essence of the paragraph.

Rule 32(h)(4). Accept the recommended changes.

Rule 32(h)(5). Accept recommendations.

Rule 32(i). Reject recommendations; "cannot" and "unable" are not necessarily synonymous and might result in unintended substantive change.

Rule 32.1.

Recommendation: Rule 32.1(a) Accept recommendations, except recommended restructuring of Rule 32.1(a)(1)

Rule 32.1(b)(1). Committee needs to decide whether to use reference to "counsel" or "attorney" or both.

Rule 32.1(b)(2). Reject changes.

Rule 32(c)(1). Need to address issue of whether to use term "attorney" or "counsel" as noted *supra*.

Rule 32(d). Reject recommendation.

Rule 32(e). Conform rule to other similar provisions but reject suggestion to insert word "disobeys" because it sounds awkward.

Rule 32.2.

Recommendation: (Note; the Committee had decided not to make any significant style changes to this rule, considering that it is pending before Congress. As the rule progressed through the process, only minor style changes have been made. The following recommendations are offered in the event the Committee decides to do further restyling of this rule).

Rule 32.2(b). Reject suggested change in title; otherwise accept changes. If change is necessary, order of title can be changed to read, "Post-Verdict Hearing; Entering a Preliminary Order of Forfeiture." Accept other changes in subdivision.

Rule 32.2(c)(1), (2), and (3). Accept changes.

Rule 32.2(c)(4). Better for title to read "Ancillary Proceeding Not Part of Sentencing." I believe Committee originally opted for shorter title given the length of the provision.

Rule 32.2(d). Accept change.

Rule 32.2(e)(3). Accept change.

Rule 33.

Recommendation: Reject change in 33(b)(2). Not necessary.

Rule 34.

Recommendation: Rule 34(a)(1). Accept change.

Rule 34(b). Reject deletion of words "a verdict or finding of guilty"--delete the word "as" before the words "the court." Otherwise, accept changes.

Rule 35.

Recommendation: Accept changes.

Rule 38(e).

Recommendation: Reject change; current title is correct.

Rule 40.

Recommendation: Rule 40(a). Accept change.

Rule 41.

Recommendation: Rule 41(a). Accept change. The word "of" after enforcement should also be deleted.

Rule 41(b). Accept change to hyphenated term; reject any reference to "covertly" observe--that is covered in substantive amendments package. Reference in (e)(2) should also be removed.

Rule 41(c). Accept recommended change.

Rule 41(e)(2). Delete reference to covert searches.

Rule 41(f)(1), (2). These provisions need to be checked.

Rule 41(i). This provision needs to be checked; not clear what the

word "copy"` modifies.

Rule 42.

Recommendation: Rule 42(a)(1). Reject proposed substitution of "warrant" for "order"

Rule 42(a)(2). Accept change.

Rule 42(a)(3). Reject changes.

Rule 43.

Recommendation: Accept changes. Conform to whatever practice Committee decides on cross-referencing other provisions in the same rule.

Rule 44.

Recommendation: Reject all proposed changes —unless Committee decides to substitute the term "attorney" for "counsel."

Rule 45.

Recommendation: Rule 45(a). Accept changes; reject proposal to substitute bullets for current structure. Reject proposed changes. There is an item on the agenda for addressing the question of whether to refer to "Presidents' Day" or "Washington's Birthday."

Rule 45(b). Reject change.

Rule 45(c). Accept change.

Rule 46.

Recommendation: Accept changes.

Rule 47

Recommendation: Accept punctuation changes. Reject other changes. Rule reflects decision by Committee to use Arabic numbers for any number less than 10, unless doing so is awkward, e.g.. using the number 1.

Rule 48.

Recommendation: Accept change.

Rule 49.

Recommendation: Accept changes.

Rule 57

Recommendation: Rule 57(a). Accept proposed changes.

Rule 57(b). Reject proposal to change order of subdivisions.

Rule 57(c). Accept proposed change

Rule 58.

Recommendation: Rule 58(b). Accept change in 58(b)(2)(A). Reject change in (b)(2)(C)--unless Committee decides to substitute "attorney" for "counsel."

Rule 58(b)(3)(A). Reject change.

Rule 58(c)(1), (2). Accept changes.

Rule 58(c)(4). Reject proposed change--difference is intended.

Rule 58(e). Accept proposed change.

Rule 58(g). Accept proposed changes.

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); and in the District Court of the Virgin Islands; in the United States Courts of Appeals; and in the Supreme Court of the United States; except that the prosecution of offenses in the District Court of the Virgin Islands shall be by indictment or information as otherwise provided by law.	**(a) Scope.** **(1)** ***In General.*** These rules govern the procedure in all criminal proceedings in the United States district courts, United States courts of appeals, and the Supreme Court of the United States. **(2)** ***State or Local Judicial Officer.*** When a rule so states, it applies to a proceeding before a state or local judicial officer. **(3)** ***Territorial Courts.*** These rules also govern the procedure in 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~~ EXTRADITING and ~~rendition~~ RENDERING of a fugitive; (B) a civil property forfeiture for ~~the violation of~~ VIOLATING a federal statute; (C) ~~the collection of~~ COLLECTING 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. §§ 256–258.

(AT LEAST CHANGE THIS ONE.)

(c) Application of Terms. (Rule 54 continued) As used in these rules the following terms have the designated meanings.

"Act of Congress" includes any act of Congress locally applicable to and in force in the District of Columbia, in Puerto Rico, in a territory or in any insular possession.

"Attorney for the government" means the Attorney General, an authorized assistant of the Attorney General, a United States Attorney, an authorized assistant of a United States Attorney, when applicable to cases arising under the laws of Guam the Attorney General of Guam or such other person or persons as may be authorized by the laws of Guam to act therein, and when applicable to cases arising under the laws of the Northern Mariana Islands the Attorney General of the Northern Mariana Islands or any other person or persons as may be authorized by the laws of the Northern Marianas to act therein.

"Civil action" refers to a civil action in a district court.

The words "demurrer," "motion to quash," "plea in abatement," "plea in bar" and "special plea in bar," or words to the same effect, in any act of Congress shall be construed to mean the motion raising a defense or objection provided in Rule 12.

"District court" includes all district courts named in subdivision (a) of this rule.

(b) Definitions. The following definitions apply to these rules:

(1) "Attorney for the government" means:

(A) the Attorney General, or an authorized assistant;

(B) a United States attorney, or an authorized assistant;

(C) when applicable to cases arising under Guam law, the Guam Attorney General or other person whom Guam law authorizes to act in the matter; and

(D) any other attorney authorized by law to conduct proceedings under these rules as a prosecutor.

(Would that it were "government Attorney." ☺)

"Federal magistrate judge" means a United States magistrate judge as defined in 28 U.S.C. §§ 631-639, a judge of the United States or another judge or judicial officer specifically empowered by statute in force in any territory or possession, the Commonwealth of Puerto Rico, or the District of Columbia, to perform a function to which a particular rule relates. "Judge of the United States" includes a judge of the district court, court of appeals, or the Supreme Court. "Law" includes statutes and judicial decisions. "Magistrate judge" includes a United States magistrate judge as defined in 28 U.S.C. §§ 631-639, a judge of the United States, another judge or judicial officer specifically empowered by statute in force in any territory or possession, the Commonwealth of Puerto Rico, or the District of Columbia, to perform a function to which a particular rule relates, and a state or local judicial officer, authorized by 18 U.S.C. § 3041 to perform the functions prescribed in Rules 3, 4, and 5.	(2) "Court" means a federal judge performing functions authorized by law. (3) "Federal judge" means: (A) a justice or judge of the United States as these terms are defined in 28 U.S.C. § 451; (B) a magistrate judge; or (C) a judge confirmed by the United States Senate and empowered by statute in any commonwealth, territory, or possession to perform a function to which a particular rule relates. (4) "Judge" means a federal judge or a state or local judicial officer. (5) "Magistrate judge" means a United States magistrate judge as defined in 28 U.S.C. §§ 631-639.

(change to "and," as in (1)(C) and 10(A)?)

"Oath" includes affirmations. "Petty offense" is defined in 18 U.S.C. § 19. "State" includes District of Columbia, Puerto Rico, territory and insular possession. "United States magistrate judge" means the officer authorized by 28 U.S.C. §§ 631-639.	(6) "Oath" includes an affirmation. (7) "Organization" is defined in 18 U.S.C. § 18. (8) "Petty offense" is defined in 18 U.S.C. § 19. (9) "State" includes the District of Columbia, and any commonwealth, territory, or possession of the United States. (10) "State or local judicial officer" means: (A) a state or local officer authorized to act under 18 U.S.C. § 3041; and (B) a judicial officer 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, any other federal judge may also act.

(OR you need A COMMA AFTER "Columbia.")

(WE'RE trying to follow the guideline to draft IN the singular?)

COMMITTEE NOTE

Rule 1 is entirely revised and expanded to incorporate Rule 54, which deals with the application of the rules. Consistent with the title of the existing rule, the Committee believed that a statement of the scope of the rules should be placed at the beginning to show readers which proceedings are governed by these rules. The Committee also revised the rule to incorporate the definitions found in Rule 54(c) as a new Rule 1(b).

Rule 1(a) contains language from Rule 54(b). But language in current Rule 54(b)(2)-(4) has been deleted for several reasons: First, Rule 54(b)(2) refers to a venue statute that governs an offense committed on the high seas or somewhere outside the jurisdiction of a particular district; it is unnecessary and has been deleted because once venue has been established, the Rules of Criminal Procedure automatically apply. Second, Rule 54(b)(3) currently deals with peace bonds; that provision is inconsistent with the governing statute and has therefore been deleted. Finally, Rule 54(b)(4) references proceedings conducted before United States Magistrate Judges, a topic now covered in Rule 58.

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

Rule 1(b) is composed of material currently located in Rule 54(c), with several exceptions. First, the reference to an "Act of Congress" has been replaced with the term "federal statute." Second, the language concerning demurrers, pleas in abatement, etc. has been deleted as being anachronistic. Third, the definitions of "civil action" and "district

court" have been deleted. Fourth, the term "attorney for the government" has been expanded to include reference to those attorneys who may serve as special or independent counsel under applicable federal statutes.

Fifth, the Committee added a definition for the term "court" in Rule 1(b)(2). Although that term originally was almost always synonymous with the term "district judge," the term might be misleading or unduly narrow because it may not cover the many functions performed by magistrate judges. *See generally* 28 U.S.C. §§ 132, 636. Additionally, the term does not cover circuit judges who may be authorized to hold a district court. *See* 28 U.S.C. § 291. The proposed definition continues the traditional view that "court" means district judge, but also reflects the current understanding that magistrate judges act as the "court" in many proceedings. Finally, the Committee intends that the term "court" be used principally to describe a judicial officer, except where a rule uses the term in a spatial sense, such as describing proceedings in "open court."

Sixth, the term "Judge of the United States" has been replaced with the term "Federal judge." That term includes Article III judges and magistrate judges and, as noted in Rule 1(b)(3)(C), federal judges other than Article III judges who may be authorized by statute to perform a particular act specified in the Rules of Criminal Procedure. Seventh, the definition of "Law" has been deleted as being superfluous and possibly misleading because it suggests that administrative regulations are excluded.

Eighth, the current rules include three definitions of "magistrate judge." The term used in amended Rule 1(b)(5) is limited to United States magistrate judges. In the current rules the term magistrate judge includes not only United States magistrate judges, but also district court judges, court of appeals judges, Supreme Court justices, and where authorized, state and local officers. The Committee believed that the rules should reflect current practice, i.e., the wider and almost exclusive use of United States magistrate judges, especially in preliminary matters. The definition, however, is not intended to restrict the use of other federal judicial officers to perform those functions. Thus, Rule 1(c) has been added to make it clear that where the rules authorize a magistrate judge to act, any other federal judge or justice may act.

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

The remainder of the rule has been amended as part of the general restyling of the rules to make them more easily understood. In addition to changes made to improve the clarity, the Committee has changed language to make style and terminology consistent throughout the Criminal Rules. These changes are intended to be stylistic only.

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

COMMITTEE NOTE

The language of Rule 2 has been amended as part of the general restyling of the Criminal Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic. No substantive change is intended.

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

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

COMMITTEE NOTE

The language of Rule 3 is amended as part of the general restyling of the Criminal Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic and no substantive change is intended, except as described below.

The amendment makes one change in practice. Currently, Rule 3 requires the complaint to be sworn before a "magistrate judge," which under current Rule 54 could include a state or local judicial officer. Revised Rule 1 no longer includes state and local officers in the definition of magistrate judges for the purposes of these rules. Instead, the definition includes only United States magistrate judges. Rule 3 requires that the complaint be made before a United States magistrate judge or before a state or local officer. The revised rule does, however, make a change to reflect prevailing practice and the outcome desired by the Committee — that the procedure take place before a *federal* judicial officer if one is reasonably available. As noted in Rule 1(c), where the rules, such as Rule 3, authorize a magistrate judge to act, any other federal judge may act.

(CHECK ME ON THIS ONE.)

THE DEFENDANT COMMITTED

Rule 4. Arrest Warrant or Summons Upon Complaint	Rule 4. Arrest Warrant or Summons on a Complaint
(a) Issuance. If it appears from the complaint, or from an affidavit or affidavits filed with the complaint, that there is probable cause to believe that an offense has been committed and that the defendant has committed it, a warrant for the arrest of the defendant shall issue to any officer authorized by law to execute it. Upon the request of the attorney for the government a summons instead of a warrant shall issue. More than one warrant or summons may issue on the same complaint. If a defendant fails to appear in response to the summons, a warrant shall issue.	**(a) Issuance.** If the complaint or one or more affidavits filed with the complaint establish probable cause to believe that an offense ~~has been committed and that the defendant committed it,~~ the judge must issue an arrest warrant to an officer authorized to execute it. At the request of the attorney for the government, the judge must issue a summons, instead of a warrant, to a person authorized to serve it. A judge may issue more than one warrant or summons on the same complaint. If a defendant fails to appear in response to a summons, a judge may, and upon request of the attorney for the government must, issue a warrant.
(b) Probable Cause. The finding of probable cause may be based upon hearsay evidence in whole or in part.	
(c) Form. **(1) Warrant.** The warrant shall be signed by the magistrate judge and shall contain the name of the defendant or, if the defendant's name is unknown, any name or description by which the defendant can be identified with reasonable certainty. It shall describe the offense charged in the complaint. It shall command that the defendant be arrested and brought before the nearest available magistrate judge. **(2) Summons.** The summons shall be in the same form as the warrant except that it shall summon the defendant to appear before a magistrate at a stated time and place.	**(b) Form.** (1) ***Warrant.*** A warrant must: (A) contain the defendant's name or, if it is unknown, a name or description by which the defendant can be identified with reasonable certainty; (B) describe the offense charged in the complaint; (C) command that the defendant be arrested and brought before a magistrate judge without unnecessary delay or, if none is reasonably available, before a state or local judicial officer; and (D) be signed by a judge. (2) ***Summons.*** A summons ~~is to~~ Must be in the same form as a warrant except that it must require the defendant to appear before a magistrate judge at a stated time and place.

(d) Execution or Service; and Return. **(1) By Whom.** The warrant shall be executed by a marshal or by some other officer authorized by law. The summons may be served by any person authorized to serve a summons in a civil action. **(2) Territorial Limits.** The warrant may be executed or the summons may be served at any place within the jurisdiction of the United States.	**(c) Execution or Service, and Return.** (1) ***By Whom.*** Only a marshal or other authorized officer may execute a warrant. Any person authorized to serve a summons in a federal civil action may serve a summons. (2) ***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, ~~an~~ officer possessing the warrant must show it to the defendant. If the officer does not possess the warrant, the officer must inform the defendant of the warrant's existence and of the offense charged and, at the defendant's request, must show the warrant to the defendant as soon as possible. (B) A summons is served on 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. A copy must also be mailed to the organization's last known address within the district or to its principal place of business elsewhere in the United States.

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

list ?
— a judge MAY deliver ANY of the following TO :
(i)
(ii)
(iii)

judicial ?

AND UNCANCELED ?

COMMITTEE NOTE

The language of Rule 4 has been amended as part of the general restyling of the Criminal Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic, except as noted below.

The first non-stylistic change is in Rule 4(a), which has been amended to provide an element of discretion in those situations when the defendant fails to respond to a summons. Under the current rule, the judge must in all cases issue an arrest warrant. The revised rule provides discretion to the judge to issue an arrest warrant if the attorney for the government does not request that an arrest warrant be issued for a failure to appear.

Current Rule 4(b), which refers to the fact that hearsay evidence may be used to support probable cause, has been deleted. That language was added to the rule in 1974, apparently to reflect emerging federal case law. *See* Advisory Committee Note to 1974 Amendments to Rule 4 (citing cases). A similar amendment was made to Rule 41 in 1972. In the intervening years, however, the case law has become perfectly clear on that proposition. Thus, the Committee believed that the reference to hearsay was no longer necessary. Furthermore, the limited reference to hearsay evidence was misleading to the extent that it might have suggested that other forms of inadmissible evidence could not be considered. For example, the rule made no reference to considering a defendant's prior criminal record, which clearly may be considered in deciding whether probable cause exists. *See, e.g., Brinegar v. United States*, 338 U.S. 160 (1949) (officer's knowledge of defendant's prior criminal activity). Rather than address that issue, or any other similar issues, the Committee believed that the matter was best addressed in Rule 1101(d)(3), Federal Rules of Evidence. That rule explicitly provides that the Federal Rules of Evidence do not apply to "preliminary examinations in criminal cases, . . . issuance of warrants for arrest, criminal summonses, and search warrants." The Advisory Committee Note accompanying that rule recognizes that: "The nature of the proceedings makes application of the formal rules of evidence inappropriate and impracticable." The Committee did not intend to make any substantive changes in practice by deleting

the reference to hearsay evidence.

New Rule 4(b), which is currently Rule 4(c), addresses the form of an arrest warrant and a summons and includes two non-stylistic changes. First, Rule 4(b)(1)(C) requires that the warrant require that the defendant be brought "without unnecessary delay" before a judge. The Committee believed that this was a more appropriate standard than the current requirement that the defendant be brought before the "nearest available" magistrate judge. This new language accurately reflects the thrust of the original rule, that time is of the essence and that the defendant should be brought with dispatch before a judicial officer in the district. Second, the revised rule states a preference that the defendant be brought before a federal judicial officer.

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

Rule 4(c) (currently Rule 4(d)) includes three changes. First, current Rule 4(d)(3) provides that the arresting officer is only required to inform the defendant of the offense charged and that a warrant exists if the officer does not have a copy of the warrant. As revised, Rule 4(c)(3)(A) explicitly requires the arresting officer in all instances to inform the defendant of the offense charged and of the fact that an arrest warrant exists. The new rule continues the current provision that the arresting officer need not have a copy of the warrant but if the defendant requests to see it, the officer must show the warrant to the defendant as soon as possible. The rule does not attempt to define any particular time limits for showing the warrant to the defendant.

Second, Rule 4(c)(3)(C) is taken from former Rule 9(c)(1). That provision specifies the manner of serving a summons on an organization. The Committee believed that Rule 4 was the more appropriate location for general provisions addressing the mechanics of arrest warrants and summonses. Revised Rule 9 liberally cross-references the basic provisions appearing in Rule 4. Under the amended rule, in all cases in which a summons is being served on an organization, a copy of the summons must be mailed to the organization.

Third, a change is made in Rule 4(c)(4). Currently, Rule 4(d)(4) requires that an unexecuted warrant must be returned to the judicial officer or judge who issued it. As amended, Rule 4(c)(4)(A) provides that after a warrant is executed, the officer must return it to the judge before whom the defendant will appear under Rule 5. At the government's request, however, an unexecuted warrant may be returned and canceled by any magistrate judge. The change recognizes the possibility that at the time the warrant is returned, the issuing judicial officer may not be available.

Rule 5. Initial Appearance Before the Magistrate Judge	Rule 5. Initial Appearance
(a) In General. Except as otherwise provided in this rule, an officer making an arrest under a warrant issued upon a complaint or any person making an arrest without a warrant shall take the arrested person without unnecessary delay before the nearest available federal magistrate judge or, if a federal magistrate judge is not reasonably available, before a state or local judicial officer authorized by 18 U.S.C. § 3041. If a person arrested without a warrant is brought before a magistrate judge, a complaint, satisfying the probable cause requirements of Rule 4(a), shall be promptly filed. When a person, arrested with or without a warrant or given a summons, appears initially before the magistrate judge, the magistrate judge shall proceed in accordance with the applicable subdivisions of this rule.	**(a) In General.** (1) ***Appearance Upon Arrest.*** (A) A person making an arrest within the United States must take the defendant without unnecessary delay before a magistrate judge, or before a state or local judicial officer as Rule 5(c) provides. (B) A person making an arrest outside the United States must take the defendant without unnecessary delay before a magistrate judge.

An officer making an arrest under a warrant issued upon a complaint charging solely a violation of 18 U.S.C. § 1073 need not comply with this rule if the person arrested is transferred without unnecessary delay to the custody of appropriate state or local authorities in the district of arrest and an attorney for the government moves promptly, in the district in which the warrant was issued, to dismiss the complaint.	(2) ***Exceptions.*** (A) An officer making an arrest under a warrant issued upon a complaint charging solely a violation of 18 U.S.C. § 1073 need not comply with this rule if: (i) the person arrested is transferred without unnecessary delay to the custody of appropriate state or local authorities in the district of arrest; and (ii) an attorney for the government moves promptly, in the district where the warrant was issued, to dismiss the complaint. (B) If a defendant is arrested for ~~a violation of~~ probation or supervised release, Rule 32.1 applies. (C) If a defendant is arrested for failing to appear in another district, Rule 40 applies. (3) ***Appearance Upon a Summons.*** When a defendant appears in response to a summons under Rule 4, a magistrate judge must proceed under Rule 5(d) or (e), as applicable.
	(b) ~~**Complaint Required.**~~ If a defendant is arrested without a warrant, a complaint meeting Rule 4(a)'s requirement of probable cause must be promptly filed in the district where the offense was allegedly committed.

	(c) Initial Appearance; Transfer to Another District. (1) ***Arrest in the District Where the Offense Was Allegedly Committed.*** If the defendant is arrested in the district where the offense was allegedly committed: (A) the initial appearance must be in that district; and (B) if a magistrate judge is not reasonably available, the initial appearance may be before a state or local judicial officer.

(2) ***Arrest in District Other Than the District Where the Offense Was Allegedly Committed.*** If the defendant is arrested in a district other than where the offense was allegedly committed, the following procedures apply:

(A) the initial appearance must be in that district, or in an adjacent district if the appearance can occur more promptly there;

(B) the judge must inform the defendant ~~of the provisions of~~ Rule 20;

(C) if the defendant was arrested without a warrant, the district court where the prosecution is pending must first issue a warrant before the magistrate judge transfers the defendant to that district;

(D) the judge must conduct a preliminary hearing as required under Rule 5.1 or Rule 58(b)(2)(G);

(E) the judge must transfer the defendant to the district where the prosecution is pending if:

(i) the government produces the warrant, a certified copy of the warrant, a facsimile of either, or other appropriate form of either; and

(ii) the judge finds that the defendant is the same person named in the indictment, information, or warrant; and

(F) when a defendant is transferred or discharged, the court must promptly transmit the papers and any bail to the clerk in the district where the prosecution is pending.

(BELOW, THIS BECOMES "the PROSECUTION is pending." SAME THING, I TAKE IT.)

(WHY HERE AND NOT IN (D) & (E)? 5(c)(1) SAYS MAGISTRATE judge if possible, THEN STATE OR LOCAL judicial officer. NO COMPARABLE PROVISION HERE. ALSO, NOTE THAT 1(b)(4) defines "judge" AS INCLUDING STATE OR LOCAL judicial officer. SO — WHO CAN TRANSFER?)

(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.

* * * * *

(OR is "COUNSEL" BROADER? WHAT do judges ACTUALLY SAY?)

(The Rules switch back And forth. I'd stick with "ATTORNEY.")

(d) Procedure in a Felony Case.

(1) ***Advice.*** 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~~ AN ATTORNEY or to request that ~~counsel~~ be appointed if the defendant cannot obtain ~~counsel~~ ONE; AN ATTORNEY

(C) the circumstances, if any, under which the defendant may secure pretrial release;

(D) any right to a preliminary hearing; and

(E) the defendant's right not to make a statement, and that any statement made may be used against the defendant.

(2) ***~~Consultation with Counsel.~~*** CONSULTING AN ATTORNEY The judge must allow the defendant reasonable opportunity to consult with ~~counsel~~ AN ATTORNEY.

(3) ***Detention or Release.*** The judge must detain or release the defendant as provided by statute or these rules.

(4) ***Plea.*** A defendant may be asked to plead only under Rule 10.

(b) Misdemeanors and Other Petty Offenses. If the charge against the defendant is a misdemeanor or other petty offense triable by a United States magistrate judge under 18 U.S.C. § 3401, the magistrate judge shall proceed in accordance with Rule 58.

(e) Procedure in a Misdemeanor Case. If the defendant is charged with a misdemeanor only, the judge must inform the defendant in accordance with Rule 58(b)(2).

COMMITTEE NOTE

The language of Rule 5 has been amended as part of the general restyling of the Criminal Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic, except as noted below.

Rule 5 has been completely revised to more clearly set out the procedures for initial appearances and to recognize that such appearances may be required at various stages of a criminal proceeding, for example, where a defendant has been arrested for violating the terms of probation.

Rule 5(a), which governs initial appearances by an arrested defendant before a magistrate judge, includes several changes. The first is a clarifying change; revised Rule 5(a)(1) provides that a person making the arrest must bring the defendant "without unnecessary delay" before a magistrate judge, instead of the current reference to "nearest available" magistrate. This language parallels changes in Rule 4 and reflects the view that time is of the essence. The Committee intends no change in practice. In using the term, the Committee recognizes that on occasion there may be necessary delay in presenting the defendant, for example, due to weather conditions or other natural causes. A second change is non-stylistic, and reflects the stated preference (as in other provisions throughout the rules) that the defendant be brought before a federal judicial officer. Only if a magistrate judge is not available should the defendant be taken before a state or local officer.

The third sentence in current Rule 5(a), which states that a magistrate judge must proceed in accordance with the rule when a defendant is arrested without a warrant or given a summons, has been deleted because it is unnecessary.

Rule 5(a)(1)(B) codifies the case law reflecting that the right to an initial appearance applies not only when a person is arrested within the United States but also when an arrest occurs outside the United States. *See, e.g., United States v. Purvis*, 768 F.2d 1237 (11th Cir. 1985); *United States v. Yunis*, 859 F.2d 953 (D.C. Cir. 1988). In these circumstances, the Committee believes — and the rule so provides — that the initial appearance should be before a federal magistrate judge rather than a state or local judicial officer.

Rule 5(a)(2)(A) consists of language currently located in Rule 5, that addresses the procedure to be followed when a defendant has been arrested under a warrant issued on a complaint charging solely a violation of 18 U.S.C. § 1073 (unlawful flight to avoid prosecution). Rule 5(a)(2)(B) and 5(a)(2)(C) are new provisions. They are intended to make it clear that when a defendant is arrested for violating probation or supervised release or for failing to appear in another district, Rules 32.1 and 40 apply. No change in practice is intended.

Rule 5(a)(3) is new and fills a perceived gap in the rules. It recognizes that a defendant may be subjected to an initial appearance under this rule if a summons was issued under Rule 4, instead of an arrest warrant. If the defendant is appearing pursuant to a summons in a felony case, Rule 5(d) applies and if the defendant is appearing in a misdemeanor case, Rule 5(e) applies.

Rule 5(b) carries forward the requirement in former Rule 5(a) that if the defendant is arrested without a warrant, a complaint must be promptly filed.

Rule 5(c) is a new provision setting out where an initial appearance is to take place. If the defendant is arrested in the district where the offense was allegedly committed, under Rule 5(c)(1), the defendant must be taken to a magistrate judge in that district. If no magistrate judge is reasonably available, a state or local judicial officer may conduct the initial appearance. On the other hand, if the defendant is arrested in a district other than the district where the offense was allegedly committed, Rule 5(c)(2) governs. In those instances, the defendant must be taken to a magistrate judge within the district of arrest, unless the appearance can take place more promptly in an adjacent district. The Committee recognized that in some cases, the nearest magistrate judge may actually be across a district's lines. The remainder of Rule 5(c)(2) includes material formerly located in Rule 40.

Rule 5(d) is derived from current Rule 5(c) and has been retitled to more clearly reflect the subject of that subdivision — the procedure to be used if the defendant is charged with a felony. Rule 5(d)(4) has been added to make clear that a defendant may only be called upon to enter a plea under the provisions of Rule 10. That language is intended to reflect and reaffirm current practice.

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

REPORTER'S NOTES

In publishing the "style" changes to the Federal Rules of Criminal Procedure, the Committee decided to publish separately any rule that includes what it considered at least one major substantive change. The purpose for this separate publication is to highlight for the bench and the bar any proposed amendments that the Committee believes will result in significant changes in current practice. Rule 5 is one of those rules. In restyling and reformatting Rule 5, the Committee decided to also propose a substantive change that would permit video teleconferencing of initial appearances. Another version of Rule 5, which includes a new subdivision (f) governing such procedures, is being published simultaneously in a separate pamphlet.

	Rule 5.1. Preliminary Hearing in a Felony Case
Rule 5(c). Offenses Not Triable by the United States Magistrate Judge. * * * * * A defendant is entitled to a preliminary examination, unless waived, when charged with any offense, other than a petty offense, which is to be tried by a judge of the district court. If the defendant waives preliminary examination, the magistrate judge shall forthwith hold the defendant to answer in the district court. If the defendant does not waive the preliminary examination, the magistrate judge shall schedule a preliminary examination.	(a) **In General.** If a defendant is charged with a felony, a magistrate judge must conduct a preliminary hearing unless: (1) the defendant waives the hearing; (2) the defendant is indicted; or (3) the government files an information under Rule 7(b). Electing a ~~Election of~~ District. Electing Venue:
	(b) **~~Election of~~ District.** A defendant arrested in a district other than where the offense was allegedly committed may elect to have the preliminary hearing conducted in the district where the prosecution is pending.
Such examination shall be held within a reasonable time but in any event not later than 10 days following the initial appearance if the defendant is in custody and no later than 20 days if the defendant is not in custody, provided, however, that the preliminary examination shall not be held if the defendant is indicted or if an information against the defendant is filed in district court before the date set for the preliminary examination.	(c) **Scheduling.** The magistrate judge must hold the preliminary hearing within a reasonable time, but no later than 10 days after the initial appearance if the defendant is in custody and no later than 20 days if not in custody.
With the consent of the defendant and upon a showing of good cause, taking into account the public interest in the prompt disposition of criminal cases, time limits specified in this subdivision may be extended one or more times by a federal magistrate judge. In the absence of such consent by the defendant, time limits may be extended by a judge of the United States only upon a showing that extraordinary circumstances exist and that delay is indispensable to the interests of justice.	(d) **Extending the Time.** With the defendant's consent and upon a showing of good cause — taking into account the public interest in the prompt disposition of criminal cases — a magistrate judge may extend the time limits in Rule 5.1(c) one or more times. If the defendant does not consent, a justice or judge of the United States (as these terms are defined in 28 U.S.C. § 451) may extend the time limits only on a showing that extraordinary circumstances exist and justice requires the delay.

(PARENS)

Rule 5.1. Preliminary Examination	
(a) Probable Cause Finding. If from the evidence it appears that there is probable cause to believe that an offense has been committed and that the defendant committed it, the federal magistrate judge shall forthwith hold the defendant to answer in district court. The finding of probable cause may be based upon hearsay evidence in whole or in part. The defendant may cross-examine adverse witnesses and may introduce evidence. Objections to evidence on the ground that it was acquired by unlawful means are not properly made at the preliminary examination. Motions to suppress must be made to the trial court as provided in Rule 12.	**(e) Hearing and Finding.** At the preliminary hearing, the defendant may cross-examine adverse witnesses and may introduce evidence but cannot object to evidence on the ground that it was unlawfully acquired. If the magistrate judge finds probable cause to believe an offense ~~has been committed and the defendant committed it,~~ that the defendant committed the magistrate judge must promptly require the defendant to appear for further proceedings.
(b) Discharge of Defendant. If from the evidence it appears that there is no probable cause to believe that an offense has been committed or that the defendant committed it, the federal magistrate judge shall dismiss the complaint and discharge the defendant. The discharge of the defendant shall not preclude the government from instituting a subsequent prosecution for the same offense.	**(f) Discharging the Defendant.** If the magistrate judge finds no probable cause to believe an offense ~~has been committed or the defendant committed it,~~ the magistrate judge must dismiss the complaint and discharge the defendant. A discharge does not preclude the government from later prosecuting the defendant for the same offense.
(c) Records. After concluding the proceeding the federal magistrate judge shall transmit forthwith to the clerk of the district court all papers in the proceeding. The magistrate judge shall promptly make or cause to be made a record or summary of such proceeding. (1) On timely application to a federal magistrate judge, the attorney for a defendant in a criminal case may be given the opportunity to have the recording of the hearing on preliminary examination made available to that attorney in connection with any further hearing or preparation for trial. The court may, by local rule, appoint the place for and define the conditions under which such opportunity may be afforded counsel.	**(g) ~~Records~~.** The preliminary hearing must be recorded by a court reporter or by a suitable recording device. A recording of the proceeding may be made available to any party upon request. A copy of the recording and a transcript may be provided to any party upon request and upon payment ~~as~~ Any required by applicable Judicial Conference regulations.

Recording the Proceedings
(Compare 6(e)(1), 11(g), and others throughout.)

(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.	Producing a
(d) Production of Statements. (1) In General. Rule 26.2(a)-(d) and (f) applies at any hearing under this rule, unless the court, for good cause shown, rules otherwise in a particular case. (2) Sanctions for Failure to Produce Statement. If a party elects not to comply with an order under Rule 26.2(a) to deliver a statement to the moving party, the court may not consider the testimony of a witness whose statement is withheld.	**(h) ~~Production~~ of Statements.** (1) ***In General.*** Rule 26.2(a)-(d) and (f) applies at any hearing under this rule, unless the magistrate judge for good cause rules otherwise in a particular case. (2) ***Sanctions for ~~Failure to Produce Statement~~.*** Not Producing a If a party disobeys a Rule 26.2~~(a)~~ order to deliver a statement to the moving party, the magistrate judge must not consider the testimony of a witness whose statement is withheld. (Not limited to (a).)

COMMITTEE NOTE

The language of Rule 5.1 has been amended as part of the general restyling of the Criminal Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic, except as noted below.

First, the title of the rule has been changed. Although the underlying statute, 18 U.S.C. § 3060, uses the phrase *preliminary examination*, the Committee believes that the phrase *preliminary hearing* is more accurate. What happens at this proceeding is more than just an examination; it includes an evidentiary hearing, argument, and a judicial ruling. Further, the phrase *preliminary hearing* predominates in actual usage.

Rule 5.1(a) is composed of the first sentence of the second paragraph of current Rule 5(c). Rule 5.1(b) addresses the ability of a defendant to elect where a preliminary hearing will be held. That provision is taken from current Rule 40(a).

Rule 5.1(c) and (d) include material currently located in Rule 5(c): scheduling and extending the time limits for the hearing. The Committee is aware that in most districts, magistrate judges perform these functions. That point is also reflected in the definition of "court" in Rule 1(b), which in turn recognizes that magistrate judges may be authorized to act.

Rule 5.1(e), addressing the issue of probable cause, contains the language currently located in Rule 5.1(a), with the exception of the sentence, "The finding of probable cause may be based upon hearsay evidence in whole or in part." That language was included in the original promulgation of the rule in 1972. Similar language was added to Rule 41 in 1972 and to Rule 4 in 1974. In the original Committee Note, the Advisory Committee explained that the language was included to make it clear that a finding of probable cause may be based upon hearsay, noting that there had been some uncertainty in the federal system about the propriety of relying upon hearsay at the preliminary examination. *See* Advisory Committee Note to Rule 5.1 (citing cases and commentary). Federal law is now clear on that proposition. Thus, the Committee believed that the reference to hearsay was no longer necessary. Further, the Committee believed that the matter was best addressed in Rule 1101(d)(3), Federal Rules of Evidence. That rule explicitly states that the Federal Rules of Evidence do not apply to "preliminary examinations in criminal cases,...issuance of warrants for arrest, criminal summonses, and search warrants." The Advisory Committee Note accompanying that rule recognizes that: "The nature of the proceedings makes application of the formal rules of evidence inappropriate and impracticable." The Committee did not intend to make any substantive changes in practice by deleting the reference to hearsay evidence.

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

Rule 5.1(g) is a revised version of the material in current Rule 5.1(c). Instead of including detailed information in the rule itself concerning records of preliminary hearings, the Committee opted simply to direct the reader to the applicable Judicial Conference regulations governing records. The Committee did not intend to make any substantive changes in the way in which those records are currently made available.

Finally, although the rule speaks in terms of initial appearances being conducted before a magistrate judge, Rule 1(c) makes clear that a district judge may perform any function in these rules that a magistrate judge may perform.

REPORTER'S NOTES

In publishing the "style" changes to the Federal Rules of Criminal Procedure, the Committee decided to publish separately any rule that includes what it considered at least one major substantive change. The purpose for this separate publication is to highlight for the bench and the bar any proposed amendments that the Committee believes will result in significant changes in current practice. Rule 5.1 is one of those rules. In revising Rule 5.1, the Committee decided to also propose a significant substantive change that would permit a United States Magistrate Judge to grant a continuance for a preliminary hearing conducted under the rule where the defendant has not consented to such a continuance. That version is being published simultaneously in a separate pamphlet.

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~~ may not dismiss the indictment on the ground that a grand juror was ~~not~~ legally ~~qualified~~ unqualified 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: attorneys for the government, the witness being questioned, interpreters when needed, and a court reporter 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.

("DISTRICT" only needed to distinguish district and Appellate clerks when there may be confusion.)

(Id break into (e) and (F).

(e) Recording and Disclosure of Proceedings.	**(e) Recording and Disclosing the 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.	(1) ***Recording the Proceedings.*** Except while the grand jury is deliberating or voting, all proceedings must be recorded by a court reporter or by a suitable recording device. But the validity of a prosecution is not affected by the unintentional failure to make a recording. Unless the court orders otherwise, an attorney for the government will retain control of the recording, the reporter's notes, and any transcript prepared from those notes.
(2) 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.	(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) an attorney for the government; 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) an attorney for the government 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 an attorney for the government 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 an attorney for the government in performing that attorney's duty to enforce federal criminal law. An attorney for the government must promptly provide the court that impaneled the grand jury with the names of all persons to whom a disclosure has been made, and must certify that the attorney has advised those persons of their obligation of secrecy ~~under this rule.~~

(IN 5(h)(1) - "This Rule" REFERS TO All of Rule 5. HERE, it REFERS ONLY to this SUBPART (B).)

(C) Disclosure otherwise prohibited by this rule of matters occurring before the grand jury may also be made— (i) when so directed by a court preliminarily to or in connection with a judicial proceeding; (ii) when permitted by a court at the request of the defendant, upon a showing that grounds may exist for a motion to dismiss the indictment because of matters occurring before the grand jury; (iii) when the disclosure is made by an attorney for the government to another federal grand jury; or (iv) when permitted by a court at the request of an attorney for the government, upon a showing that such matters may disclose a violation of state criminal law, to an appropriate official of a state or subdivision of a state for the purpose of enforcing such law. If the court orders disclosure of matters occurring before the grand jury, the disclosure shall be made in such manner, at such time, and under such conditions as the court may direct.	(C) An attorney for the government may disclose any grand-jury matter to another federal grand jury. (D) The court may authorize disclosure — at a time, in a manner, and subject to any other conditions that it directs — o a grand-jury matter: (i) preliminarily to or in connection with a judicial proceeding; (ii) at the request of a defendant who shows that a ground may exist to dismiss the indictment because of a matter that occurred before the grand jury; (iii) at the request of the government if it shows that the matter may disclose a violation of state or Indian tribal criminal law, as long as the disclosure is to an appropriate state, state-subdivision, or Indian tribal official for the purpose of enforcing that law; or (iv) at the request of the government if it shows that the matter may disclose a violation of military criminal law under the Uniform Code of Military Justice, as long as the disclosure is to an appropriate military official for the purpose of enforcing that law

(D) A petition for disclosure pursuant to subdivision (e)(3)(C)(i) shall be filed in the district where the grand jury convened. Unless the hearing is ex parte, which it may be when the petitioner is the government, the petitioner shall serve written notice of the petition upon (i) the attorney for the government, (ii) the parties to the judicial proceeding if disclosure is sought in connection with such a proceeding, and (iii) such other persons as the court may direct. The court shall afford those persons a reasonable opportunity to appear and be heard.	(E) A petition to disclose a grand-jury matter under Rule 6(e)(3)(D)(i) must be filed in the district where the grand jury convened. Unless the hearing is ex parte — as it may be when the government is the petitioner — the petitioner must serve the petition on, and the court must afford a reasonable opportunity to appear and be heard to: (i) the attorney for the government; (ii) the parties to the judicial proceeding; and (iii) any other person whom the court may designate.
(E) If the judicial proceeding giving rise to the petition is in a federal district court in another district, the court shall transfer the matter to that court unless it can reasonably obtain sufficient knowledge of the proceeding to determine whether disclosure is proper. The court shall order transmitted to the court to which the matter is transferred the material sought to be disclosed, if feasible, and a written evaluation of the need for continued grand jury secrecy. The court to which the matter is transferred shall afford the aforementioned persons a reasonable opportunity to appear and be heard.	(F) If the petition to disclose arises out of a 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.

judicial?

(To confirm that we're still talking about 6(e)(3)(D)(i).)

(4) Sealed Indictments. The federal magistrate judge to whom an indictment is returned may direct that the indictment be kept secret until the defendant is in custody or has been released pending trial. Thereupon the clerk shall seal the indictment and no person shall disclose the return of the indictment except when necessary for the issuance and execution of a warrant or summons.	(4) ***Sealed Indictment.*** The magistrate judge to whom an indictment is returned may direct that the indictment be kept secret until the defendant is in custody or has been released pending trial. The clerk must then seal the indictment, and no person may disclose the indictment's existence except as necessary to issue or execute a warrant or summons.
(5) Closed Hearing. Subject to any right to an open hearing in contempt proceedings, the court shall order a hearing on matters affecting a grand jury proceeding to be closed to the extent necessary to prevent disclosure of matters occurring before a grand jury.	(5) ***Closed Hearing.*** Subject to any right to an open hearing in a contempt proceeding, the court must close any hearing to the extent necessary to prevent disclosure of a matter occurring before a grand jury.
(6) Sealed Records. Records, orders and subpoenas relating to grand jury proceedings shall be kept under seal to the extent and for such time as is necessary to prevent disclosure of matters occurring before a grand jury.	(6) ***Sealed Records.*** Records, orders, and subpoenas relating to grand-jury proceedings must be kept under seal to the extent and as long as necessary to prevent the unauthorized disclosure of a matter occurring before a grand jury.
	(7) ***Contempt.*** A knowing violation of Rule 6 may be punished as a contempt of court.

(f) Finding and Return of Indictment. A grand jury may indict only upon the concurrence of 12 or more jurors. The indictment shall be returned by the grand jury, or through the foreperson or deputy foreperson on its behalf, to a federal magistrate judge in open court. If a complaint or information is pending against the defendant and 12 persons do not vote to indict, the foreperson shall so report to a federal magistrate judge in writing as soon as possible.	(f) **Indictment and Return.** A grand jury may indict only if at least 12 jurors concur. The grand jury — or its foreperson or deputy foreperson — must return the indictment to a magistrate judge in open court. If a complaint or information is pending against the defendant and 12 jurors do not concur in the indictment, the foreperson must promptly and in writing report the lack of concurrence to the magistrate judge.
(g) Discharge and Excuse. A grand jury shall serve until discharged by the court, but no grand jury may serve more than 18 months unless the court extends the service of the grand jury for a period of six months or less upon a determination that such extension is in the public interest. At any time for cause shown the court may excuse a juror either temporarily or permanently, and in the latter event the court may impanel another person in place of the juror excused.	Discharging the Grand Jury (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. An extension may be granted for no more than 6 months, except as otherwise provided by statute. Excusing a Juror (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.
(Compare 45(4).)	Defined (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.

COMMITTEE NOTE

The language of Rule 6 has been amended as part of the general restyling of the Criminal Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic, except as noted below.

The first change is in Rule 6(b)(1). The last sentence of current Rule 6(b)(1) provides that "Challenges shall be made before the administration of the oath to the jurors and shall be tried by the court." That language has been deleted from the amended rule. The remainder of this subdivision rests on the assumption that formal proceedings have begun against a person, i.e., an indictment has been returned. The Committee believed that although the first sentence reflects current practice of a defendant being able to challenge the composition or qualifications of the grand jurors after the indictment is returned, the second sentence does not comport with modern practice. That is, a defendant will normally not know the composition of the grand jury or identity of the grand jurors before they are administered their oath. Thus, there is no opportunity to challenge them and have the court decide the issue before the oath is given.

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

Rule 6(e) continues to spell out the general rule of secrecy of grand-jury proceedings and the exceptions to that

general rule. The last sentence in current Rule 6(e)(2), concerning contempt for violating Rule 6, now appears in Rule 6(e)(7). No change in substance is intended.

Rule 6(e)(3)(A)(ii) includes a new provision recognizing the sovereignty of Indian Tribes and the possibility that it would be necessary to disclose grand-jury information to appropriate tribal officials in order to enforce federal law. Similar language has been added to Rule 6(e)(3)(D)(iii).

Rule 6(e)(3)(C) consists of language located in current Rule 6(e)(3)(C)(iii). The Committee believed that this provision, which recognizes that prior court approval is not required for disclosure of a grand-jury matter to another grand jury, should be treated as a separate subdivision in revised Rule 6(e)(3). No change in practice is intended.

Rule 6(e)(3)(D)(iv) is a new provision that addresses disclosure of grand-jury information to armed forces personnel where the disclosure is for the purpose of enforcing military criminal law under the Uniform Code of Military Justice, 10 U.S.C. §§ 801-946. *See, e.g.*, Department of Defense Directive 5525.7 (January 22, 1985); 1984 Memorandum of Understanding Between Department of Justice and the Department of Defense Relating to the Investigation and Prosecution of Certain Crimes; Memorandum of Understanding Between the Departments of Justice and Transportation (Coast Guard) Relating to the Investigations and Prosecution of Crimes Over Which the Two Departments Have Concurrent Jurisdiction (October 9, 1967).

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

The Committee decided to leave in subdivision (e) the provision stating that a "knowing violation of Rule 6" may be punished by contempt notwithstanding that, due to its apparent application to the entirety of the Rule, the provision seemingly is misplaced in subdivision (e). Research shows that Congress added the provision in 1977 and that it was crafted solely to deal with violations of the secrecy prohibitions in subdivision (e). *See* S. Rep. No. 95-354, p. 8 (1977). Supporting this narrow construction, the Committee found no reported decision involving an application or attempted use of the contempt sanction to a violation other than of the disclosure restrictions in subdivision (e). On the other hand, the Supreme Court in dicta did indicate on one occasion its arguable understanding that the contempt sanction would be available also for a violation of Rule 6(d) relating to who may be present during the grand jury's deliberations. *Bank of Nova Scotia v. United States*, 487 U.S. 250, 263 (1988).

In sum, it appears that the scope of the contempt sanction in Rule 6 is unsettled. Because the provision creates an offense, altering its scope may be beyond the authority bestowed by the Rules Enabling Act, 28 U.S.C. §§ 2071 et seq. *See* 28 U.S.C. § 2072(b) (Rules must not "abridge, enlarge, or modify any substantive right"). The Committee decided to leave the contempt provision in its present location in subdivision (e), because breaking it out into a separate subdivision could be construed to support the interpretation that the sanction may be applied to a knowing violation of any of the Rule's provisions rather than just those in subdivision (e). Whether or not that is a correct interpretation of the provision — a matter on which the Committee takes no position — must be determined by case law, or resolved by Congress.

Current Rule 6(g) has been divided into two new subdivisions, Rule 6(g), Discharge, and Rule 6(h), Excuse. The Committee added the phrase in Rule 6(g) "except as otherwise provided by statute," to recognize the provisions of 18 U.S.C. § 3331 relating to special grand juries.

Rule 6(i) is a new provision defining the term "Indian Tribe," a term used only in this rule.

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

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

the ?

[1]The Supreme Court approved amendment in April 2000. The amendments take effect on December 1, 2000, unless Congress takes action otherwise.

(f) Bill of Particulars. The court may direct the filing of a bill of particulars. A motion for a bill of particulars may be made before arraignment or within ten days after arraignment or at such later time as the court may permit. A bill of particulars may be amended at any time subject to such conditions as justice requires.	(f) **Bill of Particulars.** The court may direct the government to file a bill of particulars. The defendant may move for a bill of particulars before or within 10 days after arraignment or at a later time if the court permits. The government may amend a bill of particulars subject to such conditions as justice requires.

COMMITTEE NOTE

The language of Rule 7 has been amended as part of the general restyling of the Criminal Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic.

The Committee has deleted the references to "hard labor" in the rule. This punishment is not found in current federal statutes.

[Rule 7(c)(2), Criminal Forfeiture, is language approved by the Supreme Court in May 2000, and pending review by Congress under 28 U.S.C. § 2074(a).]

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

(I'd use words for ten & under — except periods of time, like 10 days COMPARE 23(c).)

Rule 8. Joinder of Offenses and of Defendants	Rule 8. Joinder of Offenses or Defendants
(a) Joinder of Offenses. Two or more offenses may be charged in the same indictment or information in a separate count for each offense if the offenses charged, whether felonies or misdemeanors or both, are of the same or similar character or are based on the same act or transaction or on two or more acts or transactions connected together or constituting parts of a common scheme or plan.	(a) **Joinder of Offenses.** The indictment or information may charge a defendant in separate counts with (2) or more offenses if the offenses charged — whether felonies or misdemeanors or both — are of the same or similar character, or are based on the same act or transaction, or are connected with or constitute parts of a common scheme or plan.
(b) Joinder of Defendants. Two or more defendants may be charged in the same indictment or information if they are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses. Such defendants may be charged in one or more counts together or separately and all of the defendants need not be charged in each count.	(b) **Joinder of Defendants.** The indictment or information may charge (2) or more defendants if they are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses. The defendants may be charged in one or more counts together or separately. All defendants need not be charged in each count.

(Does this modify "SAME ACT OR TRANSACTION"? If so, COMMAS before "OR" and AFTER "TRANSACTION")

COMMITTEE NOTE

The language of Rule 8 has been amended as part of the general restyling of the Criminal Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

(4(a) says "judge".)

the defendant committed

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 attorney for the government must, issue a warrant. The court must issue the arrest warrant to an officer authorized to execute it or the summons to a person authorized to serve it.
(b) Form. **(1) Warrant.** The form of the warrant shall be as provided in Rule 4(c)(1) except that it shall be signed by the clerk, it shall describe the offense charged in the indictment or information and it shall command that the defendant be arrested and brought before the nearest available magistrate judge. The amount of bail may be fixed by the court and endorsed on the warrant. **(2) Summons.** The summons shall be in the same form as the warrant except that it shall summon the defendant to appear before a magistrate judge at a stated time and place.	**(b) Form.** (1) ***Warrant.*** The warrant must conform to Rule 4(b)(1) except that it must be signed by the clerk and must describe the offense charged in the indictment or information. (2) ***Summons.*** The summons ~~is to~~ must be in the same form as a warrant except that it must require the defendant to appear before the court at a stated time and place.

A court may issue (same as 4(a).)

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

COMMITTEE NOTE

The language of Rule 9 has been amended as part of the general restyling of the Criminal Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only, except as noted below.

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

Rule 9(a) has been amended to permit a judge discretion whether to issue an arrest warrant when a defendant fails to respond to a summons on a complaint. Under the current language of the rule, if the defendant fails to appear, the judge must issue a warrant. Under the amended version, if the defendant fails to appear and the government requests that

a warrant be issued, the judge must issue one. In the absence of such a request, the judge has the discretion whether to do so. This change mirrors language in amended Rule 4(a).

A second amendment has been made in Rule 9(b)(1). The rule has been amended to delete language permitting the court to set the amount of bail on the warrant. The Committee believes that this language is inconsistent with the 1984 Bail Reform Act. *See United States v. Thomas*, 992 F. Supp. 782 (D.V.I. 1998) (bail amount endorsed on warrant that has not been determined in proceedings conducted under Bail Reform Act has no bearing on decision by judge conducting Rule 40 hearing).

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

IV. ARRAIGNMENT, AND PREPARATION FOR TRIAL	TITLE IV. ARRAIGNMENT AND PREPARATION FOR TRIAL
Rule 10. Arraignment AN	**Rule 10. Arraignment**
Arraignment shall be conducted in open court and shall consist of reading the indictment or information to the defendant or stating to the defendant the substance of the charge and calling on the defendant to plead thereto. The defendant shall be given a copy of the indictment or information before being called upon to plead.	Arraignment must be conducted in open court and must consist of: (a) ensuring that the defendant has a copy of the indictment or information; (b) reading the indictment or information to the defendant or stating to the defendant the substance of the charge; and then (c) asking the defendant to plead to the indictment or information.

COMMITTEE NOTE

The language of Rule 10 has been amended as part of the general restyling of the Criminal Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

REPORTER'S NOTES

In publishing the "style" changes to the Federal Rules of Criminal Procedure, the Committee decided to publish separately any rule that includes what it considered at least one major substantive change. The purpose for this separate publication is to highlight for the bench and the bar any proposed amendments that the Committee believes will result in significant changes in current practice. Rule 10 is one of those rules. Another version of Rule 10, which includes several significant changes, is being published simultaneously in a separate pamphlet. That version includes a proposed amendment that would permit a defendant to waive altogether an appearance at the arraignment and another amendment that would permit use of video teleconferencing for arraignments.

Rule 11. Pleas	Rule 11. Pleas
(a) Alternatives. **(1) In General.** A defendant may plead guilty, not guilty, or nolo contendere. If a defendant refuses to plead, or if a defendant organization, as defined in 18 U.S.C. § 18, fails to appear, the court shall enter a plea of not guilty. **(2) Conditional Pleas.** With the approval of the court and the consent of the government, a defendant may enter a conditional plea of guilty or nolo contendere, reserving in writing the right, on appeal from the judgment, to review of the adverse determination of any specified pretrial motion. A defendant who prevails on appeal shall be allowed to withdraw the plea.	**(a) Entering a Plea.** (1) ***In General.*** A defendant may plead guilty, not guilty, or (with the court's consent) nolo contendere. (2) ***Conditional Plea.*** With the consent of the court and the government, a defendant may enter a conditional plea of guilty or nolo contendere, reserving in writing the right to have an appellate court review an adverse determination of a specified pretrial motion. A defendant who prevails on appeal may then withdraw the plea.
(b) Nolo Contendere. A defendant may plead nolo contendere only with the consent of the court. Such a plea shall be accepted by the court only after due consideration of the views of the parties and the interest of the public in the effective administration of justice.	(3) ***Nolo Contendere Plea.*** Before accepting a plea of nolo contendere, the court must consider the parties' views and the public interest in the effective administration of justice. (4) ~~***Failure to***~~ ***Enter a Plea.*** If a defendant refuses to enter a plea or if a defendant organization fails to appear, the court must enter a plea of not guilty.

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

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

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

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

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

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

(b) **Considering and Accepting a Guilty or Nolo Contendere Plea.**

(1) ***Advising and Questioning the Defendant.*** Before the court accepts a plea of guilty or nolo contendere, the defendant may be placed under oath, and the court must address the defendant personally in open court. During this address, the court must inform the defendant of, and determine that the defendant understands, the following:

(A) any statement that the defendant gives under oath ~~may be used against the defendant~~ the GOVERNMENT'S RIGHT TO USE in a later prosecution for perjury or false statement;

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

(C) the right to a jury trial;

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

(E) the right at trial to confront and cross-examine adverse witnesses, to be protected from compelled self-incrimination, to testify and present evidence, and to compel the attendance of witnesses;

(F) the defendant's waiver of these trial rights if the court accepts a plea of guilty or nolo contendere;

(G) the nature of each charge to which the defendant is pleading;

(NOT PARALLEL WITH OTHERS. IT'S AN INDEPENDENT CLAUSE. I'd MOVE IT TO THE END.)

(6) the terms of any provision in a plea agreement waiving the right to appeal or to collaterally attack the sentence.	(H) any maximum possible penalty, including imprisonment, fine, special assessment, forfeiture, restitution, and term of supervised release; (I) any mandatory minimum penalty; (J) the court's obligation to apply the Sentencing Guidelines, and the court's authority to depart from those guidelines under some circumstances; and (K) the terms of any plea-agreement provision waiving the right to appeal or to collaterally attack the sentence.
(d) Insuring That the Plea is Voluntary. The court shall not accept a plea of guilty or nolo contendere without first, by addressing the defendant personally in open court, determining that the plea is voluntary and not the result of force or threats or of promises apart from a plea agreement. The court shall also inquire as to whether the defendant's willingness to plead guilty or nolo contendere results from prior discussions between the attorney for the government and the defendant or the defendant's attorney.	(2) ***Ensuring That a Plea Is Voluntary***. Before accepting a plea of guilty or nolo contendere, the court must address the defendant personally in open court and determine that the plea is voluntary and did not result from force, threats, or promises (other than promises in a plea agreement). (3) ***Determining the Factual Basis for a Plea.*** Before entering judgment on a guilty plea, the court must determine that there is a factual basis for the plea.

(e) Plea Agreement Procedure.	(c) 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. The plea agreement? (See II(c)(4) and (c)(5).)	(1) *In General.* An attorney for the government and the defendant's attorney, or the defendant when proceeding 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 attorney for the government will: (A) not bring, or will move to dismiss, other charges; (B) recommend, or agree not to oppose the defendant's request, that a particular sentence or sentencing range is appropriate or that a particular provision of the Sentencing Guidelines, or policy statement, or sentencing factor ~~is~~ or ~~is not applicable~~ (such a recommendation or request does not bind the court); or (C) agree that a specific sentence or sentencing range is the appropriate disposition of the case, or that a particular provision of the Sentencing Guidelines, or policy statement, or sentencing factor ~~is~~ or ~~is not applicable~~ (such a recommendation or request binds the court once the court accepts ~~it~~).
(2) **Notice of Such Agreement.** If a plea agreement has been reached by the parties, the court shall, on the record, require the disclosure of the agreement in open court or, upon a showing of good cause, in camera, at the time the plea is offered. If the agreement is of the type specified in subdivision (e)(1)(A) or (C), the court may accept or reject the agreement, or may defer its decision as to the acceptance or rejection until there has been an opportunity to consider the presentence report. If the agreement is of the type specified in subdivision (e)(1)(B), the court shall advise the defendant that if the court does not accept the recommendation or request the defendant nevertheless has no right to withdraw the plea.	(2) ***Disclosing a Plea Agreement.*** The parties must disclose the plea agreement in open court when the plea is offered, unless the court for good cause allows the parties to disclose the plea agreement in camera.

(3) Acceptance of a Plea Agreement. If the court accepts the plea agreement, the court shall inform the defendant that it will embody in the judgment and sentence the disposition provided for in the plea agreement.	(3) ***Judicial Consideration of a Plea Agreement.*** (A) To the extent the plea agreement is of the type specified in Rule 11(c)(1)(A) or (C), the court may accept the agreement, reject it, or defer a decision until the court has reviewed the presentence report. (B) To the extent the plea agreement is of the type specified in Rule 11(c)(1)(B), the court must advise the defendant that the defendant has no right to withdraw the plea if the court does not follow the recommendation or request. (4) ***Accepting a Plea Agreement.*** If the court accepts the plea agreement, it must inform the defendant that to the extent the plea agreement is of the type specified in Rule 11 (c)(1)(A) or (C), the ~~agreed~~ disposition will be included in the judgment.
(4) Rejection of a Plea Agreement. If the court rejects the plea agreement, the court shall, on the record, inform the parties of this fact, advise the defendant personally in open court or, on a showing of good cause, in camera, that the court is not bound by the plea agreement, afford the defendant the opportunity to then withdraw the plea, and advise the defendant that if the defendant persists in a guilty plea or plea of nolo contendere the disposition of the case may be less favorable to the defendant than that contemplated by the plea agreement.	(5) ***Rejecting a Plea Agreement.*** If the court rejects a plea agreement containing provisions of the type specified in Rule 11(c)(1)(A) or (C), the court must 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 may not follow the~~ plea ~~agreement and give the defendant an opportunity to withdraw the plea; and~~ (C) ~~advise the defendant personally that~~ if ~~the plea is not withdrawn~~, ~~the court may~~ dispose of the case less favorably toward the defendant than the plea agreement contemplated.

Agreed-to

(i) THE COURT MAY NOT FOLLOW THE PLEA AGREEMENT;
(ii) THE DEFENDANT MAY WITHDRAW THE PLEA; AND
(iii) IF THE PLEA IS NOT WITHDRAWN, THE COURT MAY, ETC.

(THE "IN OPEN COURT" STUFF FROM (B) APPLIES TO (C) AS WELL, DOESN'T IT?)

(5) **Time of Plea Agreement Procedure.** Except for good cause shown, notification to the court of the existence of a plea agreement shall be given at the arraignment or at such other time, prior to trial, as may be fixed by the court.

(d) ***Withdrawing a Guilty or Nolo Contendere Plea.*** A defendant may withdraw a plea of guilty or nolo contendere:

(1) before the court accepts ~~a~~ the plea ~~of guilty or a plea of nolo contendere~~, for any or no REASON; or

(2) after the court accepts ~~a~~ the plea ~~of guilty or nolo contendere~~, but before it imposes sentence if:

(A) the court rejects a plea agreement under Rule 11(c)(5); or

(B) the defendant can show fair and just reasons for requesting the withdrawal.

(e) ***Finality of Guilty or Nolo Contendere Plea.*** After the court imposes sentence, the defendant may not withdraw a plea of guilty or nolo contendere, and the plea may be set aside only on direct appeal or by motion under 28 U.S.C. § 2255.

(IT'S IN THE LEAD-IN.)

See page following for clean revision

(1) In General

(6) Inadmissibility of Pleas, Plea Discussions, and Related Statements. Except as otherwise provided in this paragraph, evidence of the following is not, in any civil or criminal proceeding, admissible against the defendant who made the plea or was a participant in the plea discussions: (A) a plea of guilty which was later withdrawn; (B) a plea of nolo contendere; (C) any statement made in the course of any proceedings under this rule regarding either of the foregoing pleas; or (D) any statement made in the course of plea discussions with an attorney for the government which do not result in a plea of guilty or which result in a plea of guilty later withdrawn. However, such a statement is admissible (i) in any proceeding wherein another statement made in the course of the same plea or plea discussions has been introduced and the statement ought in fairness be considered contemporaneously with it, or (ii) in a criminal proceeding for perjury or false statement if the statement was made by the defendant under oath, on the record, and in the presence of counsel.	(f) **Admissibility or Inadmissibility of a Plea, Plea Discussions, and Related Statements.** Except as ~~otherwise~~ provided in this subdivision, evidence of the following is not, in any civil or criminal proceeding, admissible against the defendant who made the plea or ~~was a participant~~ participated in the plea discussions: (1) a plea of guilty that 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 that was made during plea proceedings; (4) 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~~ should 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~~. defendant's attorney.
(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.	(2) Exceptions. A statement described in Rule 11(f)(1)(C) or (D) ?
(g) Record of Proceedings. A verbatim record of the proceedings at which the defendant enters a plea shall be made and, if there is a plea of guilty or nolo contendere, the record shall include, without limitation, the court's advice to the defendant, the inquiry into the voluntariness of the plea including any plea agreement, and the inquiry into the accuracy of a guilty plea.	(g) **Recording the Proceedings.** The proceedings during which the defendant enters a plea must be recorded by a court reporter or by a suitable recording device. If there is a guilty plea or a nolo contendere plea, the record must include the inquiries and advice to the defendant required under Rule 11(b) and (c).
(h) Harmless Error. Any variance from the procedures required by this rule which does not affect substantial rights shall be disregarded.	(h) **Harmless Error.** A variance from the requirements of this rule is harmless error if it does not affect substantial rights.

(New sentence in the middle of a listed item. Do we do that anywhere else?)

COMMITTEE NOTE

The language of Rule 11 has been amended and reorganized as part of the general restyling of the Criminal Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only, except as noted below.

Amended Rule 11(b)(1) requires the court to apprise the defendant of his or her rights before accepting a plea of guilty or nolo contendere. The list is generally the same as that in the current rule except that the reference to parole has been removed and the judge is now required under Rule 11(b)(1)(H) to advise the defendant of the possibility of a fine and special assessment as a part of a maximum possible sentence. Also, the list has been re-ordered.

Rule 11(c)(1)(A) includes a change, which recognizes a common type of plea agreement — that the government will "not bring" other charges.

The Committee considered whether to address the practice in some courts of using judges to facilitate plea agreements. The current rule states that "the court shall not participate in any discussions between the parties concerning such plea agreement." Some courts apparently believe that that language acts as a limitation only upon the judge taking the defendant's plea and thus permits other judges to serve as facilitators for reaching a plea agreement between the government and the defendant. *See, e.g., United States v. Torres*, 999 F.2d 376, 378 (9th Cir. 1993) (noting practice and concluding that presiding judge had not participated in a plea agreement that had resulted from discussions involving another judge). The Committee decided to leave the Rule as it is with the understanding that doing so was in no way intended either to approve or disapprove the existing law interpreting that provision.

Amended Rules 11(c)(3) to (5) address the topics of consideration, acceptance, and rejection of a plea agreement. The amendments are not intended to make any change in practice. The topics are discussed separately because in the past there has been some question about the possible interplay between the court's consideration of the guilty plea in conjunction with a plea agreement and sentencing and the ability of the defendant to withdraw a plea. *See United States v. Hyde*, 520 U.S. 670 (1997) (holding that plea and plea agreement need not be accepted or rejected as a single unit; "guilty pleas can be accepted while plea agreements are deferred, and the acceptance of the two can be separated in time."). Similarly, the Committee decided to more clearly spell out in Rule 11(d) and 11(e) the ability of the defendant to withdraw a plea. *See United States v. Hyde, supra.*

Amended Rule 11(e) is a new provision, taken from current Rule 32(e), that addresses the finality of a guilty or nolo contendere plea after the court imposes sentence. The provision makes it clear that it is not possible for a defendant to withdraw a plea after sentence is imposed.

Currently, Rule 11(e)(5) requires that unless good cause is shown, the parties are to give pretrial notice to the court that a plea agreement exists. That provision has been deleted. First, the Committee believed that although the provision was originally drafted to assist judges, under current practice few counsel would risk the consequences in the ordinary case of not informing the court that an agreement exists. Secondly, the Committee was concerned that there might be rare cases where the parties might agree that informing the court of the existence of an agreement might endanger a defendant or compromise an on-going investigation in a related case. In the end, the Committee believed that, on balance, it would be preferable to remove the provision and reduce the risk of pretrial disclosure.

Rule 11(f) Admissibility or Inadmissibility of a Plea, Plea Discussions, and Related Statements

(1) In General. Except as provided in this ~~subdivision~~, evidence of the following is not, in any civil or criminal proceeding, admissible against the defendant who made the plea or participated in the plea discussions:

(A) a plea of guilty that was later withdrawn;

(B) a plea of nolo contendere;

(C) any statement about either of those two pleas that was made during plea proceedings; or

(D) any statement made during plea discussions with an attorney for the government that do not result in a guilty plea or that result in a guilty plea later withdrawn.

(2) Exceptions. A statement described in Rule 11(f)(1)(C) ← ? or (D) is admissible

(A) in any proceeding in which another statement made during the same plea or plea discussions has been introduced, and the statement should in fairness be considered together with the other statement; or

(5)

(B) IN A CRIMINAL PROCEEDING FOR PERJURY OR FALSE STATEMENT if the DEFENDANT MADE THE STATEMENT UNDER OATH, ON THE RECORD, AND IN THE PRESENCE of DEFENDANT'S ATTORNEY.

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 criminal proceedings are the indictment, the information, and the pleas of not guilty, guilty, and nolo contendere. (Compare 11(a)(1).)
(b) Pretrial Motions. Any defense, objection, or request which is capable of determination without the trial of the general issue may be raised before trial by motion. Motions may be written or oral at the discretion of the judge. The following must be raised prior to trial: (1) Defenses and objections based on defects in the institution of the prosecution; or (2) Defenses and objections based on defects in the indictment or information (other than that it fails to show jurisdiction in the court or to charge an offense which objections shall be noticed by the court at any time during the pendency of the proceedings); or (3) Motions to suppress evidence; or (4) Requests for discovery under Rule 16; or (5) Requests for a severance of charges or defendants under Rule 14.	(b) **Pretrial Motions.** (1) ***In General.*** ~~The provisions of~~ Rule 47 ~~apply~~ applies to a pretrial motion. (2) ***Motions That May Be Made Before Trial.*** ~~The parties~~ A party may raise by pretrial motion any defense, objection, or request that the court can determine without a trial of the general issue. (3) ***Motions That Must Be Made Before Trial.*** The following must be raised before trial: (A) a motion alleging a defect in ~~the institution of~~ instituting the prosecution; (B) a motion alleging a defect in the indictment or information — but at any time ~~during the proceeding~~ while the case is pending, the court may hear a claim that the indictment or information fails to invoke the court's jurisdiction or to state an offense; (C) a motion to suppress evidence; (D) a Rule 14 motion to sever charges or defendants; and (E) a Rule 16 motion for discovery.

	(4) *Notice of the Government's Intent to Use Evidence.* (A) *At the Government's Discretion.* At the arraignment or as soon afterward as practicable, the government may give notice to the defendant of its intent to use specified evidence at trial in order to afford the defendant an opportunity to ~~raise objections to that evidence~~ before trial under Rule 12(b)(3)(C). (B) *At the Defendant's Request.* At the arraignment or as soon afterward as practicable, the defendant may, in order to have an opportunity to ~~move to~~ suppress evidence under Rule 12(b)(3)(C), request notice of the government's intent to use (in its evidence-in-chief at trial) any evidence that the defendant may be entitled to discover under Rule 16.
(c) Motion Date. Unless otherwise provided by local rule, the court may, at the time of the arraignment or as soon thereafter as practicable, set a time for the making of pretrial motions or requests and, if required, a later date of hearing.	**(c) Motion Deadline.** The court may at the arraignment, or as soon afterward as practicable, set a deadline for the parties to make pretrial motions and may also schedule a motion hearing.
(d) Notice by the Government of the Intention to Use Evidence. **(1) At the Discretion of the Government.** At the arraignment or as soon thereafter as is practicable, the government may give notice to the defendant of its intention to use specified evidence at trial in order to afford the defendant an opportunity to raise objections to such evidence prior to trial under subdivision (b)(3) of this rule. **(2) At the Request of the Defendant.** At the arraignment or as soon thereafter as is practicable the defendant may, in order to afford an opportunity to move to suppress evidence under subdivision (b)(3) of this rule, request notice of the government's intention to use (in its evidence in chief at trial) any evidence which the defendant may be entitled to discover under Rule 16 subject to any relevant limitations prescribed in Rule 16.	

(COMPARE 6(e)(1), 11(g).)

Recording the Proceedings

(e) **Ruling on Motion.** A motion made before trial shall be determined before trial unless the court, for good cause, orders that it be deferred for determination at the trial of the general issue or until after verdict, but no such determination shall be deferred if a party's right to appeal is adversely affected. Where factual issues are involved in determining a motion, the court shall state its essential findings on the record.	(d) **Ruling on a Motion.** The court must decide every pretrial motion before trial unless it finds good cause to defer a ruling. The court must not defer ruling on a pretrial motion if the deferral will adversely affect a party's right to appeal. When factual issues are involved in deciding a motion, the court must state its essential findings on the record. (Is this Right?)
(f) **Effect of Failure To Raise Defenses or Objections.** Failure by a party to raise defenses or objections or to make requests which must be made prior to trial, at the time set by the court pursuant to subdivision (c), or prior to any extension thereof made by the court, shall constitute waiver thereof, but the court for cause shown may grant relief from the waiver.	(e) **Waiver of a Defense, Objection, or Request.** A party waives any Rule 12(b)(1) defense, objection, or request not raised by the deadline the court sets under Rule 12(c) or by any extension the court provides. For good cause, the court may grant relief from the waiver.
(g) **Records.** A verbatim record shall be made of all proceedings at the hearing, including such findings of fact and conclusions of law as are made orally.	(f) **Records.** All proceedings at a motion hearing, including any findings of fact and conclusions of law made by the court, must be recorded by a court reporter or a suitable recording device.
(h) **Effect of Determination.** If the court grants a motion based on a defect in the institution of the prosecution or in the indictment or information, it may also order that the defendant be continued in custody or that bail be continued for a specified time pending the filing of a new indictment or information. Nothing in this rule shall be deemed to affect the provisions of any Act of Congress relating to periods of limitations.	(g) **Defendant's Continued Custody or Release Status.** If the court grants a motion to dismiss based on a defect in ~~the institution of the~~ institution prosecution, in the indictment, or in the information, it may order the defendant to be released or detained under 18 U.S.C. § 3142 for a specified time until a new indictment or information is filed. This rule does not affect any federal statutory period of limitations.
(i) **Production of Statements at Suppression Hearing.** Rule 26.2 applies at a hearing on a motion to suppress evidence under subdivision (b)(3) of this rule. For purposes of this subdivision, a law enforcement officer is deemed a government witness.	(h) **Producing Statements at a Suppression Hearing.** Rule 26.2 applies at a suppression hearing under Rule 12(b)(3)(C). In a suppression hearing, a law enforcement officer is considered a government witness.

COMMITTEE NOTE

The language of Rule 12 has been amended as part of the general restyling of the Criminal Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only, except as noted below.

The last sentence of current Rule 12(a), referring to the abolishment of "all other pleas, and demurrers and motions to quash" has been deleted as unnecessary.

Rule 12(b) is modified to more clearly indicate that Rule 47 governs any pretrial motions filed under Rule 12, including form and content. The new provision also more clearly delineates those motions that *must* be filed pretrial

and those that *may* be filed pretrial. No change in practice is intended.

Rule 12(b)(4) is composed of what is currently Rule 12(d). The Committee believed that that provision, which addresses the government's requirement to disclose discoverable information for the purpose of facilitating timely defense objections and motions, was more appropriately associated with the pretrial motions specified in Rule 12(b)(3).

Rule 12(c) includes a non-stylistic change. The reference to the "local rule" exception has been deleted to make it clear that judges should be encouraged to set deadlines for motions. The Committee believed that doing so promotes more efficient case management, especially when there is a heavy docket of pending cases. Although the rule permits some discretion in setting a date for motion hearings, the Committee believed that doing so at an early point in the proceedings would also promote judicial economy.

Moving the language in current Rule 12(d) caused the relettering of the subdivisions following Rule 12(c).

Although amended Rule 12(e) is a revised version of current Rule 12(f), the Committee intends to make no change in the current law regarding waivers of motions or defenses.

Rule 12.1. Notice of Alibi	Rule 12.1. Notice of Alibi Defense
(a) Notice by Defendant. Upon written demand of the attorney for the government stating the time, date, and place at which the alleged offense was committed, the defendant shall serve within ten days, or at such different time as the court may direct, upon the attorney for the government a written notice of the defendant's intention to offer a defense of alibi. Such notice by the defendant shall state the specific place or places at which the defendant claims to have been at the time of the alleged offense and the names and addresses of the witnesses upon whom the defendant intends to rely to establish such alibi.	**(a) Government's Request for Notice and Defendant's Response.** (1) ***Government's Request.*** The attorney for the government may request in writing that the defendant notify the attorney for the government of any intended alibi defense. The request must state the time, date, and place of the alleged offense. (2) ***Defendant's Response.*** Within 10 days after the request, or some other time the court directs, the defendant must serve written notice on the attorney for the government of any intended alibi defense. The defendant's notice must state (A) the specific places where the defendant claims to have been at the time of the alleged offense; and (B) the names, addresses, and telephone numbers 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) Disclosing Government Witnesses.** (1) ***Disclosure.*** If the defendant serves a Rule 12.1(a)(2) notice, the attorney for the government must disclose in writing to the defendant, or the defendant's attorney, (A) the names, addresses, and telephone numbers of the witnesses the government intends to rely on to establish the defendant's presence at the scene of the alleged offense; and (B) any government rebuttal witnesses to the defendant's alibi witnesses. (2) ***Time to Disclose.*** Unless the court directs otherwise, the attorney for the government 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.

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

COMMITTEE NOTE

The language of Rule 12.1 has been amended as part of the general restyling of the Criminal Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only, except as noted below.

Current Rules12.1(d) and 12.1(e) have been switched in the amended rule to improve the organization of the rule.

Finally, the amended rule includes a new requirement that in providing the names and addresses of alibi and any rebuttal witnesses, the parties must also provide the phone numbers of those witnesses. *See* Rule 12.1(a)(2), Rule 12.1(b)(1), and Rule 12.1(c). The Committee believed that requiring such information would facilitate locating and interviewing those witnesses.

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

(d) **Failure to Comply.** If there is a failure to give notice when required by subdivision (b) of this rule or to submit to an examination when ordered under subdivision (c) of this rule, the court may exclude the testimony of any expert witness offered by the defendant on the issue of the defendant's guilt.	(d) **Failure to Comply.** If the defendant fails to give notice under Rule 12.2(b) or does not submit to an examination when ordered under Rule 12.2(c), the court may exclude any expert evidence from the defendant on the issue of the defendant's mental disease, mental defect, or any other mental condition bearing on the defendant's guilt.
(e) **Inadmissibility of Withdrawn Intention.** Evidence of an intention as to which notice was given under subdivision (a) or (b), later withdrawn, is not, in any civil or criminal proceeding, admissible against the person who gave notice of the intention.	(e) **Inadmissibility of Withdrawn Intention.** Evidence of an intention as to which notice was given under Rule 12.2(a) or (b), later withdrawn, is not, in any civil or criminal proceeding, admissible against the person who gave notice of the intention. (COMPARE 12.1(F).)

COMMITTEE NOTE

The language of Rule 12.2 has been amended as part of the general restyling of the Criminal Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

REPORTER'S NOTES

In publishing the "style" changes to the Federal Rules of Criminal Procedure, the Committee decided to publish separately any rule that includes what it considered at least one major substantive change. The purpose for this separate publication is to highlight for the bench and the bar any proposed amendments that the Committee believes will result in significant changes in current practice. Rule 12.2 is one of those rules. Although this version of Rule 12.2 contains only "style" changes, another version of the rule is being published simultaneously in a separate pamphlet. That version of Rule 12.2 includes five significant amendments.

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

(Too big A gap between subject and verb.)

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

(WE'RE NOT CONSISTENT ABOUT THIS.)

(NOT IN 12.1(c).)

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

INTENT

(Compare 12.1(F).)

COMMITTEE NOTE

The language of Rule 12.3 has been amended as part of the general restyling of the Criminal Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only, except as noted below.

The Committee considered the issue of whether (as currently provided in Rule 12.3) a defendant could invoke the defense of public authority on either an actual or believed exercise of public authority. The Committee ultimately decided that any attempt to provide the defendant with a "right" to assert the defense was not a matter within the purview of the Committee under the Rules Enabling Act. The Committee decided to retain the current language, which recognizes, as a nonsubstantive matter, that if the defendant intends to raise the defense, notice must be given. Thus, the Committee decided not to make any changes in the current rule regarding the availability of the defense.

Substantive changes have been made in Rule 12.3(a)(4) and 12.3(b). As in Rule 12.1, the Committee decided to include in the restyled rule the requirement that the parties provide the telephone numbers of any witnesses disclosed under the rule.

(Compare 12.1(F) and 12.2(e).)

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

COMMITTEE NOTE

The language of Rule 13 has been amended as part of the general restyling of the Criminal Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

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

COMMITTEE NOTE

The language of Rule 14 has been amended as part of the general restyling of the Criminal Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

The reference to a defendant's "confession" in the last sentence of the current rule has been deleted. The Committee believed that the reference to the "defendant's statements" in the amended rule would fairly embrace any confessions or admissions by a defendant.

(See 45(b)(1)(B) and 57(a)(2).)

Rule 15. Depositions	Rule 15. Depositions
(a) When Taken. Whenever due to exceptional circumstances of the case it is in the interest of justice that the testimony of a prospective witness of a party be taken and preserved for use at trial, the court may upon motion of such party and notice to the parties order that testimony of such witness be taken by deposition and that any designated book, paper, document, record, recording, or other material not privileged, be produced at the same time and place. If a witness is detained pursuant to section 3144 of title 18, United States Code, the court on written motion of the witness and upon notice to the parties may direct that the witness' deposition be taken. After the deposition has been subscribed the court may discharge the witness.	**(a) When Taken.** **(1)** ***In General.*** A party may move that a prospective witness be deposed in order to preserve testimony for trial. The court may grant ~~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.	**(b) Notice.** **(1)** ***In General.*** A party seeking to take a deposition must give every other party reasonable written notice of the deposition's date and location. The notice must state the name and address of each deponent. If requested by a party receiving the notice, the court for good cause may change the deposition's date or location. **(2)** ***To the Custodial Officer.*** A party seeking to take the deposition must also notify the officer who has custody of the defendant of the scheduled date and location.

The officer having custody of a defendant shall be notified of the time and place set for the examination and shall, unless the defendant waives in writing the right to be present, produce the defendant at the examination and keep the defendant in the presence of the witness during the examination, unless, after being warned by the court that disruptive conduct will cause the defendant's removal from the place of the taking of the deposition, the defendant persists in conduct which is such as to justify exclusion from that place. A defendant not in custody shall have the right to be present at the examination upon request subject to such terms as may be fixed by the court, but a failure, absent good cause shown, to appear after notice and tender of expenses in accordance with subdivision (c) of this rule shall constitute a waiver of that right and of any objection to the taking and use of the deposition based upon that right.	**(c) Defendant's Presence.** (1) ***Defendant in Custody.*** The officer who has custody of the defendant must produce the defendant at the deposition and keep the defendant in the witness's presence during the examination, unless the defendant: (A) waives in writing the right to be present; or (B) persists in disruptive conduct justifying exclusion after the court ~~has warned the defendant~~ BEING WARNED by that disruptive conduct will result in the defendant's exclusion. (2) ***Defendant Not in Custody.*** A defendant who is not in custody has the right upon request to be present at the deposition, subject to any conditions imposed by the court. If the government tenders the defendant's expenses as provided in Rule 15(d) but the defendant still fails to appear, the defendant — absent good cause — waives both the right to appear and any objection to the taking and use of the deposition based on that right.
(c) Payment of Expenses. Whenever a deposition is taken at the instance of the government, or whenever a deposition is taken at the instance of a defendant who is unable to bear the expenses of the taking of the deposition, the court may direct that the expense of travel and subsistence of the defendant and the defendant's attorney for attendance at the examination and the cost of the transcript of the deposition shall be paid by the government.	**(d) Expenses.** If the deposition was requested by the government, the court may — or if the defendant is unable to bear the deposition expenses, the court must — order the government to pay: (1) any reasonable travel and subsistence expenses of the defendant and the defendant's attorney to attend the deposition, and (2) the ~~deposition transcript~~ costs of the DEPOSITION TRANSCRIPT

MANNER of TAKING

(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) **~~Taken.~~** Unless these rules or a court order provide otherwise, a deposition must be filed ~~and it must be taken~~ in the same manner as a deposition in a civil action, except that: TAKEN and (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 defendan or the defendant's attorney, for use at the deposition, any statement of the deponent in the government's possession to which the defendant would be entitled at trial.
(e) Use. At the trial or upon any hearing, a part or all of a deposition, so far as otherwise admissible under the rules of evidence, may be used as substantive evidence if the witness is unavailable, as unavailability is defined in Rule 804(a) of the Federal Rules of Evidence, or the witness gives testimony at the trial or hearing inconsistent with that witness' deposition. Any deposition may also be used by any party for the purpose of contradicting or impeaching the testimony of the deponent as a witness. If only a part of a deposition is offered in evidence by a party, an adverse party may require the offering of all of it which is relevant to the part offered and any party may offer other parts.	(f) **Use as Evidence.** A party may use all or part of a deposition as provided by the Federal Rules of Evidence. (HAS BEEN SINGULAR UNTIL NOW.)
(f) Objections to Deposition Testimony. Objections to deposition testimony or evidence or parts thereof and the grounds for the objection shall be stated at the time of the taking of the deposition.	(g) **Objections.** A party objecting to deposition testimony or evidence must state the grounds for th 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.

BY AGREEMENT

COMMITTEE NOTE

The language of Rule 15 has been amended as part of the general restyling of the Criminal Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only, except as noted below.

In Rule 15(a), the list of materials to be produced has been amended to include the expansive term "data" to reflect the fact that in an increasingly technological culture, the information may exist in a format not already covered by the

more conventional list, such as a book or document.

The last portion of current Rule 15(b), dealing with the defendant's presence at a deposition, has been moved to amended Rule 15(c).

Rule 15(d), which addresses the payment of expenses incurred by the defendant and the defendant's attorney, has been changed. Under the current rule, if the government requests the deposition, or if the defendant requests the deposition and is unable to pay for it, the court *may* direct the government to pay for travel and subsistence expenses for both the defendant and the defendant's attorney. In either case, the current rule requires the government to pay for the transcript. Under the amended rule, if the government requested the deposition, the court *must* require the government to pay reasonable subsistence and travel expenses and the cost of the deposition transcript. If the defendant is unable to pay the deposition expenses, the court *must* order the government to pay reasonable subsistence and travel expenses and the deposition transcript costs—regardless of who requested the deposition. Although the current rule places no apparent limits on the amount of funds that should be reimbursed, the Committee believed that insertion of the word "reasonable" was consistent with current practice.

Rule 15(f) has been revised to more clearly reflect that the admissibility of any deposition taken under the rule is governed not by the rule itself, but instead by the Federal Rules of Evidence.

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

(First time we've gone to 5 levels. Instead, Maybe "if ——, ..." And if ——.")

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

(Why NOW?)

PREPARING

(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 attorney for the government knows — or through due diligence could know — that the item exists; and (iii) the item is material to ~~the preparation of~~ PREPARING the defense or the government intends to use the item in its case-in-chief at trial.
(E) Expert Witnesses. At the defendant's request, the government shall disclose to the defendant a written summary of testimony that the government intends to use under Rules 702, 703, or 705 of the Federal Rules of Evidence during its case in chief at trial. If the government requests discovery under subdivision (b)(1)(C)(ii) of this rule and the defendant complies, the government shall, at the defendant's request, disclose to the defendant a written summary of testimony the government intends to use under Rules 702, 703, or 705 as evidence at trial on the issue of the defendant's mental condition. The summary provided under this subdivision shall describe the witnesses' opinions, the bases and the reasons for those opinions, and the witnesses' qualifications.	(G) *Expert Testimony.* Upon 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 those opinions, and the witness's qualifications.
(2) Information Not Subject to Disclosure. Except as provided in paragraphs (A), (B), (D), and (E) of subdivision (a)(1), this rule does not authorize the discovery or inspection of reports, memoranda, or other internal government documents made by the attorney for the government or any other government agent investigating or prosecuting the case. Nor does the rule authorize the discovery or inspection of statements made by government witnesses or prospective government witnesses except as provided in 18 U.S.C. § 3500.	(2) ***Information Not Subject to Disclosure.*** Except as Rule 16(a)(1) provides otherwise, this rule does not authorize the discovery or inspection of reports, memoranda, or other internal government documents made by the attorney for the government or other government agent in connection with ~~the investigation or prosecution~~ INVESTIGATING PROSECUTING of the case. Nor does this rule authorize the discovery or inspection of statements made by prospective government witnesses except as provided in 18 U.S.C. § 3500.

(3) Grand Jury Transcripts. Except as provided in Rules 6, 12(i) and 26.2, and subdivision (a)(1)(A) of this rule, these rules do not relate to discovery or inspection of recorded proceedings of a grand jury.	(3) *Grand Jury Transcripts.* This rule does not apply to the discovery or inspection of a grand jury's recorded proceedings, except as provided in Rules 6, 12(h), 16(a)(1), and 26.2.
[(4) Failure to Call Witness.] (Deleted Dec. 12, 1975)	
(b) The Defendant's Disclosure of Evidence. **(1) Information Subject to Disclosure.** **(A) Documents and Tangible Objects.** If the defendant requests disclosure under subdivision (a)(1)(C) or (D) of this rule, upon compliance with such request by the government, the defendant, on request of the government, shall permit the government to inspect and copy or photograph books, papers, documents, photographs, tangible objects, or copies or portions thereof, which are within the possession, custody, or control of the defendant and which the defendant intends to introduce as evidence in chief at the trial.	**(b) Defendant's Disclosure.** (1) *Information Subject to Disclosure.* (A) *Documents and Objects.* If the defendant requests disclosure under Rule 16(a)(1)(E) and the government complies, then the defendant must permit the government, upon request, to inspect and copy, or photograph books, papers, documents, data, photographs, tangible objects, buildings or places, or copies or portions of any of these items, if: (i) the item is within the defendant's possession, custody, or control; and (ii) the defendant intends to use the item in the defendant's case-in-chief at trial.
(B) Reports of Examinations and Tests. If the defendant requests disclosure under subdivision (a)(1)(C) or (D) of this rule, upon compliance with such request by the government, the defendant, on request of the government, shall permit the government to inspect and copy or photograph any results or reports of physical or mental examinations and of scientific tests or experiments made in connection with the particular case, or copies thereof, within the possession or control of the defendant, which the defendant intends to introduce as evidence in chief at the trial or which were prepared by a witness whom the defendant intends to call at the trial when the results or reports relate to that witness' testimony.	(B) *Reports of Examinations and Tests.* If 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 use the item in the defendant's case-in-chief at trial, or intends to call the witness who prepared the report and the report relates to the witness's testimony.

(BREAK THE LINK TO "If.")

77

(C) Expert Witnesses. Under the following circumstances, the defendant shall, at the government's request, disclose to the government a written summary of testimony that the defendant intends to use under Rules 702, 703, or 705 of the Federal Rules of Evidence as evidence at trial: (i) if the defendant requests disclosure under subdivision (a)(1)(E) of this rule and the government complies, or (ii) if the defendant has given notice under Rule 12.2(b) of an intent to present expert testimony on the defendant's mental condition. This summary shall describe the witnesses' opinions, the bases and reasons for those opinions, and the witnesses' qualifications.	(C) *Expert Testimony.* If 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.
(2) Information Not Subject To Disclosure. Except as to scientific or medical reports, this subdivision does not authorize the discovery or inspection of reports, memoranda, or other internal defense documents made by the defendant, or the defendant's attorneys or agents in connection with the investigation or defense of the case, or of statements made by the defendant, or by government or defense witnesses, or by prospective government or defense witnesses, to the defendant, the defendant's agents or attorneys.	(2) ***Information Not Subject to Disclosure.*** Except for scientific or medical reports, Rule 16(b)(1) does not authorize discovery or inspection of: (A) reports, memoranda, or other documents made by the defendant, or the defendant's attorney or agent, during the case's investigation or defense; or (B) a statement made to the defendant, or the defendant's attorney or agent, by: (i) the defendant; (ii) a government or defense witness; or (iii) a prospective government or defense witness.
[(3) Failure to Call Witness.] (Deleted Dec. 12, 1975)	
(c) Continuing Duty to Disclose. If, prior to or during trial, a party discovers additional evidence or material previously requested or ordered, which is subject to discovery or inspection under this rule, such party shall promptly notify the other party or that other party's attorney or the court of the existence of the additional evidence or material.	(c) **Continuing Duty to Disclose.** A party who discovers additional evidence or material before or during trial must promptly disclose its existence to the other party or the court, if: (1) the evidence or material is subject to discovery or inspection under this rule; and (2) the other party previously requested, or the court ordered, its production.

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

COMMITTEE NOTE

The language of Rule 16 has been amended as part of the general restyling of the Criminal Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only, except as noted below.

Current Rule 16(a)(1)(A) is now located in Rule 16(a)(1)(A), (B), and (C). Current Rule 16(a)(1)(B), (C), (D), and (E) have been relettered.

Amended Rule 16(b)(1)(B) includes a change that may be substantive in nature. Rule 16(a)(1)(E) and 16(a)(1)(F) require production of specified information if the government intends to "use" the information "in its case-in-chief at trial." The Committee believed that the language in revised Rule 16(b)(1)(B), which deals with a defendant's disclosure of information to the government, should track the similar language in revised Rule 16(a)(1). In Rule 16(b)(1)(B)(ii), the Committee changed the current provision which reads: "the defendant intends to *introduce* as evidence" to the "defendant intends to *use* the item . . ." The Committee recognized that this might constitute a substantive change in the rule but believed that it was a necessary conforming change with the provisions in Rule16(a)(1)(E) and (F), noted *supra*, regarding use of evidence by the government.

In amended Rule 16(d)(1), the last phrase in the current subdivision — which refers to a possible appeal of the court's discovery order — has been deleted. In the Committee's view, no substantive change results from that deletion. The language is unnecessary because the court, regardless of whether there is an appeal, will have maintained the record.

Finally, current Rule 16(e), which addresses the topic of notice of alibi witnesses, has been deleted as being unnecessarily duplicative of Rule 12.1.

FOR ATTENDANCE of a WITNESS

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

SUBPOENA

(WE USUALLY HAVE HEADINGS AT THE (1), (2), (3) LEVEL.)

(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, 28 U.S.C. § 1783 governs the subpoena's service.
(f) For Taking Depositions; Place of Examination. **(1) Issuance.** An order to take a deposition authorizes the issuance by the clerk of the court for the district in which the deposition is to be taken of subpoenas for the persons named or described therein. **(2) Place.** The witness whose deposition is to be taken may be required by subpoena to attend at any place designated by the trial court, taking into account the convenience of the witness and the parties.	**(f) ~~Deposition Subpoena.~~** (1) ***Issuance.*** A court order to take a deposition authorizes the clerk in the district where the deposition is to be taken to issue a subpoena for any witness named or described in the order. (2) ***Place.*** After considering the convenience of the witness and the parties, the court may order — and the subpoena may require — the witness to appear anywhere the court designates.
(g) Contempt. Failure by any person without adequate excuse to obey a subpoena served upon that person may be deemed a contempt of the court from which the subpoena issued or of the court for the district in which it issued if it was issued by a United States magistrate judge.	**(g) Contempt.** The court may hold in contempt a witness who, without adequate excuse, disobeys a subpoena issued by a federal court in 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~~ the statements.

COMMITTEE NOTE

The language of Rule 17 has been amended as part of the general restyling of the Criminal Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only, except as noted below.

A potential substantive change has been made in Rule 17(c)(1); the word "data" has been added to the list of matters that may be subpoenaed. The Committee believed that inserting that term will reflect the fact that in an increasingly technological culture, the information may exist in a format not already covered by the more conventional list, such as a book or document.

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

COMMITTEE NOTE

The language of Rule 17.1 has been amended as part of the general restyling of the Criminal Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only, except as noted below.

Current Rule 17.1 prohibits the court from holding a pretrial conference where the defendant is not represented by counsel. It is unclear whether this would bar such a conference when the defendant invokes the constitutional right to self-representation. *See Faretta v. California*, 422 U.S. 806 (1975). The amended version makes clear that a pretrial conference may be held in these circumstances. Moreover, the Committee believed that pretrial conferences might be particularly useful in those cases where the defendant is proceeding pro se.

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

WHERE **COMMITTEE NOTE**
(SEE 6(e)(3)(E) & OTHERS.)

The language of Rule 18 has been amended as part of the general restyling of the Criminal Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

Rule 19. ~~Rescinded.~~ [RESERVED]	**Rule 19. [~~Rescinded.~~]** RESERVED

Rule 20. Transfer From the District for Plea and Sentence	Rule 20. Transfer for Plea and Sentence
(a) Indictment or Information Pending. A defendant arrested, held, or present in a district other than that in which an indictment or information is pending against that defendant may state in writing a wish to plead guilty or nolo contendere, to waive trial in the district in which the indictment or information is pending, and to consent to disposition of the case in the district in which that defendant was arrested, held, or present, subject to the approval of the United States attorney for each district. Upon receipt of the defendant's statement and of the written approval of the United States attorneys, the clerk of the court in which the indictment or information is pending shall transmit the papers in the proceeding or certified copies thereof to the clerk of the court for the district in which the defendant is arrested, held, or present, and the prosecution shall continue in that district.	**(a) Consent to Transfer.** A prosecution may be transferred from the district where the indictment or information is pending, or from which a warrant on a complaint has been issued, to the district where the defendant is arrested, held, or present, if: (1) the defendant states in writing a wish to plead guilty or nolo contendere and to waive trial in the district where the indictment, information, or complaint is pending, consents in writing to the court's disposing of the case in the transferee district, and files the statement in the transferee district; and (2) the United States attorneys in both districts approve the transfer in writing. **(b) Clerk's Duties.** After receiving the defendant's statement and the required approvals, the clerk where the indictment, information, or complaint is pending must send the file, or a certified copy, to the clerk in the transferee district.
(b) Indictment or Information Not Pending. A defendant arrested, held, or present, in a district other than the district in which a complaint is pending against that defendant may state in writing a wish to plead guilty or nolo contendere, to waive venue and trial in the district in which the warrant was issued, and to consent to disposition of the case in the district in which that defendant was arrested, held, or present, subject to the approval of the United States attorney for each district. Upon filing the written waiver of venue in the district in which the defendant is present, the prosecution may proceed as if venue were in such district.	
(c) Effect of Not Guilty Plea. If after the proceeding has been transferred pursuant to subdivision (a) or (b) of this rule the defendant pleads not guilty, the clerk shall return the papers to the court in which the prosecution was commenced, and the proceeding shall be restored to the docket of that court. The defendant's statement that the defendant wishes to plead guilty or nolo contendere shall not be used against that defendant.	**(c) Effect of a Not Guilty Plea.** If the defendant pleads not guilty after the case has been transferred under Rule 20(a), the clerk must return the papers to the court where the prosecution began, and that court must restore the proceeding to its docket. The defendant's statement that the defendant wished to plead guilty or nolo contendere is not, in any civil or criminal proceeding, admissible against the defendant.

86

("This Rule" seems to refer to the Rule more generally — not a specific subpart. I guess either works here.)

(Sometimes we say "this Rule." Not sure I see the distinction)

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

(Compare 20(b).)

COMMITTEE NOTE

The language of Rule 20 has been amended as part of the general restyling of the Criminal Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only, except as noted below.

(87)

New Rule 20(d)(2) applies to juvenile cases and has been added to parallel a similar provision in new Rule 20(b). The new provision provides that after the court has determined that the provisions in Rule 20(d)(1) have been completed and the transfer is approved, the file (or certified copy) must be transmitted from the original court to the transferee court.

Rule 21. Transfer From the District for Trial	Rule 21. Transfer for Trial
(a) For Prejudice in the District. The court upon motion of the defendant shall transfer the proceeding as to that defendant to another district whether or not such district is specified in the defendant's motion if the court is satisfied that there exists in the district where the prosecution is pending so great a prejudice against the defendant that the defendant cannot obtain a fair and impartial trial at any place fixed by law for holding court in that district.	(a) **For Prejudice.** Upon the defendant's motion, the court must transfer the proceeding ~~as to~~ that defendant to another district if the court is satisfied that so great a prejudice against the defendant exists in the transferring district that the defendant cannot obtain a fair and impartial trial there.
(b) Transfer in Other Cases. For the convenience of parties and witnesses, and in the interest of justice, the court upon motion of the defendant may transfer the proceeding as to that defendant or any one or more of the counts thereof to another district.	(b) **For Convenience.** Upon the defendant's motion, the court may transfer the proceeding, or one or more counts, ~~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.

COMMITTEE NOTE

The language of Rule 21 has been amended as part of the general restyling of the Criminal Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

Amended Rule 21(d) consists of what was formerly Rule 22. The Committee believed that the substance of Rule 22, which addressed the issue of the timing of motions to transfer, was more appropriate for inclusion in Rule 21.

Rule 22. Time of Motion to Transfer	Rule 22. ~~Time to File a Motion to Transfer~~
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.	[~~Rescinded.~~] RESERVED

COMMITTEE NOTE

Rule 22 has been abrogated. The substance of the rule is now located in Rule 21(d).

VI. TRIAL	TITLE VI. TRIAL
Rule 23. Trial by Jury or by the Court	**Rule 23. Jury or Nonjury Trial**
(a) Trial by Jury. Cases required to be tried by jury shall be so tried unless the defendant waives a jury trial in writing with the approval of the court and the consent of the government.	**(a) Jury Trial.** If the defendant is entitled to a jury trial, the trial must be by jury unless: (1) the defendant waives a jury trial in writing; (2) the government consents; and (3) the court approves.
(b) Jury of Less Than Twelve. Juries shall be of 12 but at any time before verdict the parties may stipulate in writing with the approval of the court that the jury shall consist of any number less than 12 or that a valid verdict may be returned by a jury of less than 12 should the court find it necessary to excuse one or more jurors for any just cause after trial commences. Even absent such stipulation, if the court finds it necessary to excuse a juror for just cause after the jury has retired to consider its verdict, in the discretion of the court a valid verdict may be returned by the remaining 11 jurors.	**(b) Jury Size.** (1) ***In General.*** A jury consists of 12 persons unless this rule provides otherwise. (2) ***Stipulation for a Smaller Jury.*** At any time before the verdict, the parties may, with the court's approval, stipulate in writing that: (A) the jury may consist of fewer than 12 persons; or (B) a jury of fewer than 12 persons may return a verdict if the court finds it necessary to excuse a juror for good cause after the trial begins. (3) ***Court Order for a Jury of 11.*** After the jury has retired to deliberate, the court may permit a jury of 11 persons to return a verdict, even without a stipulation by the parties, if the court finds good cause to excuse a juror.
(c) Trial Without a Jury. In a case tried without a jury the court shall make a general finding and shall in addition, on request made before the general finding, find the facts specially. Such findings may be oral. If an opinion or memorandum of decision is filed, it will be sufficient if the findings of fact appear therein.	**(c) Nonjury Trial.** In a case tried without a jury, the court must find the defendant guilty or not guilty. If a party requests before the finding of guilty or not guilty, the court must state its specific findings of fact in open court or in a written decision or opinion.

COMMITTEE NOTE

The language of Rule 23 has been amended as part of the general restyling of the Criminal Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

In current Rule 23(b), the term "just cause" has been replaced with the more familiar term "good cause," that appears in other rules. No change in substance is intended.

Rule 24. Trial Jurors	Rule 24. Trial Jurors
(a) Examination. The court may permit the defendant or the defendant's attorney and the attorney for the government to conduct the examination of prospective jurors or may itself conduct the examination. In the latter event the court shall permit the defendant or the defendant's attorney and the attorney for the government to supplement the examination by such further inquiry as it deems proper or shall itself submit to the prospective jurors such additional questions by the parties or their attorneys as it deems proper.	**(a) Examination.** **(1)** ***In General.*** The court may examine prospective jurors or may permit the attorneys for the parties to do so. **(2)** ***Court Examination.*** If the court examines the jurors, it must permit the attorneys for the parties to: (A) ask further questions that the court considers proper; or (B) submit further questions that the court may ask if it considers them proper.
(b) Peremptory Challenges. If the offense charged is punishable by death, each side is entitled to 20 peremptory challenges. If the offense charged is punishable by imprisonment for more than one year, the government is entitled to 6 peremptory challenges and the defendant or defendants jointly to 10 peremptory challenges. If the offense charged is punishable by imprisonment for not more than one year or by fine or both, each side is entitled to 3 peremptory challenges. If there is more than one defendant, the court may allow the defendants additional peremptory challenges and permit them to be exercised separately or jointly.	**(b) Peremptory Challenges.** Each side is entitled to the number of peremptory challenges to prospective jurors specified below. The court may allow additional peremptory challenges to multiple defendants, and may allow the defendants to exercise those challenges separately or jointly. **(1)** ***Capital Case.*** Each side has 20 peremptory challenges when the government seeks the death penalty. **(2)** ***Other Felony Case.*** The government has 6 peremptory challenges and the defendant or defendants jointly have 10 peremptory challenges when the defendant is charged with a crime punishable by imprisonment of more than one year. **(3)** ***Misdemeanor Case.*** Each side has 3 peremptory challenges when the defendant is charged with a crime punishable by fine, imprisonment of one year or less, or both.

(COMPARE (c)(4) BELOW.)

(c) Alternate Jurors. (1) *In General.* The court may empanel no more than 6 jurors, in addition to the regular jury, to sit as alternate jurors. An alternate juror, in the order called, shall replace a juror who becomes or is found to be unable or disqualified to perform juror duties. Alternate jurors shall (i) be drawn in the same manner, (ii) have the same qualifications, (iii) be subject to the same examination and challenges, and (iv) take the same oath as regular jurors. An alternate juror has the same functions, powers, facilities and privileges as a regular juror.	**(c) Alternate Jurors.** (1) ***In General.*** The court may impanel up to ~~6~~ SIX alternate jurors to replace any jurors who ~~are unable to~~ CANNOT perform or who are disqualified from performing their duties. (2) ***Procedure.*** (A) ~~A~~ AN alternate jurors must have the same qualifications and be selected and sworn in the same manner as any other juror. (B) Alternate jurors replace jurors in the same sequence in which the alternates were selected. An alternate juror who replaces a juror has the same authority as the other jurors.
(2) *Peremptory Challenges.* In addition to challenges otherwise provided by law, each side is entitled to 1 additional peremptory challenge if 1 or 2 alternate jurors are empaneled, 2 additional peremptory challenges if 3 or 4 alternate jurors are empaneled, and 3 additional peremptory challenges if 5 or 6 alternate jurors are empaneled. The additional peremptory challenges may be used to remove an alternate juror only, and the other peremptory challenges allowed by these rules may not be used to remove an alternate juror. (3) *Retention of Alternate Jurors.* When the jury retires to consider the verdict, the court in its discretion may retain the alternate jurors during deliberations. If the court decides to retain the alternate jurors, it shall ensure that they do not discuss the case with any other person unless and until they replace a juror during deliberations. If an alternate replaces a regular juror after deliberations have begun, the court shall instruct the jury to begin its deliberations anew.	(3) ***~~Retention of~~ RETAINING Alternate Jurors.*** The court may retain alternate jurors after the jury retires to deliberate. The court must ensure that a retained alternate does not discuss the case with anyone until that alternate replaces a juror or is discharged. If an alternate replaces a juror after deliberations have begun, the court must instruct the jury to begin its deliberations anew. (4) ***Peremptory Challenges.*** Each side is entitled to the number of additional peremptory challenges to prospective alternate jurors specified below, ~~which~~ may be used only to remove alternate jurors. (A) *One or Two Alternates.* One additional peremptory challenge is permitted when one or two alternates are impaneled. (B) *Three or Four Alternates.* Two additional peremptory challenges are permitted when three or four alternates are impaneled. (C) *Five or Six Alternates.* Three additional peremptory challenges are permitted when five or six alternates are impaneled.

(AS ELSEWHERE)

THESE ADDITIONAL CHALLENGES

COMMITTEE NOTE

The language of Rule 24 has been amended as part of the general restyling of the Criminal Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only, except as noted below.

In restyling Rule 24(a), the Committee deleted the language that authorized the defendant to conduct voir dire of prospective jurors. The Committee believed that the current language was potentially ambiguous and could lead one incorrectly to conclude that a defendant, represented by counsel, could personally conduct voir dire or additional voir dire. The Committee believed that the intent of the current provision was to permit a defendant to participate personally in voir dire only if the defendant was acting pro se. Amended Rule 24(a) refers only to attorneys for the parties, i.e., the defense counsel and the attorney for the government, with the understanding that if the defendant is not represented by counsel, the court may still, in its discretion, permit the defendant to participate in voir dire. In summary, the Committee intends no change in practice.

Finally, the rule authorizes the court in multi-defendant cases to grant additional peremptory challenges to the defendants. If the court does so, the prosecution may request additional challenges in a multi-defendant case, not to exceed the total number available to the defendants jointly. The court, however, is not required to equalize the number of challenges where additional challenges are granted to the defendant.

Rule 25. Judge; Disability	Rule 25. Judge's Disability
(a) During Trial. If by reason of death, sickness or other disability the judge before whom a jury trial has commenced is unable to proceed with the trial, any other judge regularly sitting in or assigned to the court, upon certifying familiarity with the record of the trial, may proceed with and finish the trial.	**(a) During Trial.** Any judge regularly sitting in or assigned to the court may complete a jury trial if: (1) the judge before whom the trial began cannot proceed because of death, sickness, or other disability; and (2) the judge completing the trial certifies familiarity with the trial record.
(b) After Verdict or Finding of Guilt. If by reason of absence, death, sickness or other disability the judge before whom the defendant has been tried is unable to perform the duties to be performed by the court after a verdict or finding of guilt, any other judge regularly sitting in or assigned to the court may perform those duties; but if that judge is satisfied that a judge who did not preside at the trial cannot perform those duties or that it is appropriate for any other reason, that judge may grant a new trial. (See 17(c))	**(b) After a Verdict or Finding of Guilty.** (1) IN GENERAL. After a verdict or finding of guilty, any judge regularly sitting in or assigned to a court may complete the court's duties if the judge who presided at trial cannot perform those duties because of absence, death, sickness, or other disability. (2) GRANTING A NEW TRIAL. The successor judge may grant a new trial if satisfied that: (A) a judge other than the one who presided at the trial cannot perform the post-trial duties; or (B) a new trial is necessary for some other reason.

COMMITTEE NOTE

The language of Rule 25 has been amended as part of the general restyling of the Criminal Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

Rule 25(b)(2) addresses the possibility of a new trial when a judge determines that no other judge could perform post-trial duties or when the judge determines that there is some other reason for doing so. The current rule indicates that those reasons must be "appropriate." The Committee, however, believed that a better term would be "necessary," because that term includes notions of manifest necessity. No change in meaning or practice is intended.

Rule 26. Taking of Testimony	Rule 26. Taking Testimony
In all trials the testimony of witnesses shall be taken orally in open court, unless otherwise provided by an Act of Congress, or by these rules, the Federal Rules of Evidence, or other rules adopted by the Supreme Court.	In ~~all~~ EVERY trials the testimony of witnesses must be taken orally in open court, unless otherwise provided by an Act of Congress or by rules adopted under 28 U.S.C. §§ 2072-2077.

COMMITTEE NOTE

The language of Rule 26 has been amended as part of the general restyling of the Criminal Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

REPORTER'S NOTES

In publishing the "style" changes to the Federal Rules of Criminal Procedure, the Committee decided to publish separately any rule that includes what it considered at least one major substantive change. The purpose for this separate publication is to highlight for the bench and the bar any proposed amendments that the Committee believes will result in significant changes in current practice. Rule 26 is one of those rules. This proposed revision of Rule 26 includes only style changes. Another version of Rule 26, which includes an amendment that would authorize a court to receive testimony from a remote location, is being published simultaneously in a separate pamphlet.

Rule 26.1. Determination of Foreign Law	Rule 26.1. ~~Foreign Law Determination~~ Issue of Foreign Law
A party who intends to raise an issue concerning the law of a foreign country shall give reasonable written notice. The court, in determining foreign law, may consider any relevant material or source, including testimony, whether or not submitted by a party or admissible under the Federal Rules of Evidence. The court's determination shall be treated as a ruling on a question of law.	A party intending to raise an issue of foreign law must provide the court and all parties with reasonable written notice. Issues of foreign law are questions of law, but in deciding such issues a court may consider any relevant material or source — including testimony — without regard to the Federal Rules of Evidence.

COMMITTEE NOTE

The language of Rule 26.1 has been amended as part of the general restyling of the Criminal Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

(PLAIN ERROR ☺) — WITNESS'S

Rule 26.2. Production of Witness Statements	Rule 26.2. Producing a Witness's Statement
(a) Motion for Production. After a witness other than the defendant has testified on direct examination, the court, on motion of a party who did not call the witness, shall order the attorney for the government or the defendant and the defendant's attorney, as the case may be, to produce, for the examination and use of the moving party, any statement of the witness that is in their possession and that relates to the subject matter concerning which the witness has testified.	**(a) Motion to Produce.** After a witness other than the defendant has testified on direct examination, the court, on motion of a party who did not call the witness, must order ~~an~~ attorney for the government or the defendant and the defendant's attorney, as the case may be, to produce, for the examination and use of the moving party, any statement of the witness that is in ~~the~~ possession and that relates to the subject matter of the ~~witnesses's~~ testimony.
(b) Production of Entire Statement. If the entire contents of the statement relate to the subject matter concerning which the witness has testified, the court shall order that the statement be delivered to the moving party.	**(b) Producing the Entire Statement.** If the entire statement relates to the subject matter of the witness's testimony, the court must order that the statement be delivered to the moving party.
(c) Production of Excised Statement. If the other party claims that the statement contains privileged information or matter that does not relate to the subject matter concerning which the witness has testified, the court shall order that it be delivered to the court in camera. Upon inspection, the court shall excise the portions of the statement that are privileged or that do not relate to the subject matter concerning which the witness has testified, and shall order that the statement, with such material excised, be delivered to the moving party. Any portion of the statement that is withheld from the defendant over the defendant's objection must be preserved by the attorney for the government, and, if the defendant appeals a conviction, must be made available to the appellate court for the purpose of determining the correctness of the decision to excise the portion of the statement.	**(c) Producing a Redacted Statement.** If the party who called the witness claims that the statement contains information that is privileged or does not relate to the subject matter of the witness's testimony, the court must inspect the statement in camera. After excising any privileged or unrelated portions, the court must order delivery of the redacted statement to the moving party. If the defendant objects to an excision, the court must preserve the entire statement with the excised portion indicated, under seal, as part of the record.
(d) Recess for Examination of Statement. Upon delivery of the statement to the moving party, the court, upon application of that party, may recess the proceedings so that counsel may examine the statement and prepare to use it in the proceedings.	**(d) Recess to Examine a Statement.** The court may recess the proceedings to allow time for a party to examine the statement and prepare for its use.
(e) Sanction for Failure to Produce Statement. If the other party elects not to comply with an order to deliver a statement to the moving party, the court shall order that the testimony of the witness be stricken from the record and that the trial proceed, or, if it is the attorney for the government who elects not to comply, shall declare a mistrial if required by the interest of justice.	**(e) Sanction for ~~Failure to Produce or Deliver~~ a Statement.** If the party who called the witness disobeys an order to produce ~~or deliver~~ a statement, the court must strike the witness's testimony from the record. If ~~an~~ attorney for the government disobeys the order, the court must declare a mistrial if justice so requires.

NOT PRODUCING ?

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(VERY CONFUSING — THIN DISTINCTION (?) BETWEEN "PRODUCE" AND "DELIVER." WHY DOES HEADING TO (b) NOT SAY "DELIVERING"? NONE OF THE RULES CITED IN (g) REFER TO "DELIVERING.")

(f) Definition. As used in this rule, a "statement" of a witness means: **(1)** a written statement made by the witness that is signed or otherwise adopted or approved by the witness; **(2)** a substantially verbatim recital of an oral statement made by the witness that is recorded contemporaneously with the making of the oral statement and that is contained in a stenographic, mechanical, electrical, or other recording or a transcription thereof; or **(3)** a statement, however taken or recorded, or a transcription thereof, made by the witness to a grand jury.	**(f) Definition.** As used in this rule, a witness's "statement" means: **(1)** a written statement that the witness makes and signs, or otherwise adopts or approves; **(2)** a substantially verbatim, contemporaneously recorded recital of the witness's oral statement that is contained in any recording or any transcription of a recording; or **(3)** the witness's statement to a grand jury, however taken or recorded, or a transcription of such a statement.
(g) Scope of Rule. This rule applies at a suppression hearing conducted under Rule 12, at trial under this rule, and to the extent specified: **(1)** in Rule 32(c)(2) at sentencing; **(2)** in Rule 32.1(c) at a hearing to revoke or modify probation or supervised release; **(3)** in Rule 46(i) at a detention hearing; **(4)** in Rule 8 of the Rules Governing Proceedings under 28 U.S.C. § 2255; and **(5)** in Rule 5.1 at a preliminary examination.	**(g) Scope.** This rule applies at trial, at a suppression hearing under Rule 12, and to the extent specified in the following rules: **(1)** Rule 5.1(h) (preliminary hearing); **(2)** Rule 32(h)(2) (sentencing); **(3)** Rule 32.1(e) (hearing to revoke or modify probation or supervised release); **(4)** Rule 46(j) (detention hearing); and **(5)** Rule 8 of the Rules Governing Proceedings under 28 U.S.C. § 2255.

COMMITTEE NOTE

The language of Rule 26.2 has been amended as part of the general restyling of the Criminal Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only, except as noted below.

Current Rule 26.2(c) states that if the court withholds a portion of a statement, over the defendant's objection, "the attorney for the government" must preserve the statement. The Committee believed that the better rule would be for the court to simply seal the entire statement as a part of the record, in the event that there is an appeal.

Also, the terminology in Rule 26.2(c) has been changed. The rule now speaks in terms of a "redacted" statement instead of an "excised" statement. No change in practice is intended.

Finally, the list of proceedings has been placed in numerical order by rule in Rule 26.2(g).

Rule 26.3. Mistrial	Rule 26.3. Mistrial
Before ordering a mistrial, the court shall provide an opportunity for the government and for each defendant to comment on the propriety of the order, including whether each party consents or objects to a mistrial, and to suggest any alternatives.	Before ordering a mistrial, the court must give each defendant and the government an opportunity to commen on the propriety of the order, to state whether that party consents or objects, and to suggest alternatives.

COMMITTEE NOTE

The language of Rule 26.3 has been amended as part of the general restyling of the Criminal Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

Rule 27. Proof of Official Record	Rule 27. Proof of Official Record
An official record or an entry therein or the lack of such a record or entry may be proved in the same manner as in civil actions.	A party may prove an official record, an entry in such a record, or the lack of a record or entry in the same manner as in a civil action.

COMMITTEE NOTE

The language of Rule 27 has been amended as part of the general restyling of the Criminal Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

Rule 28. Interpreters	Rule 28. Interpreters
The court may appoint an interpreter of its own selection and may fix the reasonable compensation of such interpreter. Such compensation shall be paid out of funds provided by law or by the government, as the court may direct.	The court may select, appoint, and fix the reasonable compensation for an interpreter. The compensation must be paid from funds provided by law or by the government, as the court may direct.

COMMITTEE NOTE

The language of Rule 28 has been amended as part of the general restyling of the Criminal Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

Rule 29. Motion for Judgment of Acquittal	Rule 29. Motion for Judgment of Acquittal
(a) Motion Before Submission to Jury. Motions for directed verdict are abolished and motions for judgment of acquittal shall be used in their place. The court on motion of a defendant or of its own motion shall order the entry of judgment of acquittal of one or more offenses charged in the indictment or information after the evidence on either side is closed if the evidence is insufficient to sustain a conviction of such offense or offenses. If the defendant's motion for judgment of acquittal at the close of the evidence offered by the government is not granted, the defendant may offer evidence without having reserved the right.	(a) **Before Submission to the Jury.** After the government closes its evidence or after the close of all the evidence, the court on the defendant's motion must enter a judgment of acquittal of any offense ~~as to~~ which the evidence is insufficient to sustain a conviction. The court may on its own consider whether the evidence is insufficient to sustain a conviction. If the court denies a motion for judgment of acquittal at the close of the government's evidence, the defendant may offer evidence without having reserved the right to do so.
(b) Reservation of Decision on Motion. The court may reserve decision on a motion for judgment of acquittal, proceed with the trial (where the motion is made before the close of all the evidence), submit the case to the jury and decide the motion either before the jury returns a verdict or after it returns a verdict of guilty or is discharged without having returned a verdict. If the court reserves a decision, it must decide the motion on the basis of the evidence at the time the ruling was reserved.	(b) **Reserving Decision.** The court may reserve decision on a motion for judgment of acquittal, proceed with the trial (where the motion is made before the close of all the evidence), submit the case to the jury and decide the motion either before the jury returns a verdict or after it returns a verdict of guilty or is discharged without having returned a verdict. If the court reserves decision, it must decide the motion on the basis of the evidence at the time the ruling was reserved.
(c) Motion After Discharge of Jury. If the jury returns a verdict of guilty or is discharged without having returned a verdict, a motion for judgment of acquittal may be made or renewed within 7 days after the jury is discharged or within such further time as the court may fix during the 7-day period. If a verdict of guilty is returned the court may on such motion set aside the verdict and enter judgment of acquittal. If no verdict is returned the court may enter judgment of acquittal. It shall not be necessary to the making of such a motion that a similar motion has been made prior to the submission of the case to the jury. (Compare (a) and (d)(1).)	(c) **After Jury Verdict or Discharge.** Time for a Motion (1) ***~~In General:~~*** A defendant may move for judgment of acquittal, or renew such a motion, within 7 days after a guilty verdict or after the court discharges the jury, whichever is later, or within any other time the court fixes during the 7-day period. (2) ***Ruling on the Motion.*** If the jury has returned a guilty verdict, the court may set aside the verdict and enter an acquittal. If the jury has failed to return a verdict, the court may enter judgment of acquittal. (3) ***No Prior Motion Required.*** A defendant is not required to move for judgment of acquittal before the court submits the case to the jury as a prerequisite for making such a motion after jury discharge.

103

(d) Same: Conditional Ruling on Grant of Motion. If a motion for judgment of acquittal after verdict of guilty under this Rule is granted, the court shall also determine whether any motion for a new trial should be granted if the judgment of acquittal is thereafter vacated or reversed, specifying the grounds for such determination. If the motion for a new trial is granted conditionally, the order thereon does not affect the finality of the judgment. If the motion for a new trial has been granted conditionally and the judgment is reversed on appeal, the new trial shall proceed unless the appellate court has otherwise ordered. If such motion has been denied conditionally, the appellee on appeal may assert error in that denial, and if the judgment is reversed on appeal, subsequent proceedings shall be in accordance with the order of the appellate court.	**(d) Conditional Ruling on a Motion for a New Trial.** **(1)** ***Motion for a New Trial.*** If the court enters a judgment of acquittal after a guilty verdict, the court must also conditionally determine whether any motion for a new trial should be granted if the judgment of acquittal is later vacated or reversed. The court must specify the reasons for that determination. **(2)** ***Finality.*** The court's order conditionally granting a motion for a new trial does not affect the finality of the judgment of acquittal. **(3)** ***Appeal.*** (A) *Grant of a Motion for a New Trial.* If the court conditionally grants a motion for a new trial, and an appellate court later reverses the judgment of acquittal, the trial court must proceed with the new trial unless the appellate court orders otherwise. (B) *Denial of a Motion for a New Trial.* If the court conditionally denies a motion for a new trial, an appellee may assert that the denial was erroneous. If the appellate court later reverses the judgment of acquittal, the trial court must proceed as the appellate court directs.

(BREAKS THE LINK TO "If.")

COMMITTEE NOTE

The language of Rule 29 has been amended as part of the general restyling of the Criminal Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only, except as noted below.

In Rule 29(a), the first sentence abolishing "directed verdicts" has been deleted because it is unnecessary. The rule continues to recognize that a judge may sua sponte enter a judgment of acquittal.

Rule 29(c)(1) addresses the issue of the timing of a motion for acquittal. The amended rule now includes language that the motion must be made within 7 days after a guilty verdict or after the judge discharges the jury, whichever occurs later. That change reflects the fact that in a capital case or in a case involving criminal forfeiture, for example, the jury may not be discharged until it has completed its sentencing duties. The court may still set another time for the defendant to make or renew the motion, if it does so within the 7-day period.

Rule 29.1. Closing Argument	29.1. Closing Argument
After the closing of evidence the prosecution shall open the argument. The defense shall be permitted to reply. The prosecution shall then be permitted to reply in rebuttal.	Closing arguments proceed in the following order: (a) the government argues; (b) the defense argues; and (c) the government rebuts.

COMMITTEE NOTE

The language of Rule 29.1 has been amended as part of the general restyling of the Criminal Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

Rule 30. Instructions	Rule 30. Jury Instructions
At the close of the evidence or at such earlier time during the trial as the court reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth in the requests. At the same time copies of such requests shall be furnished to all parties. The court shall inform counsel of its proposed action upon the requests prior to their arguments to the jury. The court may instruct the jury before or after the arguments are completed or at both times. No party may assign as error any portion of the charge or omission therefrom unless that party objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which that party objects and the grounds of the objection. Opportunity shall be given to make the objection out of the hearing of the jury and, on request of any party, out of the presence of the jury.	(a) **In General.** Any party may request in writing that the court instruct the jury on the law as specified in the request. The request must be made at the close of the evidence or at any earlier time during the trial that the court reasonably directs. When the request is made, the requesting party must furnish a copy to every other party. (b) **Ruling on a Request.** The court must inform the parties before closing arguments how it intends to rule on the requested instructions. (c) **Time for Giving Instructions.** The court may instruct the jury before or after the arguments are completed, or at both times. (d) **Objections to Instructions.** A party who objects to any portion of the instructions or to a failure to give a requested instruction must inform the court of the specific objection and the grounds for the objection before the jury retires to deliberate. An opportunity must be given to object out of the jury's hearing and, on request, out of the jury's presence.

(DO A WORD SEARCH & MAKE THESE CONSISTENT?)

COMMITTEE NOTE

The language of Rule 30 has been amended as part of the general restyling of the Criminal Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only, except as noted, below.

Rule 30(d) has been changed to clarify what, if anything, counsel must do to preserve error regarding an instruction or failure to instruct. The rule retains the requirement of a contemporaneous and specific objection (before the jury retires to deliberate). As the Supreme Court recognized in *Jones v. United States*, 527 U.S. 373, 388 (1999), read literally, current Rule 30 could be construed to bar any appellate review when in fact a court may conduct a limited review under a plain error standard. The topic of plain error is not addressed in Rule 30 because it is already covered in Rule 52. No change in practice is intended by the amendment.

REPORTER'S NOTES

In publishing the "style" changes to the Federal Rules of Criminal Procedure, the Committee decided to publish separately any rule that includes what it considered at least one major substantive change. The purpose for this separate publication is to highlight for the bench and the bar any proposed amendments that the Committee believes will result in significant changes in current practice. Rule 30 is one of those rules. This proposed revision of Rule 30 includes only proposed style changes. Another version of Rule 30 includes a substantive amendment that would authorize a court to require the parties to file requests for instructions before trial. That version of Rule 30 is being published simultaneously in a separate pamphlet.

Rule 31. Verdict	Rule 31. Jury Verdict
(a) Return. The verdict shall be unanimous. It shall be returned by the jury to the judge in open court.	**(a) Return.** The jury must return its verdict to a judge in open court. The verdict must be unanimous.
(b) Several Defendants. If there are two or more defendants, the jury at any time during its deliberations may return a verdict or verdicts with respect to a defendant or defendants as to whom it has agreed; if the jury cannot agree with respect to all, the defendant or defendants as to whom it does not agree may be tried again.	**(b) Partial Verdicts, Mistrial, and Retrial.** (1) ***Multiple Defendants.*** If there are multiple defendants, the jury may return a verdict at any time during its deliberations as to any defendant ~~as to~~ ON whom it has agreed. (2) ***Multiple Counts.*** If the jury cannot agree on all counts as to any defendant, the jury may return a verdict on those counts ~~as to~~ ON which it has agreed. (3) ***Mistrial and Retrial.*** If the jury cannot agree on a verdict as to all counts, the court may declare a mistrial ~~as to~~ ON those counts. The government may retry any defendant on any count ~~as to~~ ON which the jury could not agree.
(c) Conviction of Less Offense. The defendant may be found guilty of an offense necessarily included in the offense charged or of an attempt to commit either the offense charged or an offense necessarily included therein if the attempt is an offense.	**(c) Lesser Offense or Attempt.** A defendant may be found guilty of any of the following: (1) an offense necessarily included in the offense charged; (2) an attempt to commit the offense charged; or (3) an attempt to commit an offense necessarily included in the offense charged, if the attempt is an offense in its own right.
(d) Poll of Jury. After a verdict is returned but before the jury is discharged, the court shall, on a party's request, or may on its own motion, poll the jurors individually. If the poll reveals a lack of unanimity, the court may direct the jury to deliberate further or may declare a mistrial and discharge the jury.	**(d) Jury Poll.** After a verdict is returned but before the jury is discharged, the court must on a party's request, or may on its own, poll the jurors individually. If the poll reveals a lack of unanimity, the court may direct the jury to deliberate further or may declare a mistrial and discharge the jury.
(e) Criminal Forfeiture. [Abrogated][2]	~~**(e) Criminal Forfeiture.** [Abrogated]~~

[2] Supreme Court approved amendment in April 2000. The amendments take effect on December 1, 2000, unless Congress takes action otherwise.

COMMITTEE NOTE

The language of Rule 31 has been amended as part of the general restyling of the Criminal Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

Rule 31(b) has been amended to clarify that a jury may return partial verdicts, either as to multiple defendants or multiple counts, or both. *See, e.g., United States v. Cunningham*, 145 F.3d 1385, 1388-89 (D.C. Cir. 1998) (partial verdicts on multiple defendants and counts). No change in practice is intended.

VII. JUDGMENT	TITLE VII. POST-CONVICTION PROCEDURES
Rule 32. Sentence and Judgment	**Rule 32. Sentencing and Judgment**
(f) Definitions. For purposes of this rule — **(1)** "victim" means any individual against whom an offense has been committed for which a sentence is to be imposed, but the right of allocution under subdivision (c)(3)(E) may be exercised instead by — **(A)** a parent or legal guardian if the victim is below the age of eighteen years or incompetent; or **(B)** one or more family members or relatives designated by the court if the victim is deceased or incapacitated; if such person or persons are present at the sentencing hearing, regardless of whether the victim is present; and **(2)** "crime of violence or sexual abuse" means a crime that involved the use or attempted or threatened use of physical force against the person or property of another, or a crime under chapter 109A of title 18, United States Code.	**(a) Definitions.** The following definitions apply under this rule: **(1)** "Victim" means an individual against whom the defendant committed an offense for which the court will impose sentence. **(2)** "Crime of violence or sexual abuse" means: **(A)** a crime that involves the use, attempted use, or threatened use of physical force against another's person or property; or **(B)** a crime under 18 U.S.C. §§ 2241–2248 or §§ 2251-2257.
(a) In General; Time for Sentencing. When a presentence investigation and report are made under subdivision (b)(1), sentence should be imposed without unnecessary delay following completion of the process prescribed by subdivision (b)(6). The time limits prescribed in subdivision (b)(6) may be either shortened or lengthened for good cause.	**(b) Time of Sentencing.** **(1)** ***In General.*** The court must impose sentence without unnecessary delay. **(2)** ***Changing Time Limits.*** The court may, for good cause, change any time limits prescribed in ~~Rule 32~~ This Rule.

(b) Presentence Investigation and Report. **(1) When Made.** The probation officer must make a presentence investigation and submit a report to the court before sentence is imposed unless: **(A)** the court finds that the information in the record enables it to exercise its sentencing authority meaningfully under 18 U.S.C. § 3553; and **(B)** the court explains this finding on the record. Notwithstanding the preceding sentence, a presentence investigation and report, or other report containing information sufficient for the court to enter an order of restitution, as the court may direct, shall be required in any case in which restitution is required to be ordered.	**(c) Presentence Investigation.** **(1)** ***Required Investigation.*** (A) *In General.* The probation officer must conduct a presentence investigation and submit a report to the court before it imposes sentence unless: (i) 18 U.S.C. § 3593(c) or another statute requires otherwise; or (ii) the court finds that the information in the record enables it to meaningfully exercise its sentencing authority under 18 U.S.C. § 3553, and the court explains its finding on the record. (B) *Restitution.* If the law requires restitution, the probation officer must conduct an investigation and submit a report that contains sufficient information for the court to order restitution.
(2) Presence of Counsel. On request, the defendant's counsel is entitled to notice and a reasonable opportunity to attend any interview of the defendant by a probation officer in the course of a presentence investigation.	**(2)** ***Interviewing the Defendant.*** The probation officer who interviews a defendant as part of a presentence investigation must, on request, give the defendant's attorney notice and a reasonable opportunity to attend the interview.
(3) Nondisclosure. The report must not be submitted to the court or its contents disclosed to anyone unless the defendant has consented in writing, has pleaded guilty or nolo contendere, or has been found guilty.	

(4) Contents of the Presentence Report. The presentence report must contain — **(A)** information about the defendant's history and characteristics, including any prior criminal record, financial condition, and any circumstances that, because they affect the defendant's behavior, may be helpful in imposing sentence or in correctional treatment; **(B)** the classification of the offense and of the defendant under the categories established by the Sentencing Commission under 28 U.S.C. § 994(a), as the probation officer believes to be applicable to the defendant's case; the kinds of sentence and the sentencing range suggested for such a category of offense committed by such a category of defendant as set forth in the guidelines issued by the Sentencing Commission under 28 U.S.C. § 994(a)(1); and the probation officer's explanation of any factors that may suggest a different sentence — within or without the applicable guideline — that would be more appropriate, given all the circumstances; **(C)** a reference to any pertinent policy statement issued by the Sentencing Commission under 28 U.S.C. § 994(a)(2);	**(d) Presentence Report.** (1) ***Contents of the Report.*** The presentence report must contain the following information: (A) the defendant's history and characteristics, including: (i) any prior criminal record; (ii) the defendant's financial condition; and (iii) any circumstances affecting the defendant's behavior that may be helpful in imposing sentence or in correctional treatment; (B) the kinds of sentences and the sentencing range provided by the Sentencing Commission's guidelines, and the probation officer's explanation of any factors that may suggest a more appropriate sentence within or without an applicable guideline; (C) a reference to any pertinent Sentencing Commission policy statement;

(D) verified information, stated in a nonargumentative style, containing an assessment of the financial, social, psychological, and medical impact on any individual against whom the offense has been committed; (E) in appropriate cases, information about the nature and extent of nonprison programs and resources available for the defendant; (F) in appropriate cases, information sufficient for the court to enter restitution; (G) any report and recommendation resulting from a study ordered by the court under 18 U.S.C. § 3552(b); and (H) any other information required by the court.	(D) verified information, stated in a nonargumentative style, that assesses the financial, social, psychological, and medical impact on any individual against whom the offense has been committed; (E) when appropriate, the nature and extent of nonprison programs and resources available to the defendant; (F) when the law permits the court to order restitution, information sufficient for such an order; (G) if the court orders a study under 18 U.S.C. § 3552(b), any resulting report and recommendation; and (H) any other information that the court requires.
(5) **Exclusions.** The presentence report must exclude: (A) any diagnostic opinions that, if disclosed, might seriously disrupt a program of rehabilitation; (B) sources of information obtained upon a promise of confidentiality; or (C) any other information that, if disclosed, might result in harm, physical or otherwise, to the defendant or other persons.	(2) ***Exclusions.*** The presentence report must exclude the following: (A) any diagnoses that, if disclosed, might seriously disrupt a rehabilitation program; (B) any sources of information obtained upon a promise of confidentiality; and (C) any other information that, if disclosed, might result in physical or other harm to the defendant or others.

(6) Disclosure and Objections. **(A)** Not less than 35 days before the sentencing hearing — unless the defendant waives this minimum period — the probation officer must furnish the presentence report to the defendant, the defendant's counsel, and the attorney for the Government. The court may, by local rule or in individual cases, direct that the probation officer not disclose the probation officer's recommendation, if any, on the sentence.	**(e) Disclosing the Report and Recommendation.** (1) ***Time to Disclose.*** Unless the defendant has consented in writing, the probation officer must not submit a presentence report to the court or disclose its contents to anyone until the defendant has pleaded guilty or nolo contendere, or has been found guilty. (2) ***Minimum Required Notice.*** The probation officer must give the presentence report to the defendant, the defendant's attorney, and the attorney for the government at least 35 days before sentencing unless the defendant waives this minimum period. (3) ***Sentence Recommendation.*** By local rule or by order in a case, the court may direct the probation officer not to disclose to anyone other than the court the officer's recommendation on the sentence.
(B) Within 14 days after receiving the presentence report, the parties shall communicate in writing to the probation officer, and to each other, any objections to any material information, sentencing classifications, sentencing guideline ranges, and policy statements contained in or omitted from the presentence report. After receiving objections, the probation officer may meet with the defendant, the defendant's attorney, and the attorney for the Government to discuss those objections. The probation officer may also conduct a further investigation and revise the presentence report as appropriate.	**(f) Objecting to the Report.** (1) ***Time to Object.*** Within 14 days after receiving the presentence report, the parties must state in writing any objections, including objections to material information, sentencing guideline ranges, and policy statements contained in or omitted from the report. (2) ***Serving Objections.*** An objecting party must provide a copy of its objections to every other party and to the probation officer. (3) ***Action on Objections.*** After receiving objections, the probation officer may meet with the parties to discuss the objections. The probation officer may then investigate further and revise the presentence report as appropriate.

(C) Not later than 7 days before the sentencing hearing, the probation officer must submit the presentence report to the court, together with an addendum setting forth any unresolved objections, the grounds for those objections, and the probation officer's comments on the objections. At the same time, the probation officer must furnish the revisions of the presentence report and the addendum to the defendant, the defendant's counsel, and the attorney for the Government. (D) Except for any unresolved objection under subdivision (b)(6)(B), the court may, at the hearing, accept the presentence report as its findings of fact. For good cause shown, the court may allow a new objection to be raised at any time before imposing sentence.	(g) **Submitting the Report.** At least 7 days before sentencing, the probation officer must submit to the court and to the parties the presentence report and an addendum containing any unresolved objections, the grounds for those objections, and the probation officer's comments on them.

(c) Sentence. **(1) Sentencing Hearing.** At the sentencing hearing, the court must afford counsel for the defendant and for the Government an opportunity to comment on the probation officer's determinations and on other matters relating to the appropriate sentence, and must rule on any unresolved objections in the presentence report. The court may, in its discretion, permit the parties to introduce testimony or other evidence on the objections. For each matter controverted, the court must make either a finding on the allegation or a determination that no finding is necessary because the controverted matter will not be taken into account in, or will not affect, sentencing. A written record of these findings and determinations must be appended to any copy of the presentence report made available to the Bureau of Prisons. **(2) Production of Statements at Sentencing Hearing.** Rule 26.2(a)-(d) and (f) applies at a sentencing hearing under this rule. If a party elects not to comply with an order under Rule 26.2(a) to deliver a statement to the movant, the court may not consider the affidavit or testimony of the witness whose statement is withheld.	**(h) Sentencing.** (1) ***In General.*** At sentencing, the court: (A) must verify that the defendant and the defendant's attorney have read and discussed the presentence report and any addendum to the report; (B) must give the defendant and the defendant's attorney a written summary of — or summarize in camera — any information excluded from the presentence report under Rule 32(d)(2) on which the court will rely in sentencing, and give them a reasonable opportunity to comment on that information; (C) must allow the parties' attorneys to comment on the probation officer's determinations and other matters relating to an appropriate sentence; and (D) may, for good cause, allow a party to make a new objection at any time before sentence is imposed. (2) ***Introducing Evidence; Producing Statements.*** The court may permit the parties to introduce evidence on the objections. If a witness testifies at sentencing, Rule 26.2(a)-(d) and (f) applies. If a party ~~does not comply with~~ disobeys a Rule 26.2~~(a)~~ order to produce a witness's statement, the court must not consider that witness's testimony.

(FOR CONSISTENCY WITH 26.2(e) AND OTHER RULES CITED IN 26.2(g).)

CONCERNING THE PRESENTENCE REPO

(3) Imposition of Sentence. Before imposing sentence, the court must: **(A)** verify that the defendant and the defendant's counsel have read and discussed the presentence report made available under subdivision (b)(6)(A). If the court has received information excluded from the presentence report under subdivision (b)(5) the court — in lieu of making that information available — must summarize it in writing, if the information will be relied on in determining sentence.	(3) ***Court Determinations.*** At sentencing, the court: (A) may accept any undisputed portion of the presentence report as a finding of fact; (B) must — for any disputed portion of the presentence report or other controverted matter — rule on the dispute or determine that a ruling is unnecessary either because the matter will not affect sentencing, or because the court will not consider the matter in sentencing; and (C) must append a copy of the court's determinations under this rule to any copy of the presentence report made available to the Bureau of Prisons.
The court must also give the defendant and the defendant's counsel a reasonable opportunity to comment on that information; **(B)** afford defendant's counsel an opportunity to speak on behalf of the defendant; **(C)** address the defendant personally and determine whether the defendant wishes to make a statement and to present any information in mitigation of the sentence; **(D)** afford the attorney for the Government an opportunity to speak equivalent to that of the defendant's counsel to speak to the court;	(4) ***Opportunity to Speak.*** (A) *By a Party.* Before imposing sentence, the court must: (i) provide the defendant's attorney an opportunity to speak on the defendant's behalf; (ii) address the defendant personally in order to permit the defendant to speak or present any information to mitigate the sentence; and (iii) provide the attorney for the government an opportunity to speak equivalent to that of the defendant's attorney.

(E) if sentence is to be imposed for a crime of violence or sexual abuse, address the victim personally if the victim is present at the sentencing hearing and determine if the victim wishes to make a statement or present any information in relation to the sentence.	(B) *By a Victim.* Before imposing sentence, the court must address any victim of a crime of violence or sexual abuse who is present at sentencing and permit the victim to speak or submit any information ~~concerning~~ the sentence. Whether or not the victim is present, a victim's right to address the court may be exercised by the following persons if present: (i) a parent or legal guardian, if the victim is younger than 18 years or is incompetent; or (ii) one or more family members or relatives the court designates, if the victim is deceased or incapacitated.
(4) In Camera Proceedings. The court's summary of information under subdivision (c)(3)(A) may be in camera. Upon joint motion by the defendant and the attorney for the Government, the court may hear in camera the statements — made under subdivision (c)(3)(B), (C), (D), and (E) — by the defendant, the defendant's counsel, the victim, or the attorney for the government.	(C) *In Camera Proceedings.* Upon a party's motion the court may hear in camera any statement made under Rule 32(h)(4).
	(5) ***Notice of Possible Departure from Sentencing Guidelines.*** Before the court may depart from the ~~Guidelines calculation~~ on a ground not identified as a ground for departure either in the presentence report or in a prehearing submission ~~by a party,~~ the court must give the parties reasonable notice that it is contemplating such a departure. The notice must ~~specifically identify~~ the ground on which the court is contemplating a departure.

(5) Notification of Right to Appeal. After imposing sentence in a case which has gone to trial on a plea of not guilty, the court must advise the defendant of the right to appeal. After imposing sentence in any case, the court must advise the defendant of any right to appeal the sentence, and of the right of the person who is unable to pay the cost of an appeal to apply for leave to appeal in forma pauperis. If the defendant so requests, the clerk of the court must immediately prepare and file a notice of appeal on behalf of the defendant.	**(i) Defendant's Right to Appeal.** **(1)** ***Advice of a Right to Appeal.*** (A) *Appealing a Conviction.* If the defendant pleaded not guilty and was convicted, after sentencing the court must advise the defendant of the right to appeal the conviction. (B) *Appealing a Sentence.* After sentencing — regardless of the defendant's plea — the court must advise the defendant of any right to appeal the sentence. (C) *Appeal Costs.* The court must advise a defendant who ~~is unable to~~ pay appeal costs of the right to ask for permission to appeal in forma pauperis. (COMPARE 32.1(a)(3)(B) AND (b)(1)(B)(ii).) CANNOT **(2)** ***Clerk's Filing of Notice.*** If the defendant so requests, the clerk must immediately prepare and file a notice of appeal on the defendant's behalf.
(d) Judgment. **(1) In General.** A judgment of conviction must set forth the plea, the verdict or findings, the adjudication, and the sentence. If the defendant is found not guilty or for any other reason is entitled to be discharged, judgment must be entered accordingly. The judgment must be signed by the judge and entered by the clerk. **(2) Criminal Forfeiture.** Forfeiture procedures are governed by Rule 32.2. [3]	**(j) Judgment.** **(1)** ***In General.*** In the judgment of conviction, the court must set forth the plea, the jury verdict or the court's findings, the adjudication, and the sentence. If the defendant is found not guilty or is otherwise entitled to be discharged, the court must so enter judgment. The judge must sign the judgment, and the clerk must enter it. **(2)** ***Criminal Forfeiture.*** Forfeiture procedures are governed by Rule 32.2.

[3] The Supreme Court approved amendments in April 2000. The amendments take effect on December 1, 2000, unless Congress takes action otherwise.

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

COMMITTEE NOTE

The language of Rule 32 [which reflects the amendments transmitted to Congress by the Supreme Court on April 17, 2000] has been amended as part of the general restyling of the Criminal Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only, except as noted below.

The rule has been completely reorganized to make it easier to follow and apply. For example, the definitions in the rule have been moved to the first sections and the sequencing of the sections generally follows the procedure for presentencing and sentencing procedures.

Revised Rule 32(a) contains definitions that currently appear in Rule 32(f). One substantive change was made in Rule 32(a)(2). The Committee expanded the definition of victims of crimes of violence or sexual abuse to include victims of child pornography under 18 U.S.C. §§ 2251-2257 (child pornography and related offenses). The Committee considered those victims to be similar to victims of sexual offenses under 18 U.S.C. §§ 2241-2248, who already possess that right.

Under current Rule 32(c)(1), the court is required to "rule on any unresolved objections to the presentence report." The rule does not specify, however, whether that provision should be read literally to mean every objection that might have been made to the report or only on those objections that might in some way actually affect the sentence. The Committee believed that a broad reading of the current rule might place an unreasonable burden on the court without providing any real benefit to the sentencing process. Revised Rule 32(h)(3) narrows the requirement for court findings to those instances when the objection addresses a "controverted matter." If the objection satisfies that criterion, the court must either make a finding on the objection or decide that a finding is not required because the matter will not affect sentencing or that the matter will not be considered at all in sentencing.

Revised Rule 32(h)(4)(B) provides for the right of certain victims to address the court during sentencing. As noted, *supra*, revised Rule 32(a)(2) expands the definition of victims in Rule 32(a)(2) to include victims of crimes under 18 U.S.C. §§ 2251-57 (child pornography and related offenses). Thus, they too will now be permitted to address the court.

Rule 32(h)(4)(C) includes a change concerning who may request an in camera proceeding. Under current Rule 32(c)(4), the parties must file a joint motion for an in camera proceeding to hear the statements by defense counsel, the defendant, the attorney for the government, or any victim. Under the revised rule, any party may move that the court hear in camera any statement—by a party or a victim—made under revised Rule 32(h)(4).

Rule 32(h)(5) is a new provision that reflects *Burns v. United States*, 501 U.S. 129, 138-39 (1991). In *Burns*, the Court held that before a sentencing court could depart upward on a ground, not previously identified in the presentence report as a ground for departure, Rule 32 requires the court to give the parties reasonable notice that it is contemplating

such a ruling and to identify the specific ground for the departure. The Court also indicated that because the procedural entitlements in Rule 32 apply equally to both parties, it was equally appropriate to frame the issue as whether notice is required before the sentencing court departs either upward or downward. *Id.* at 135, n.4.

Finally, current Rule 32(e), which addresses the ability of a defendant to withdraw a guilty plea, has been moved to Rule 11(e).

REPORTER'S NOTES

In publishing the "style" changes to the Federal Rules of Criminal Procedure, the Committee decided to publish separately any rule that includes what it considered at least one major substantive change. The purpose for this separate publication is to highlight for the bench and the bar any proposed amendments that the Committee believes will result in significant changes in current practice. Rule 32 is one of those rules. In revising Rule 32, the Committee decided to also propose a substantive change that would limit the occasions that the sentencing judge would have to rule on unresolved objections to the presentence report. That version of Rule 32 is being published simultaneously in a separate pamphlet.

(COMPARE (b)(1)(a).)

Rule 32.1. Revocation or Modification of Probation or Supervised Release.	Rule 32.1. Revoking or Modifying Probation or Supervised Release
(a) Revocation of Probation or Supervised Release. **(1) Preliminary Hearing.** Whenever a person is held in custody on the ground that the person has violated a condition of probation or supervised release, the person shall be afforded a prompt hearing before any judge, or a United States magistrate who has been given the authority pursuant to 28 U.S.C. § 636 to conduct such hearings, in order to determine whether there is probable cause to hold the person for a revocation hearing. The person shall be given **(A)** notice of the preliminary hearing and its purpose and of the alleged violation; **(B)** an opportunity to appear at the hearing and present evidence in the person's own behalf; **(C)** upon request, the opportunity to question witnesses against the person unless, for good cause, the federal magistrate decides that justice does not require the appearance of the witness; and **(D)** notice of the person's right to be represented by counsel. The proceedings shall be recorded stenographically or by an electronic recording device. If probable cause is found to exist, the person shall be held for a revocation hearing. The person may be released pursuant to Rule 46(c) pending the revocation hearing. If probable cause is not found to exist, the proceeding shall be dismissed.	**(a) Initial Appearance.** (1) ***In Custody.*** A person held in custody for ~~a violation of~~ probation or supervised release must be taken without unnecessary delay before a magistrate judge. (2) (A) If the ~~defendant~~ is held in custody in the district where an alleged violation occurred, the initial appearance must be in that district. (B) If the ~~defendant~~ is held in custody in a district other than where an alleged violation occurred, the initial appearance must be in that district, or in an adjacent district if the appearance can occur more promptly there. (2) ***Upon a Summons.*** When a person appears in response to a summons for ~~a violation of~~ probation or supervised release, a magistrate judge must proceed under this rule. (3) ***Advice.*** The judge must inform the person of the following: (A) the alleged violation of probation or supervised release; (B) the person's right to retain counsel or to request that counsel be appointed if the person cannot obtain counsel; (C) the person's right, if held in custody, to preliminary hearing under Rule 32.1(b)(1); and (D) the person's right not to make a statement ~~concerning~~ any alleged violation, and that any statement made may be used against the person.

(I'd try to avoid subdivisions that don't add up to the whole — despite 24(b) and (c)(4).)

	(4) ***Appearance in the District With Jurisdiction.*** If the person is arrested or appears in the district that has jurisdiction to conduct a revocation hearing — either originally or by transfer of jurisdiction — the court must proceed under Rule 32.1(b)–(e).
	(5) ***Appearance in a District Lacking Jurisdiction.*** If the person is arrested or appears in a district that does not have jurisdiction to conduct a revocation hearing, the magistrate judge must: (A) if the alleged violation occurred in the district of arrest, conduct a preliminary hearing under Rule 32.1(b) and either: (i) transfer the person to the district that has jurisdiction, if the judge finds probable cause to believe that a violation occurred; or (ii) dismiss the proceedings and so notify the court that has jurisdiction, if the judge finds no probable cause to believe that a violation occurred; or (B) if the alleged violation did not occur in the district of arrest, transfer the person to the district that has jurisdiction if: (i) the government produces certified copies of the judgment, warrant, and warrant application; and (ii) the judge finds that the person is the same person named in the warrant.
	(6) ***Release or Detention.*** The magistrate judge may release or detain the person under 18 U.S.C. § 3143(a) pending further proceedings. The burden of establishing that the person will not flee or pose a danger to any other person or to the community rests with the person.

	(b) Revocation. **(1) *Preliminary Hearing.*** (A) *In General.* If a person is in custody for violating a condition of probation or supervised release, a magistrate judge must conduct a ~~prompt~~ hearing to determine whether there is probable cause to believe that a violation occurred. The person may waive the hearing.
	(B) *Requirements.* The hearing must be recorded by a court reporter or by a suitable recording device. The judge must give the person: (i) notice of the hearing and its purpose, the alleged violation ~~of probation or supervised release~~, and the person's right to retain ~~counsel~~ or to request that ~~counsel~~ be appointed if the person cannot obtain ~~counsel~~; (ii) an opportunity to appear at the hearing and present evidence; and (iii) upon request, an opportunity to question an adverse witness, unless the judge determines that the interest of justice does not require the witness to appear.
	(C) *Referral.* If the judge finds probable cause, the judge must conduct a revocation hearing. If the judge does not find probable cause, the judge must dismiss the proceeding.

(2) **Revocation Hearing.** The revocation hearing, unless waived by the person, shall be held within a reasonable time in the district of jurisdiction. The person shall be given: (A) written notice of the alleged violation; (B) disclosure of the evidence against the person; (C) an opportunity to appear and to present evidence in the person's own behalf; (D) the opportunity to question adverse witnesses; and (E) notice of the person's right to be represented by counsel. (COMPARE (A)(1)(B)(iii).)	(2) ***Revocation Hearing.*** Unless waived by the person, the court must hold the revocation hearing within a reasonable time in the district having jurisdiction. The person is entitled to: (A) written notice of the alleged violation; (B) disclosure of the evidence against the person; (C) an opportunity to appear, present evidence, and question adverse witnesses unless the court determines that the interest of justice does not require the witness to appear; and (D) notice of the person's right to retain ~~counsel~~ or to request that ~~counsel~~ be appointed if the person cannot obtain ~~counsel.~~
(b) Modification of Probation or Supervised Release. A hearing and assistance of counsel are required before the terms or conditions of probation or supervised release can be modified, unless the relief to be granted to the person on probation or supervised release upon the person's request or on the court's own motion is favorable to the person, and the attorney for the government, after having been given notice of the proposed relief and a reasonable opportunity to object, has not objected. An extension of the term of probation or supervised release is not favorable to the person for the purposes of this rule. (I'd be consistent throughout.)	**(c) Modification.** (1) ***In General.*** Before modifying the conditions of probation or supervised release, the court must hold a hearing, at which the person has the right to an attorney. (2) ***Exceptions.*** A hearing is not required if: (A) the person waives the hearing; or (B) the relief sought is favorable to the person and does not extend the term of probation or of supervised release; and (C) the attorney for the government has received notice of the relief sought, has had a reasonable opportunity to object, and has not done so.
	(d) Disposition ~~of the Case.~~ The court's disposition of the case is governed by 18 U.S.C. § 3563 and § 3565 (probation) and § 3583 (supervised release).

(c) Production of Statements. **(1) In General.** Rule 26.2(a)-(d) and (f) applies at any hearing under this rule. **(2) Sanctions for Failure to Produce Statement.** If a party elects not to comply with an order under Rule 26.2(a) to deliver a statement to the moving party, the court may not consider the testimony of a witness whose statement is withheld.	(e) **Producing Statements.** Rule 26.2(a)–(d) and (f) applies at a hearing under this rule. If a party ~~does not comply with~~ disobeys a Rule 26.2~~(a)~~ order to produce a witness's statement, the court ~~cannot~~ must not consider that witness's testimony.

(FOR CONSISTENCY WITH 26.2(e) AND OTHER RULES CITED IN 26.2(g).)

COMMITTEE NOTE

The language of Rule 32.1 has been amended as part of the general restyling of the Criminal Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only, except as noted below.

Rule 32.1 has been completely revised and expanded. The Committee believed that it was important to spell out more completely in this rule the various procedural steps that must be met when dealing with a revocation or modification of probation or supervised release. To that end, some language formerly located in Rule 40 has been moved to revised Rule 32.1. Throughout the rule, the terms "magistrate judge," and "court" (*see* revised Rule 1(b)(Definitions) are used to reflect that in revocation cases, initial proceedings in both felony and misdemeanor cases will normally be conducted before a magistrate judge, although a district judge may also conduct them. But the revocation decision must be made by a district judge if the offense of conviction was a felony. *See* 18 U.S.C. § 3401(i) (recognizing that district judge may designate a magistrate judge to conduct hearing and submit proposed findings of fact and recommendations).

Revised Rule 32.1(a)(1)-(4) is new material. Presently, there is no provision in the rules for conducting initial appearances for defendants charged with violating probation or supervised release—although some districts apply such procedures. Although the rule labels these proceedings as initial appearances, the Committee believed that it was best to separate those proceedings from Rule 5 proceedings, because the procedures differ for persons who are charged with violating conditions of probation or supervised release. The Committee has added a requirement in Rule 32.1(a)(3)(D) that the person be apprised of the right to remain silent concerning the alleged violation of the terms of probation or supervised release. Although a question may arise as to whether the person has any residual privilege not to present incriminating information regarding the offense that originally led to the conviction and terms of probation or supervised release, the person should have a privilege with regard to the alleged violation leading to the Rule 32.1 proceedings.

Revised Rule 32.1(a)(5) is derived from current Rule 40(d).

Revised Rule 32.1(a)(6), which is derived from current Rule 32.1(a)(1)(D), provides that the defendant bears the burden of showing that he or she will not flee or pose a danger pending a hearing on the revocation of probation or supervised release. The Committee believes that the new language is not a substantive change because it makes no change in practice.

Rule 32.1(b)(1)(B)(iii) and Rule 32.1(b)(2)(C) address the ability of a releasee to question adverse witnesses at the preliminary and revocation hearings. Those provisions recognize that the court should apply a balancing test at the

hearing itself when considering the releasee's asserted right to cross-examine adverse witnesses. The court is to balance the person's interest in the constitutionally guaranteed right to confrontation against the government's good cause for denying it. *See, e.g., Morrissey v. Brewer*, 408 U.S. 471, 489 (1972); *United States v. Comito*, 177 F.3d 1166 (9th Cir. 1999); *United States v. Walker*, 117 F.3d 417 (9th Cir. 1997); *United States v. Zentgraf*, 20 F.3d 906 (8th Cir. 1994).

Rule 32.1(c)(2)(A) permits the person to waive a hearing to modify the conditions of probation or supervised release. Although that language is new to the rule, the Committee believes that it reflects current practice.

The remainder of revised Rule 32.1 is derived from the current Rule 32.1.

Rule 32.2. Criminal Forfeiture	Rule 32.2. Criminal Forfeiture
(a) **Notice to the Defendant.** A court shall not enter a judgment of forfeiture in a criminal proceeding unless the indictment or information contains notice to the defendant that the government will seek the forfeiture of property as part of any sentence in accordance with the applicable statute.	(a) **Notice to the Defendant.** A court must not enter a judgment of forfeiture in a criminal proceeding unless the indictment or information contains notice to the defendant that the government will seek the forfeiture of property as part of any sentence in accordance with the applicable statute.
(b) **Entry of Preliminary Order of Forfeiture; Post Verdict Hearing.** (1) As soon as practicable after entering a guilty verdict or accepting a plea of guilty or *nolo contendere* on any count in an indictment or information with regard to which criminal forfeiture is sought, the court shall determine what property is subject to forfeiture under the applicable statute. If forfeiture of specific property is sought, the court shall determine whether the government has established the requisite nexus between the property and the offense. If the government seeks a personal money judgment against the defendant, the court shall determine the amount of money that the defendant will be ordered to pay. The court's determination may be based on evidence already in the record, including any written plea agreement or, if the forfeiture is contested, on evidence or information presented by the parties at a hearing after the verdict or finding of guilt. (2) If the court finds that property is subject to forfeiture, it shall promptly enter a preliminary order of forfeiture setting forth the amount of any money judgment or directing the forfeiture of specific property without regard to any third party's interest in all or part of it. Determining whether a third party has such an interest shall be deferred until any third party files a claim in an ancillary proceeding under Rule 32.2(c).	(b) **Entering Preliminary Order of Forfeiture; ~~Post Verdict Hearing.~~** (1) ***In General.*** As soon as practicable after entering a guilty verdict or accepting a plea of guilty or nolo contendere on any count in an indictment or information ~~with regard to~~ which criminal forfeiture is sought, the court must determine what property is subject to forfeiture under the applicable statute. If forfeiture of specific property ~~is sought~~, the court must determine whether the government has established the requisite nexus between the property and the offense. If the government seeks a personal money judgment ~~against the defendant~~, the court must determine the amount of money that the defendant will be ordered to pay. The court's determination may be based on evidence already in the record, including any written plea agreement or, if the forfeiture is contested, on evidence or information presented by the parties at a hearing after the verdict or finding of guilt.

(3) The entry of a preliminary order of forfeiture authorizes the Attorney General (or a designee) to seize the specific property subject to forfeiture; to conduct any discovery the court considers proper in identifying, locating, or disposing of the property; and to commence proceedings that comply with any statutes governing third-party rights. At sentencing—or at any time before sentencing if the defendant consents—the order of forfeiture becomes final as to the defendant and shall be made a part of the sentence and included in the judgment. The court may include in the order of forfeiture conditions reasonably necessary to preserve the property's value pending any appeal.	(2) ***Preliminary Order.*** If the court finds that property is subject to forfeiture, it must promptly enter a preliminary order of forfeiture setting forth the amount of any money judgment or directing the forfeiture of specific property without regard to any third party's interest in all or part of it. Determining whether a third party has such an interest must be deferred until any third party files a claim in an ancillary proceeding under Rule 32.2(c).
	(3) ***Seizing Property.*** The entry of a preliminary order of forfeiture authorizes the Attorney General (or a designee) to seize the specific property subject to forfeiture; to conduct any discovery the court considers proper in identifying, locating, or disposing of the property; and to commence proceedings that comply with any statutes governing third-party rights. At sentencing — or at any time before sentencing if the defendant consents — the order of forfeiture becomes final as to the defendant and must be made a part of the sentence and included in the judgment. The court may include in the order of forfeiture conditions reasonably necessary to preserve the property's value pending any appeal.
(4) Upon a party's request in a case in which a jury returns a verdict of guilty, the jury shall determine whether the government has established the requisite nexus between the property and the offense committed by the defendant.	(4) ***Jury Determination.*** Upon a party's request in a case in which a jury returns a verdict of guilty, the jury must determine whether the government has established the requisite nexus between the property and the offense committed by the defendant.

(c) Ancillary Proceeding; Final Order of Forfeiture. (1) If, as prescribed by statute, a third party files a petition asserting an interest in the property to be forfeited, the court shall conduct an ancillary proceeding but no ancillary proceeding is required to the extent that the forfeiture consists of a money judgment. (A) In the ancillary proceeding, the court may, on motion, dismiss the petition for lack of standing, for failure to state a claim, or for any other lawful reason. For purposes of the motion, the facts set forth in the petition are assumed to be true. (B) After disposing of any motion filed under Rule 32.2(c)(1)(A) and before conducting a hearing on the petition, the court may permit the parties to conduct discovery in accordance with the Federal Rules of Civil Procedure if the court determines that discovery is necessary or desirable to resolve factual issues. When discovery ends, a party may move for summary judgment under Rule 56 of the Federal Rules of Civil Procedure.	**(c) Ancillary Proceeding; Final Order of Forfeiture.** (1) *In General.* If, as prescribed by statute, a third party files a petition asserting an interest in the property to be forfeited, the court must conduct an ancillary proceeding but no ancillary proceeding is required to the extent that the forfeiture consists of a money judgment. (A) In the ancillary proceeding, the court may, on motion, dismiss the petition for lack of standing, for failure to state a claim, or for any other lawful reason. For purposes of the motion, the facts set forth in the petition are assumed to be true. (B) After disposing of any motion filed under Rule 32.2(c)(1)(A) and before conducting a hearing on the petition, the court may permit the parties to conduct discovery in accordance with the Federal Rules of Civil Procedure if the court determines that discovery is necessary or desirable to resolve factual issues. When discovery ends, a party may move for summary judgment under ~~Rule 56 of the~~ Federal Rules of Civil Procedure 56

(Compare 38(g).)

(More subdivisions that don't add up to the whole.)

(The "if" clause is restrictive, or essential, as in (c)(1)(B).)

(2) When the ancillary proceeding ends, the court shall enter a final order of forfeiture by amending the preliminary order as necessary to account for any third-party rights. If no third party files a timely claim, the preliminary order becomes the final order of forfeiture, if the court finds that the defendant (or any combination of defendants convicted in the case) had an interest in the property that is forfeitable under the applicable statute. The defendant may not object to the entry of the final order of forfeiture on the ground that the property belongs, in whole or in part, to a codefendant or third party, nor may a third party object to the final order on the ground that the third party had an interest in the property. (3) If multiple third-party petitions are filed in the same case, an order dismissing or granting one petition is not appealable until rulings are made on all petitions, unless the court determines that there is no just reason for delay. (4) An ancillary proceeding is not part of sentencing.	(2) ***Entering a Final Order.*** When the ancillary proceeding ends, the court must enter a final order of forfeiture by amending the preliminary order as necessary to account for any third-party rights. If no third party files a timely petition, the preliminary order becomes the final order of forfeiture if the court finds that the defendant (or any combination of defendants convicted in the case) had an interest in the property that is forfeitable under the applicable statute. The defendant may not object to the entry of the final order ~~of forfeiture~~ on the ground that the property belongs, in whole or in part, to a codefendant or third party, nor may a third party object to the final order on the ground that the third party had an interest in the property. (3) ***Multiple Petitions.*** If multiple third-party petitions are filed in the same case, an order dismissing or granting one petition is not appealable until rulings are made on all the petitions, unless the court determines that there is no just reason for delay. (4) ~~***Ancillary Proceeding:***~~ An ancillary proceeding is not part of sentencing.
(d) Stay Pending Appeal. If a defendant appeals from a conviction or order of forfeiture, the court may stay the order of forfeiture on terms appropriate to ensure that the property remains available pending appellate review. A stay does not delay the ancillary proceeding or the determination of a third party's rights or interests. If the court rules in favor of any third party while an appeal is pending, the court may amend the order of forfeiture but shall not transfer any property interest to a third party until the decision on appeal becomes final, unless the defendant consents in writing or on the record.	**(d) Stay Pending Appeal.** If a defendant appeals from a conviction or order of forfeiture, the court may stay the order of forfeiture on terms appropriate to ensure that the property remains available pending appellate review. A stay does not delay the ancillary proceeding or the determination of a third party's rights or interests. If the court rules in favor of any third party while an appeal is pending, the court may amend the order of forfeiture but must not transfer any property interest to a third party until the decision on appeal becomes final, unless the defendant consents in writing or on the record.

(Otherwise, it's same as main heading - the (c) heading.)

(why?)

(Not supposed to read "conviction of forfeiture," isn't?)

(e) **Subsequently Located Property; Substitute Property.** (1) On the government's motion, the court may at any time enter an order of forfeiture or amend an existing order of forfeiture to include property that: (A) is subject to forfeiture under an existing order of forfeiture but was located and identified after that order was entered; or (B) is substitute property that qualifies for forfeiture under an applicable statute.	(e) **Subsequently Located Property; Substitute Property.** (1) ***In General.*** On the government's motion, the court may at any time enter an order of forfeiture or amend an existing order of forfeiture to include property that: (A) is subject to forfeiture under an existing order of forfeiture but was located and identified after that order was entered; o (B) is substitute property that qualifies for forfeiture under an applicable statute.
(2) If the government shows that the property is subject to forfeiture under Rule 32.2(e)(1), the court shall: (A) enter an order forfeiting that property, or amend an existing preliminary or final order to include it; and (B) if a third party files a petition claiming an interest in the property, conduct an ancillary proceeding under Rule 32.2(c). (3) There is no right to trial by jury under Rule 32.2(e). (STILL SEEMS REDUNDANT WITH (e)(1).)	(2) ***Procedure.*** If the government shows that the property is subject to forfeiture under Rule 32.2(e)(1), the court must: (A) enter an order forfeiting that property, o amend an existing preliminary or final order to include it; and (B) if a third party files a petition claiming an interest in the property, conduct an ancillary proceeding under Rule 32.2(c) (3) ***Jury Trial Limited.*** There is no right to trial ~~by jury~~ under Rule 32.2(e). (Compare 23(a).)

COMMITTEE NOTE

The language of Rule 32.2 has been amended as part of the general restyling of the Criminal Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

Rule 33. New Trial	Rule 33. New Trial
On a defendant's motion, the court may grant a new trial to that defendant if the interests of justice so require. If trial was by the court without a jury, the court may— on defendant's motion for new trial— vacate the judgment, take additional testimony, and direct the entry of a new judgment. A motion for a new trial based on newly discovered evidence may be made only within three years after the verdict or finding of guilty. But if an appeal is pending, the court may grant the motion only on remand of the case. A motion for a new trial based on any other grounds may be made only within 7 days after the verdict or finding of guilty or within such further time as the court may fix during the 7-day period. (COMPARE 34(b).)	(a) **Defendant's Motion.** Upon the defendant's motion, the court may vacate any judgment and grant a new trial if the interest of justice so requires. If the case was tried without a jury, the court may take additional testimony and enter a new judgment. (b) **Time to File.** (1) ***Newly Discovered Evidence.*** A defendant must file a motion for a new trial grounded on newly discovered evidence within 3 years after the verdict or finding of guilty. If an appeal is pending, the court may not grant a motion for a new trial until the appellate court remands the case. (2) ***Other Grounds.*** A defendant must file a motion for a new trial grounded on any reason other than newly discovered evidence within 7 days after the verdict or finding of guilty, or as within such further time the court sets during the 7-day period.

COMMITTEE NOTE

The language of Rule 33 has been amended as part of the general restyling of the Criminal Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

Rule 34. Arrest of Judgment	Rule 34. Arresting Judgment
The court on motion of a defendant shall arrest judgment if the indictment or information does not charge an offense or if the court was without jurisdiction of the offense charged. The motion in arrest of judgment shall be made within 7 days after verdict or finding of guilty, or after plea of guilty or *nolo contendere*, or within such further time as the court may fix during the 7-day period.	(a) **In General.** Upon the defendant's motion or on its own, the court must arrest judgment if: (1) the indictment or information ~~does~~ did? not charge an offense; or (2) the court did not have jurisdiction of the charged offense. (b) **Time to File.** The defendant must move to ~~set aside a verdict or finding of guilty~~ arrest judgment? within 7 days after the verdict or finding of guilty, or after a plea of guilty or nolo contendere, or within such further time as the court ~~may set~~ sets during the 7-day period.

(Compare 33(b).)

(Compare 33(b)(2).)

COMMITTEE NOTE

The language of Rule 34 has been amended as part of the general restyling of the Criminal Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

Rule 35. Correction or Reduction of Sentence	Rule 35. Correcting or Reducing a Sentence
(a) Correction of Sentence on Remand. The court shall correct a sentence that is determined on appeal under 18 U.S.C. 3742 to have been imposed in violation of law, to have been imposed as a result of an incorrect application of the sentencing guidelines, or to be unreasonable, upon remand of the case to the court– (1) for imposition of a sentence in accord with the findings of the court of appeals; or (2) for further sentencing proceedings if, after such proceedings, the court determines that the original sentence was incorrect.	(a) **Correcting Clear Error.** Within 7 days after sentencing, the court may correct a sentence that resulted from arithmetical, technical, or other clear error.

(b) Reduction of Sentence for Substantial Assistance. If the Government so moves within one year after the sentence is imposed, the court may reduce a sentence to reflect a defendant's subsequent, substantial assistance in investigating or prosecuting another person in accordance with the guidelines and policy statements issued by the Sentencing Commission under 28 U.S.C. § 994. The court may consider a government motion to reduce a sentence made one year or more after the sentence is imposed if the defendant's substantial assistance involves information or evidence not known by the defendant until one year or more after sentence is imposed. In evaluating whether substantial assistance has been rendered, the court may consider the defendant's pre-sentence assistance. In applying this subdivision, the court may reduce the sentence to a level below that established by statute as a minimum sentence.	**(b) Reducing a Sentence for Substantial Assistance.** (1) ***In General.*** Upon the government's motion made within one year after sentencing, the court may reduce a sentence if: (A) the defendant, after sentencing, provided substantial assistance in investigating or prosecuting another person; and (B) reducing the sentence accords with the Sentencing Commission's guidelines and policy statements. (2) ***Later Motion.*** The court may consider a government motion to reduce a sentence made more than one year after sentencing if the defendant's substantial assistance involved: (A) information not known to the defendant until more than one year after sentencing; or (B) information ~~provided by~~ that provided the defendant to the government within one year of sentencing, but ~~which~~ that did not become useful to the government until more than one year after sentencing. (3) ***Evaluating Substantial Assistance.*** In evaluating whether the defendant has provided substantial assistance, the court may consider the defendant's presentence assistance. (4) ***Below Statutory Minimum.*** When acting under Rule 35(b), the court may reduce the sentence to a level below the minimum sentence established by statute.
(c) Correction of Sentence by Sentencing Court. The court, acting within 7 days after the imposition of sentence, may correct a sentence that was imposed as the result of arithmetical, technical, or other clear error.	

COMMITTEE NOTE

The language of Rule 35 has been amended as part of the general restyling of the Criminal Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only, except as noted below.

The Committee deleted current Rule 35(a) (Correction on Remand). That rule, which currently addresses the issue of the district court's actions following a remand on the issue of sentencing, was added by Congress in 1984. P.L. No. 98-473. The rule cross-references 18 U.S.C. § 3742, also enacted in 1984, which provides detailed guidance on the various options available to the appellate courts in addressing sentencing errors. In reviewing both provisions, the Committee concluded that Rule 35(a) was no longer needed. First, the statute clearly covers the subject matter, and second, it is not necessary to address an issue that would be very clear to a district court following a decision by a court of appeals.

Former Rule 35(c), which addressed the authority of the court to correct certain errors in the sentence, is now located in Rule 35(a).

REPORTER'S NOTES

In publishing the "style" changes to the Federal Rules of Criminal Procedure, the Committee decided to publish separately any rule that includes what it considered at least one major substantive change. The purpose for this separate publication is to highlight for the bench and the bar any proposed amendments that the Committee believes will result in significant changes in current practice. Rule 35 is one of those rules. Another version of Rule 35, which includes a substantive change, is being published simultaneously in a separate pamphlet. That version includes an amendment that would authorize a court to hear a motion to reduce a sentence, more than one year after sentence was imposed, when the defendant's substantial assistance involved information known to the defendant within one year after sentencing, but no motion was filed because the significance or usefulness of the information was not apparent until after the one-year period had elapsed.

Rule 36. Clerical Mistakes.	Rule 36. Clerical Error
Clerical mistakes in judgments, orders, or other parts of the record and errors in the record arising from oversight or omission may be corrected by the court at any time and after such notice, if any, as the court orders.	After giving any notice it considers appropriate, the court may at any time correct a clerical error in a judgment, order, or other part of the record, or correct an error in the record arising from oversight or omission.

COMMITTEE NOTE

The language of Rule 36 has been amended as part of the general restyling of the Criminal Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

VIII. APPEAL	
Rule 37. Taking Appeal. [Abrogated 1968.]	**Rule 37. [Reserved]**

Rule 38. Stay of Execution	**Rule 38. Staying a Sentence or a Disability**
(a) Stay of Execution. A sentence of death shall be stayed if an appeal is taken from the conviction or sentence.	**(a) Death Sentence.** The court must stay a death sentence if the defendant appeals the conviction or sentence.
(b) Imprisonment. A sentence of imprisonment shall be stayed if an appeal is taken from the conviction or sentence and the defendant is released pending disposition of appeal pursuant to Rule 9(b) of the Federal Rules of Appellate Procedure. If not stayed, the court may recommend to the Attorney General that the defendant be retained at, or transferred to, a place of confinement near the place of trial or the place where an appeal is to be heard, for a period reasonably necessary to permit the defendant to assist in the preparation of an appeal to the court of appeals.	**(b) Imprisonment.** (1) ***Stay Granted.*** If the defendant is released pending appeal, the court must stay a sentence of imprisonment. (2) ***Stay Denied.*** If the defendant is not released pending appeal, the court may recommend to the Attorney General that the defendant be confined near the place of the trial or appeal for a period reasonably necessary to permit the defendant to assist in preparing the appeal.
(c) Fine. A sentence to pay a fine or a fine and costs, if an appeal is taken, may be stayed by the district court or by the court of appeals upon such terms as the court deems proper. The court may require the defendant pending appeal to deposit the whole or any part of the fine and costs in the registry of the district court, or to give bond for the payment thereof, or to submit to an examination of assets, and it may make any appropriate order to restrain the defendant from dissipating such defendant's assets.	**(c) Fine.** If the defendant appeals, the district court, or the court of appeals under Federal Rule of Appellate Procedure 8, may stay a sentence to pay a fine or a fine and costs. The court may stay the sentence on any terms considered proper and may require the defendant to: (1) deposit all or part of the fine and costs into the district court's registry pending appeal; (2) post a bond to pay the fine and costs; or (3) submit to an examination concerning the defendant's assets and, if appropriate, order the defendant to refrain from dissipating assets.
(d) Probation. A sentence of probation may be stayed if an appeal from the conviction or sentence is taken. If the sentence is stayed, the court shall fix the terms of the stay.	**(d) Probation.** If the defendant appeals, the court may stay a sentence of probation. The court must set the terms of any stay.

(PARALLEL WITH THE ORDER IN THE TEXT.)

and Restitution

(e) Notice to Victims and Restitution. [4] A sanction imposed as part of the sentence pursuant to 18 U.S.C. 3555 or 3556 may, if an appeal of the conviction or sentence is taken, be stayed by the district court or by the court of appeals upon such terms as the court finds appropriate. The court may issue such orders as may be reasonably necessary to ensure compliance with the sanction upon disposition of the appeal, including the entering of a restraining order or an injunction or requiring a deposit in whole or in part of the monetary amount involved into the registry of the district court or execution of a performance bond.	**(e) ~~Restitution and~~ Notice to Victims.** **(1)** ***In General.*** If the defendant appeals, the district court, or the court of appeals under Federal Rule of Appellate Procedure 8, may stay — on any terms considered appropriate — any sentence providing for notice under 18 U.S.C. § 3555 or restitution under 18 U.S.C. § 3556. **(2)** ***Ensuring Compliance.*** The court may issue any order reasonably necessary to ensure compliance with a notice or restitution order after disposition of an appeal, including: (A) a restraining order; (B) an injunction; (C) an order requiring the defendant to deposit all or part of any monetary restitution into the district court's registry; or (D) an order requiring the defendant to post a bond.
(f) Disabilities. A civil or employment disability arising under a Federal statute by reason of the defendant's conviction or sentence may, if an appeal is taken, be stayed by the district court or by the court of appeals upon such terms as the court finds appropriate. The court may enter a restraining order or an injunction, or take any other action that may be reasonably necessary to protect the interest represented by the disability pending disposition of the appeal.	**(f) Forfeiture.** A stay of a forfeiture order is governed by Rule 32.2(d). **(g) Disability.** If the defendant's conviction or sentence creates a civil or employment disability under federal law, the district court, or the court of appeals under Federal Rule of Appellate Procedure 8, may stay the disability pending appeal on any terms considered appropriate. The court may issue any order reasonably necessary to protect the interest represented by the disability pending appeal, including a restraining order or an injunction.

[4] The Supreme Court approved amendments in April 2000. The amendments take effect on December 1, 2000, unless Congress takes action otherwise.

COMMITTEE NOTE

The language of Rule 38 has been amended as part of the general restyling of the Criminal Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

The reference to Appellate Rule 9(b) is deleted. The Committee believed that the reference was unnecessary and its deletion was not intended to be substantive in nature.

Rule 39. Supervision of Appeal [Abrogated 1968]	Rule 39. [Reserved]

IX. SUPPLEMENTARY AND SPECIAL PROCEEDINGS	TITLE VIII. SUPPLEMENTARY AND SPECIAL PROCEEDINGS
Rule 40. Commitment to Another District	**Rule 40. Arrest for Failing to Appear in Another District**
(a) Appearance Before Federal Magistrate Judge. If a person is arrested in a district other than that in which the offense is alleged to have been committed, that person shall be taken without unnecessary delay before the nearest available federal magistrate judge, in accordance with the provisions of Rule 5. Preliminary proceedings concerning the defendant shall be conducted in accordance with Rules 5 and 5.1, except that if no preliminary examination is held because an indictment has been returned or an information filed or because the defendant elects to have the preliminary hearing conducted in the district in which the prosecution is pending, the person shall be held to answer upon a finding that such person is the person named in the indictment, information, or warrant. If held to answer, the defendant shall be held to answer in the district court in which the prosecution is pending — provided that a warrant is issued in that district if the arrest was made without a warrant — upon production of the warrant or a certified copy thereof. The warrant or certified copy may be produced by facsimile transmission.	**(a) In General.** A person arrested under a warrant issued in another district for failing to appear — as required by the terms of that person's release under 18 U.S.C. §§ 3141-3156 or by a subpoena — must be taken without unnecessary delay before a magistrate judge in the district of the arrest. **(b) Proceedings.** The judge must proceed under Rule 5(c)(2) as applicable. **(c) Release or Detention Order.** The judge may modify any previous release or detention order issued in another district, but must state in writing the reasons for doing so.
(b) Statement by Federal Magistrate Judge. In addition to the statements required by Rule 5, the federal magistrate judge shall inform the defendant of the provisions of Rule 20.	
(c) Papers. If a defendant is held or discharged, the papers in the proceeding and any bail taken shall be transmitted to the clerk of the district court in which the prosecution is pending.	

(d) Arrest of Probationer or Supervised Releasee. If a person is arrested for a violation of probation or supervised release in a district other than the district having jurisdiction, such person must be taken without unnecessary delay before the nearest available federal magistrate judge. The person may be released under Rule 46(c). The federal magistrate judge shall: (1) Proceed under Rule 32.1 if jurisdiction over the person is transferred to that district; (2) Hold a prompt preliminary hearing if the alleged violation occurred in that district, and either (i) hold the person to answer in the district court of the district having jurisdiction or (ii) dismiss the proceedings and so notify the court; or (3) Otherwise order the person held to answer in the district court of the district having jurisdiction upon production of certified copies of the judgment, the warrant, and the application for the warrant, and upon a finding that the person before the magistrate judge is the person named in the warrant.	
(e) Arrest for Failure to Appear. If a person is arrested on a warrant in a district other than that in which the warrant was issued, and the warrant was issued because of the failure of the person named therein to appear as required pursuant to a subpoena or the terms of that person's release, the person arrested must be taken without unnecessary delay before the nearest available federal magistrate judge. Upon production of the warrant or a certified copy thereof and a finding that the person before the magistrate judge is the person named in the warrant, the federal magistrate judge shall hold the person to answer in the district in which the warrant was issued.	
(f) Release or Detention. If a person was previously detained or conditionally released, pursuant to chapter 207 of title 18, United States Code, in another district where a warrant, information, or indictment issued, the federal magistrate judge shall take into account the decision previously made and the reasons set forth therefor, if any, but will not be bound by that decision. If the federal magistrate judge amends the release or detention decision or alters the conditions of release, the magistrate judge shall set forth the reasons therefor in writing.	

COMMITTEE NOTE

The language of Rule 40 has been amended as part of the general restyling of the Criminal Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

Rule 40 has been completely revised. The Committee believed that it would be much clearer and more helpful to locate portions of Rule 40 in Rules 5 (initial appearances), 5.1 (preliminary hearings), and 32.1 (revocation or modification of probation or supervised release). Accordingly, current Rule 40(a) has been relocated in Rules 5 and 5.1. Current Rule 40(b) has been relocated in Rule 5(c)(2)(B) and current Rule 40(c) has been moved to Rule 5(c)(2)(F).

Current Rule 40(d) has been relocated in Rule 32.1(a)(5). Current Rule 40(e)(1) is now located in revised Rule 40(a). Current Rule 40(e)(2) is now in revised Rule 40(b) and current Rule 40(f) is revised Rule 40(c).

Rule 41. Search and Seizure	Rule 41. Search and Seizure
(a) Authority to Issue Warrant. Upon the request of a federal law enforcement officer or an attorney for the government, a search warrant authorized by this rule may be issued (1) by a federal magistrate judge, or a state court of record within the federal district, for a search of property or for a person within the district and (2) by a federal magistrate judge for a search of property or for a person either within or outside the district if the property or person is within the district when the warrant is sought but might move outside the district before the warrant is executed.	**(a) Scope and Definitions.** (1) ***Scope.*** This rule does not modify any statute regulating search or seizure, or the issuance and execution of a search warrant in special circumstances.
(BRYAN would CRINGE. We have hyphenated PHRASAL ADJECTIVES THROUGHOUT.) ☺	(2) ***Definitions.*** The following definitions apply under this rule: (A) "Property" includes documents, books, papers, any other tangible objects, and information. (B) "Daytime" means the hours between 6:00 a.m. and 10:00 p.m. according to local time. (C) "Federal law enforcement officer" means a government agent (other than an attorney for the government) who is engaged in ~~the enforcement~~ of the criminal laws and is within any category of officers authorized by the Attorney General to request ~~the issuance of~~ a search warrant. ENFORCING

	(b) **Authority to Issue a Warrant.** At the request of a federal law enforcement officer or an attorney for the government: (1) a magistrate judge having authority in the district — or if none is reasonably available, a judge of a state court of record in the district — may issue a warrant to search for and seize a person or property located within the district; and (2) a magistrate judge may issue a warrant for a person or property outside the district if the person or property is located within the district when the warrant is issued but might move outside the district before the warrant is executed.
(b) Property or Persons Which May be Seized With a Warrant. A warrant may be issued under this rule to search for and seize any (1) property that constitutes evidence of the commission of a criminal offense; or (2) contraband, the fruits of the crime, or things otherwise criminally possessed; or (3) property designed or intended for use or which has been used as the means of committing a criminal offense; or (4) person for whose arrest there is probable cause, or who is unlawfully restrained.	(c) **Persons or Property Subject to Search or Seizure.** A warrant may be issued for any of the following: (1) evidence of ~~the commission of~~ a crime; (2) contraband, fruits of crime, or other items illegally possessed; (3) property designed for use, intended for use, or used in committing a crime; or (4) a person to be arrested or a person who is unlawfully restrained.

, OR COVERTLY OBSERVE?
(SEE (e)(2).)

OR BE MOVED?
(PROPERTY CAN'T MOVE ITSELF?)

(c) Issuance and Contents. **(1) Warrant Upon Affidavit.** A warrant other than a warrant upon oral testimony under paragraph (2) of this subdivision shall issue only on an affidavit or affidavits sworn to before the federal magistrate judge or state judge and establishing grounds for issuing the warrant. If the federal magistrate judge or state judge is satisfied that the grounds for the application exist or that there is probable cause to believe that they exist, that magistrate judge or state judge shall issue a warrant identifying the property or person to be seized and naming or describing the person or place to be searched. The finding of probable cause may be based upon hearsay evidence in whole or in part. Before ruling on a request for a warrant the federal magistrate judge or state judge may require the affiant to appear personally and may examine under oath the affiant and any witnesses the affiant may produce, provided that such proceeding shall be taken down by a court reporter or recording equipment and made part of the affidavit.	**(d) Obtaining a Warrant.** (1) ***Probable Cause.*** After receiving an affidavit or other information, a magistrate judge or a judge of a state court of record must issue the warrant if there is probable cause to search for and seize a person or property under Rule 41(c). (2) ***Requesting a Warrant in the Presence of a Judge.*** (A) *Warrant on an Affidavit.* When a federal law enforcement officer or an attorney for the government presents an affidavit in support of a warrant, the judge may require the affiant to appear personally and may examine under oath the affiant and any witness the affiant produces. (B) *Warrant on Sworn Testimony.* The judge may wholly or partially dispense with a written affidavit and base a warrant on sworn testimony if doing so is reasonable under the circumstances. (C) *Recording Testimony.* Testimony taken in support of a warrant must be recorded by a court reporter or by a suitable recording device, and the judge must file the transcript or recording with the clerk, along with any affidavit.
The warrant shall be directed to a civil officer of the United States authorized to enforce or assist in enforcing any law thereof or to a person so authorized by the President of the United States.	

It shall command the officer to search, within a specified period of time not to exceed 10 days, the person or place named for the property or person specified. The warrant shall be served in the daytime, unless the issuing authority, by appropriate provision in the warrant, and for reasonable cause shown, authorized its execution at times other than daytime. It shall designate a federal magistrate judge to whom it shall be returned.	
(2) Warrant Upon Oral Testimony. **(A) General Rule.** If the circumstances make it reasonable to dispense, in whole or in part, with a written affidavit, a Federal magistrate judge may issue a warrant based upon sworn testimony communicated by telephone or other appropriate means, including facsimile transmission. **(B) Application.** The person who is requesting the warrant shall prepare a document to be known as a duplicate original warrant and shall read such duplicate original warrant, verbatim, to the Federal magistrate judge. The Federal magistrate judge shall enter, verbatim, what is so read to such magistrate judge on a document to be known as the original warrant. The Federal magistrate judge may direct that the warrant be modified.	(3) ***Requesting a Warrant by Telephonic or Other Means.*** (A) *In General.* A magistrate judge may issue a warrant based on information communicated by telephone or other appropriate means, including facsimile transmission. (B) *Recording Testimony.* Upon learning that an applicant is requesting a warrant, a magistrate judge must: (i) place under oath the applicant and any person on whose testimony the application is based; and (ii) make a verbatim record of the conversation with a suitable recording device, if available, or by court reporter, or in writing.

(C) Issuance. If the Federal magistrate judge is satisfied that the circumstances are such as to make it reasonable to dispense with a written affidavit and that the grounds for the application exist or that there is probable cause to believe that they exist, the Federal magistrate judge shall order the issuance of a warrant by directing the person requesting the warrant to sign the Federal magistrate judge's name on the duplicate original warrant. The Federal magistrate judge shall immediately sign the original warrant and enter on the face of the original warrant the exact time when the warrant was ordered to be issued. The finding of probable cause for a warrant upon oral testimony may be based on the same kind of evidence as is sufficient for a warrant upon affidavit.	
(D) Recording and Certification of Testimony. When a caller informs the Federal magistrate judge that the purpose of the call is to request a warrant, the Federal magistrate judge shall immediately place under oath each person whose testimony forms a basis of the application and each person applying for that warrant. If a voice recording device is available, the Federal magistrate judge shall record by means of such device all of the call after the caller informs the Federal magistrate judge that the purpose of the call is to request a warrant. Otherwise a stenographic or longhand verbatim record shall be made. If a voice recording device is used or a stenographic record made, the Federal magistrate judge shall have the record transcribed, shall certify the accuracy of the transcription, and shall file a copy of the original record and the transcription with the court. If a longhand verbatim record is made, the Federal magistrate judge shall file a signed copy with the court.	(C) *Certifying Testimony.* The magistrate judge must have any recording or court reporter's notes transcribed, certify the transcription's accuracy, and file a copy of the record and the transcription with the clerk. Any written verbatim record must be signed by the magistrate judge and filed with the clerk. (D) *Suppression Limited.* Absent a finding of bad faith, evidence obtained from a warrant issued under Rule 41(d)(3)(A) is not subject to suppression on the ground that issuing the warrant in that manner was unreasonable under the circumstances.

(E) **Contents.** The contents of a warrant upon oral testimony shall be the same as the contents of a warrant upon affidavit.	(e) **Issuing the Warrant.** (1) ***In General.*** The magistrate judge or a judge of a state court of record must issue the warrant to an officer authorized to execute it and deliver a copy to the district clerk. (2) ***Contents of the Warrant.*** The warrant must identify the person or property to be searched or covertly observed, identify any person or property to be seized, and designate the magistrate judge to whom it must be returned. The warrant must command the officer to: (A) execute the warrant within a specified time no longer than 10 days; (B) execute the warrant during the daytime, unless the judge for good cause expressly authorizes execution ~~of the warrant~~ at another time; and (C) return the warrant to the magistrate judge designated in the warrant.

(F) Additional Rule for Execution. The person who executes the warrant shall enter the exact time of execution on the face of the duplicate original warrant.	(3) *Warrant by Telephonic or Other Means.* If a magistrate judge decides to issue a warrant under Rule 41(d)(3)(A), the following additional procedures apply: (A) *Preparing a Proposed Duplicate Original Warrant.* The applicant must prepare a "proposed duplicate original warrant" and must read or otherwise transmit the contents of that document verbatim to the magistrate judge. (B) *Preparing an Original Warrant.* The magistrate judge must enter the contents of the proposed duplicate original warrant into an original warrant. (C) *Modifications.* The magistrate judge may direct the applicant to modify the proposed duplicate original warrant. In that case, the judge must also modify the original warrant.
(G) Motion to Suppress Precluded. Absent a finding of bad faith, evidence obtained pursuant to a warrant issued under this paragraph is not subject to a motion to suppress on the ground that the circumstances were not such as to make it reasonable to dispense with a written affidavit.	(D) *Signing the Original Warrant and the Duplicate Original Warrant.* Upon determining to issue the warrant, the magistrate judge must immediately sign the original warrant, enter on its face the exact time ~~when~~ it is issued, and direct the applicant to sign the judge's name on the duplicate original warrant.

(Compare (F)(1).)

(d) Execution and Return with Inventory. The officer taking property under the warrant shall give to the person from whom or from whose premises the property was taken a copy of the warrant and a receipt for the property taken or shall leave the copy and receipt at the place from which the property was taken.	**(f) Executing and Returning the Warrant.** (1) ***~~Notation of Time.~~*** The officer executing the warrant must enter on ~~the~~ face ~~of the warrant~~ the exact date and time it is executed. (2) ***Inventory.*** ~~An~~ officer executing the warrant must also prepare and verify an inventory of any property seized ~~and~~ must do so in the presence of: ~~(A)~~ another officer; and (B) the person from whom, or from whose premises, the property was taken, if present; or (C) if ~~either of these~~ persons is not present, at least one other credible person. (3) ***Receipt.*** The officer executing the warrant must: (A) give a copy of the warrant and a receipt for the property taken to the person from whom, or from whose premises, the property was taken; or (B) leave a copy of the warrant and receipt at the place where the officer took the property.
The return shall be made promptly and shall be accompanied by a written inventory of any property taken. The inventory shall be made in the presence of the applicant for the warrant and the person from whose possession or premises the property was taken, if they are present, or in the presence of at least one credible person other than the applicant for the warrant or the person from whose possession or premises the property was taken, and shall be verified by the officer. The federal magistrate judge shall upon request deliver a copy of the inventory to the person from whom or from whose premises the property was taken and to the applicant for the warrant.	(4) ***Return.*** The officer executing the warrant must promptly return it — together with a copy of the inventory — to the magistrate judge designated on the warrant. The judge must, on request, give a copy of the inventory to the person from whom or from whose premises the property was taken and to the applicant for the warrant.

(e) **Motion for Return of Property.** A person aggrieved by an unlawful search and seizure or by the deprivation of property may move the district court for the district in which the property was seized for the return of the property on the ground that such person is entitled to lawful possession of the property. The court shall receive evidence on any issue of fact necessary to the decision of the motion. If the motion is granted, the property shall be returned to the movant, although reasonable conditions may be imposed to protect access and use of the property in subsequent proceedings. If a motion for return of property is made or comes on for hearing in the district of trial after an indictment or information is filed, it shall be treated also as a motion to suppress under Rule 12.	(g) **Motion to Return Property.** A person aggrieved by an unlawful search and seizure of property or by the deprivation of property may move for the property's return. The motion must be filed in the district where the property was seized. The court must receive evidence on any factual issue necessary to decide the motion. If it grants the motion, the court must return the property to the movant, but may impose reasonable conditions to protect access to the property and its use in later proceedings.
(f) **Motion to Suppress.** A motion to suppress evidence may be made in the court of the district of trial as provided in Rule 12.	(h) **Motion to Suppress.** A defendant may move to suppress evidence in the court where the trial will occur, as Rule 12 provides.
(g) **Return of Papers to Clerk.** The federal magistrate judge before whom the warrant is returned shall attach to the warrant a copy of the return, inventory and all other papers in connection therewith and shall file them with the clerk of the district court for the district in which the property was seized.	(i) **Forwarding Papers to the Clerk.** The magistrate judge to whom the warrant is returned must attach to the warrant a copy of the return, inventory, and all other related papers and must deliver them to the clerk in the district where the property was seized.
(h) **Scope and Definitions.** This rule does not modify any act, inconsistent with it, regulating search, seizure and the issuance and execution of search warrants in circumstances for which special provision is made. The term "property" is used in this rule to include documents, books, papers and any other tangible objects. The term "daytime" is used in this rule mean hours from 6:00 a.m. to 10:00 p.m. according to local time. The phrase "federal law enforcement officer" is used in this rule to mean any government agent, other than an attorney for the government as defined in Rule 54(c), who is engaged in the enforcement of the criminal laws and is within any category of officers authorized by the Attorney General to request the issuance of a search warrant.	(What does "copy of" Modify? If just first two items: "A copy of the RETURN and of the INVENTORY, ALONG WITH ALL OTHER RELATED PAPERS, AND Must, etc." If ALL THREE ITEMS: "A copy of the RETURN, of the INVENTORY, and of ALL OTHER RELATED PAPERS AND Must, etc.")

COMMITTEE NOTE

The language of Rule 41 has been amended as part of the general restyling of the Criminal Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. Rule 41 has been completely reorganized to make it easier to read and apply its key provisions.

Current Rule 41(c)(1), which refers to the fact that hearsay evidence may be used to support probable cause, has been deleted. That language was added to the rule in 1972, apparently to reflect emerging federal case law. *See* Advisory Committee Note to 1972 Amendments to Rule 41 (citing cases). Similar language was added to Rule 4 in 1974. In the intervening years, however, the case law has become perfectly clear on that proposition. Thus, the Committee believed that the reference to hearsay was no longer necessary. Furthermore, the limited reference to hearsay evidence was misleading to the extent that it might have suggested that other forms of inadmissible evidence could not be considered. For example, the rule made no reference to considering a defendant's prior criminal record, which clearly may be considered in deciding whether probable cause exists. *See, e.g., Brinegar v. United States*, 338 U.S. 160 (1949) (officer's knowledge of defendant's prior criminal activity). Rather than address that issue, or any other similar issues, the Committee believed that the matter was best addressed in Rule 1101(d)(3), Federal Rules of Evidence. That rule explicitly provides that the Federal Rules of Evidence do not apply to "preliminary examinations in criminal cases, . . . issuance of warrants for arrest, criminal summonses, and search warrants." The Advisory Committee Note accompanying that rule recognizes that: "The nature of the proceedings makes application of the formal rules of evidence inappropriate and impracticable." The Committee did not intend to make any substantive changes in practice by deleting the reference to hearsay evidence.

REPORTER'S NOTES

In publishing the "style" changes to the Federal Rules of Criminal Procedure, the Committee decided to publish separately any rule that includes what it considered at least one major substantive change. The purpose for this separate publication is to highlight for the bench and the bar any proposed amendments that the Committee believes will result in significant changes in current practice. Rule 41 is one of those rules. Another version of Rule 41, which includes a substantive change that would permit a judge to issue a warrant for a covert entry for purposes of noncontinuous observation, is being published simultaneously in a separate pamphlet.

Rule 42. Criminal Contempt	Rule 42. Criminal Contempt
(b) Disposition Upon Notice and Hearing. A criminal contempt except as provided in subdivision (a) of this rule shall be prosecuted on notice. The notice shall state the time and place of hearing, allowing a reasonable time for the preparation of the defense, and shall state the essential facts constituting the criminal contempt charged and describe it as such. The notice shall be given orally by the judge in open court in the presence of the defendant or, on application of the United States attorney or of an attorney appointed by the court for that purpose, by an order to show cause or an order of arrest. The defendant is entitled to a trial by jury in any case in which an act of Congress so provides. The defendant is entitled to admission to bail as provided in these rules. If the contempt charged involves disrespect to or criticism of a judge, that judge is disqualified from presiding at the trial or hearing except with the defendant's consent. Upon a verdict or finding of guilt the court shall enter an order fixing the punishment. (Subdivisions in the middle of the section again. I guess we're not opposed.)	(a) **Disposition After Notice.** Any person who commits criminal contempt may be punished for that contempt after prosecution on notice. (1) ***Notice.*** The court must give the person notice in open court, in an order to show cause, or in an arrest ~~order~~ (WARRANT? The notice must: (A) state the time and place of the trial; (B) allow the defendant a reasonable time to prepare a defense; and (C) state the essential facts constituting the charged criminal contempt and describe it as such. (2) ***Appointing a Prosecutor.*** The court must request that the contempt be prosecuted by an attorney for the government, unless the interest of justice requires appointment of the another attorney. If the government declines the request, the court must appoint another attorney to prosecute the contempt. (3) ***Trial and Disposition.*** ~~A~~ The person being prosecuted ~~for criminal contempt~~ is entitled to a jury trial in any case in which federal law so provides and must be released or detained as Rule 46 provides. If the criminal contempt involves disrespect toward or criticism of a judge, that judge is disqualified from presiding at the contempt trial or hearing unless the defendant consents. Upon a finding or verdict of guilty, the court must impose ~~the~~ punishment.
(a) Summary Disposition. A criminal contempt may be punished summarily if the judge certifies that the judge saw or heard the conduct constituting the contempt and that it was committed in the actual presence of the court. The order of contempt shall recite the facts and shall be signed by the judge and entered of record.	(b) **Summary Disposition.** Notwithstanding any other provision of these rules, the court may summarily punish a person who commits criminal contempt in its presence if the judge saw or heard the contemptuous conduct and so certifies. The contempt order must recite the facts, be signed by the judge, and be filed with the clerk.

COMMITTEE NOTE

The language of Rule 42 has been amended as part of the general restyling of the Criminal Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only, except as noted below.

The revised rule is intended to more clearly set out the procedures for conducting a criminal contempt proceeding. The current rule implicitly recognizes that an attorney for the government may be involved in the prosecution of such cases. Revised Rule 42(a)(2) now explicitly addresses the appointment of a "prosecutor" and adopts language to reflect the holding in *Young v. United States ex rel. Vuitton*, 481 U.S. 787 (1987). In that case the Supreme Court indicated that ordinarily the court should request that an attorney for the government prosecute the contempt; only if that request is denied, should the court appoint a private prosecutor. The rule envisions that a disinterested counsel should be appointed to prosecute the contempt.

Finally, Rule 42(b) has been amended to make it clear that a court may summarily punish a person for committing contempt in the court's presence without regard to whether other rules, such as Rule 32 (sentencing procedures), might otherwise apply. *See, e.g., United States v. Martin-Trigona*, 759 F.2d 1017 (2d Cir. 1985).

(Otherwise, "include" seems to modify other two items.)

X. GENERAL PROVISIONS	TITLE IX. GENERAL PROVISIONS
Rule 43. Presence of the Defendant	**Rule 43. Defendant's Presence**
(a) Presence Required. The defendant shall be present at the arraignment, at the time of the plea, at every stage of the trial including the impaneling of the jury and the return of the verdict, and at the imposition of sentence, except as otherwise provided by this rule.	**(a) When Required.** Unless this rule provides otherwise, the defendant must be present at: (1) the initial appearance, arraignment, and plea; (2) every trial stage, including jury impanelment and the return of the verdict; and (3) sentencing.
(b) Continued Presence Not Required. The further progress of the trial to and including the return of the verdict, and the imposition of sentence, will not be prevented and the defendant will be considered to have waived the right to be present whenever a defendant, initially present at trial, or having pleaded guilty or nolo contendere, (1) is voluntarily absent after the trial has commenced (whether or not the defendant has been informed by the court of the obligation to remain during the trial), (2) in a noncapital case, is voluntarily absent at the imposition of sentence, or (3) after being warned by the court that disruptive conduct will cause the removal of the defendant from the courtroom, persists in conduct which is such as to justify exclusion from the courtroom.	**(b) When Not Required.** A defendant need not be present under any of the following circumstances: (1) ***Organizational Defendant.*** The defendant is an organization represented by counsel who is present. (2) ***Misdemeanor Offense.*** The offense is punishable by fine or by imprisonment for not more than one year, or both, and with the defendant's written consent, the court permits arraignment, plea, trial, and sentencing to occur in the defendant's absence. (3) ***Conference or Hearing on a Legal Question.*** The proceeding involves only a conference or hearing on a question of law. (4) ***Sentence Correction.*** The proceeding involves the correction or reduction of sentence under Rule 35 or 18 U.S.C. § 3582(c).

(c) **Presence Not Required.** A defendant need not be present: (1) when represented by counsel and the defendant is an organization, as defined in 18 U.S.C. § 18; (2) when the offense is punishable by fine or by imprisonment for not more than one year or both, and the court, with the written consent of the defendant, permits arraignment, plea, trial, and imposition of sentence in the defendant's absence; (3) when the proceeding involves only a conference or hearing upon a question of law; or (4) when the proceeding involves a reduction or correction of sentence under Rule 35(b) or (c) or 18 U.S.C. § 3582(c). (NOT REFERRING TO WHOLE RULE.)	(c) **Waiving Continued Presence.** (1) ***In General.*** A defendant who was initially present at trial, or who had pleaded guilty or nolo contendere, waives the right to be present under the following circumstances: (A) when the defendant is voluntarily absent after the trial has begun, regardless of whether the court informed the defendant of an obligation to remain during trial; (B) in a noncapital case, when the defendant is voluntarily absent during sentencing; or (C) when the court warns the defendant that it will remove the defendant from the courtroom for disruptive behavior, but the defendant persists in conduct that justifies removal from the courtroom.
(OR OMIT "UNDER RULE 43(c)(1)")	(2) ***Waiver's Effect.*** If the defendant waives the right to be present under ~~this rule~~ Rule 43(c)(1), the trial may proceed to completion, including the verdict's return and sentencing, during the defendant's absence.

COMMITTEE NOTE

The language of Rule 43 has been amended as part of the general restyling of the Criminal Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

REPORTER'S NOTES

In publishing the "style" changes to the Federal Rules of Criminal Procedure, the Committee decided to publish separately any rule that includes what it considered at least one major substantive change. The purpose for this separate publication is to highlight for the bench and the bar any proposed amendments that the Committee believes will result in significant changes in current practice. Rule 43 is one of those rules. Another version of Rule 43, which recognizes that the proposed Rules 5 and 10 would authorize video teleconferencing of certain proceedings, is being published simultaneously in a separate pamphlet.

Rule 44. Right to and Assignment of Counsel	Rule 44. Right to and Appointment of ~~Counsel~~
(a) Right to Assigned Counsel. Every defendant who is unable to obtain counsel shall be entitled to have counsel assigned to represent that defendant at every stage of the proceedings from initial appearance before the federal magistrate judge or the court through appeal, unless the defendant waives such appointment.	**(a) Right to Appointed Counsel.** A defendant who ~~is unable to~~ obtain ~~counsel~~ is entitled to have ~~counsel~~ appointed to represent the defendant at every stage of the proceeding from initial appearance through appeal, unless the defendant waives this right.
(b) Assignment Procedure. The procedures for implementing the right set out in subdivision (a) shall be those provided by law and by local rules of court established pursuant thereto.	**(b) Appointment Procedure.** Federal law and local court rules govern the procedure for implementing the right to ~~counsel~~.
(c) Joint Representation. Whenever two or more defendants have been jointly charged pursuant to Rule 8(b) or have been joined for trial pursuant to Rule 13, and are represented by the same retained or assigned counsel or by retained or assigned counsel who are associated in the practice of law, the court shall promptly inquire with respect to such joint representation and shall personally advise each defendant of the right to the effective assistance of counsel, including separate representation. Unless it appears that there is good cause to believe no conflict of interest is likely to arise, the court shall take such measures as may be appropriate to protect each defendant's right to counsel.	**(c) Inquiry Into Joint Representation.** **(1)** ***Joint Representation.*** Joint representation occurs when: (A) two or more defendants have been charged jointly under Rule 8(b) or have been joined for trial under Rule 13; and (B) the defendants are represented by the same ~~counsel~~, or ~~counsel~~ who are associated in law practice. **(2)** ***Court's Responsibilities in Cases of Joint Representation.*** The court must promptly inquire about the propriety of joint representation and must personally advise each defendant of the right to the effective assistance of counsel, including separate representation. Unless there is good cause to believe that no conflict of interest is likely to arise, the court must take appropriate measures to protect each defendant's right to counsel.

COMMITTEE NOTE

The language of Rule 44 has been amended as part of the general restyling of the Criminal Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

Revised Rule 44 now refers to the "appointment" of counsel, rather than the assignment of counsel; the Committee believed the former term was more appropriate. *See* 18 U.S.C. § 3006A. In Rule 44(c), the term "retained or assigned" has been deleted as being unnecessary, without changing the court's responsibility to conduct an inquiry where joint representation occurs.

Rule 45. Time	Rule 45. Computing and Extending Time
(a) Computation. In computing any period of time the day of the act or event from which the designated period of time begins to run shall not be included. The last day of the period so computed shall be included, unless it is a Saturday, a Sunday, or a legal holiday, or, when the act to be done is the filing of some paper in court, a day on which weather or other conditions have made the office of the clerk of the district court inaccessible, in which event the period runs until the end of the next day which is not one of the aforementioned days. When a period of time prescribed or allowed is less than 11 days, intermediate Saturdays, Sundays and legal holidays shall be excluded in the computation. As used in these rules, "legal holiday" includes New Year's Day, Birthday of Martin Luther King, Jr., Washington's Birthday, Memorial Day, Independence Day, Labor Day, Columbus Day, Veterans Day, Thanksgiving Day, Christmas Day, and any other day appointed as a holiday by the President or the Congress of the United States, or by the state in which the district court is held.	**(a) Computing Time.** The following rules apply in computing any period of time specified in these rules, any local rule, or any court order: **(1)** ***Day of the Event Excluded.*** Exclude the day of the act, event, or default that begins the period. **(2)** ***Exclusion from Brief Periods.*** Exclude intermediate Saturdays, Sundays, and legal holidays when the period is less than 11 days. **(3)** ***Last Day.*** Include the last day of the period unless it is a Saturday, Sunday, legal holiday, or a day on which weather or other conditions make the clerk's office inaccessible. When the last day is excluded, the period runs until the end of the next day that is not a Saturday, Sunday, legal holiday, or day when the clerk's office is inaccessible. **(4)** ***"Legal Holiday" Defined.*** As used in this rule, "legal holiday" means: (A) New Year's Day; (B) Martin Luther King, Jr.'s Birthday; (C) Presidents' Day;

(How about bullets? 56(c) doesn't break these out.)

	(D) Memorial Day; (E) Independence Day; (F) Labor Day; (G) Columbus Day; (H) Veterans' Day; (I) Thanksgiving Day; (J) Christmas Day; and (K) any other day declared a holiday by the President, Congress, or the state where the district court is held.
(b) Enlargement. When an act is required or allowed to be done at or within a specified time, the court for cause shown may at any time in its discretion (1) with or without motion or notice, order the period enlarged if request therefor is made before the expiration of the period originally prescribed or as extended by a previous order or (2) upon motion made after the expiration of the specified period permit the act to be done if the failure to act was the result of excusable neglect; but the court may not extend the time for taking any action under Rules 29, 33, 34 and 35, except to the extent and under the conditions stated in them.	**(b) Extending Time.** (1) ***In General.*** When an act must or may be done within a specified period, the court on its own may extend the time, or for good cause may do so on a party's motion made: (A) before the originally prescribed or previously extended time expires; or (B) after the time expires if the party failed to act ~~due to~~ excusable neglect. (2) ***Exceptions.*** The court may not extend the time to take any action under Rules 29, 33, 34, and 35, except as stated in those rules.
[(c) Unaffected by Expiration of Term.] Rescinded Feb. 28, 1966, eff. July 1, 1966.	
(d) For Motions; Affidavits. A written motion, other than one which may be heard *ex parte*, and notice of the hearing thereof shall be served not later than 5 days before the time specified for the hearing unless a different period is fixed by rule or order of the court. For cause shown such an order may be made on *ex parte* application. When a motion is supported by an affidavit, the affidavit shall be served with the motion; and opposing affidavits may be served not less than 1 day before the hearing unless the court permits them to be served at a later time.	

(e) Additional Time After Service by Mail. Whenever a party has the right or is required to do an act within a prescribed period after the service of a notice or other paper upon that party and the notice or other paper is served by mail, 3 days shall be added to the prescribed period.	**(c) Additional Time After Service.** When these rules permit or require a party to act within a specified period after a notice or a paper has been served on that party, 3 days are added to the period if service occurs in the manner provided under ~~Rule~~ 5(b)(2)(B), (C), or (D) ~~of the~~ Federal Rules of Civil Procedure.

COMMITTEE NOTE

The language of Rule 45 has been amended as part of the general restyling of the Criminal Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

In Rule 45(a)(4)(C), the term "Presidents' Day" is used instead of "Washington's Birthday" — the term used in the statute. The former term reflects the prevalent modern usage and was selected to conform the rule to the recently restyled Federal Rules of Appellate Procedure.

The additional three days provided by Rule 45(c) is extended to the means of service authorized by the new paragraph (D) added to Rule 5(b) of the Federal Rules of Civil Procedure, including — with the consent of the person served — service by electronic means. The means of service authorized in civil actions apply to criminal cases under Rule 49 (b).

Rule 45(d), which governs the timing of written motions and affidavits, has been moved to Rule 47.

Rule 46. Release from Custody	Rule 46. Release from Custody; Supervising Detention
(a) **Release Prior to Trial.** Eligibility for release prior to trial shall be in accordance with 18 U.S.C. §§ 3142 and 3144.	(a) **Before Trial.** The provisions of 18 U.S.C. §§ 3142 and 3144 govern pretrial release.
(b) **Release During Trial.** A person released before trial shall continue on release during trial under the same terms and conditions as were previously imposed unless the court determines that other terms and conditions or termination of release are necessary to assure such person's presence during the trial or to assure that such person's conduct will not obstruct the orderly and expeditious progress of the trial.	(b) **During Trial.** A person released before trial continues on release during trial under the same terms and conditions. But the court may order different terms and conditions or terminate the release if necessary to ensure that the person will be present during trial or that the person's conduct will not obstruct the orderly and expeditious progress of the trial.
(c) **Pending Sentence and Notice of Appeal.** Eligibility for release pending sentence or pending notice of appeal or expiration of the time allowed for filing notice of appeal, shall be in accordance with 18 U.S.C. § 3143. The burden of establishing that the defendant will not flee or pose a danger to any other person or to the community rests with the defendant.	(c) **Pending Sentencing or Appeal.** The provisions of 18 U.S.C. § 3143 govern release pending sentencing or appeal. The burden of establishing that the defendant will not flee or pose a danger to any other person or to the community rests with the defendant.
	(d) **Pending Hearing on a Violation of Probation or Supervised Release.** Rule 32.1(a)(6) governs release pending a hearing on a violation of probation or supervised release.
(d) **Justification of Sureties.** Every surety, except a corporate surety which is approved as provided by law, shall justify by affidavit and may be required to describe in the affidavit the property by which the surety proposes to justify and the encumbrances thereon, the number and amount of other bonds and undertakings for bail entered into by the surety and remaining undischarged and all the other liabilities of the surety. No bond shall be approved unless the surety thereon appears to be qualified.	(e) **Surety.** The court must not approve a bond unless any surety appears to be qualified. Every surety, except a legally approved corporate surety, must demonstrate by affidavit that its assets are adequate. The court may require the affidavit to describe the following: (1) the property that the surety proposes to use as security; (2) any encumbrance on that property; (3) the number and amount of any other undischarged bonds and bail undertakings the surety has issued; and (4) any other liability of the surety.

(AGAIN, THE IF CLAUSE IS ESSENTIAL TO MEANING.)

(e) Forfeiture. **(1) Declaration.** If there is a breach of condition of a bond, the district court shall declare a forfeiture of the bail. **(2) Setting Aside.** The court may direct that a forfeiture be set aside in whole or in part, upon such conditions as the court may impose, if a person released upon an execution of an appearance bond with a surety is subsequently surrendered by the surety into custody or if it otherwise appears that justice does not require the forfeiture. (I'd SAY "MAY WHOLLY OR PARTIALLY SET ASIDE.")	**(f) Bail Forfeiture.** (1) ***Declaration.*** The court must declare the bail forfeited if a condition of the bond is breached. (2) ***Setting Aside.*** The court may set aside, in whole or in part, a bail forfeiture upon any condition the court may impose, if: (A) the surety later surrenders into custody the person released on the surety's appearance bond; or (B) it appears that justice does not require bail forfeiture.
(3) Enforcement. When a forfeiture has not been set aside, the court shall on motion enter a judgment of default and execution may issue thereon. By entering into a bond the obligors submit to the jurisdiction of the district court and irrevocably appoint the clerk of the court as their agent upon whom any papers affecting their liability may be served. Their liability may be enforced on motion without the necessity of an independent action. The motion and such notice of the motion as the court prescribes may be served on the clerk of the court, who shall forthwith mail copies to the obligors to their last known addresses. **(4) Remission.** After entry of such judgment, the court may remit it in whole or in part under the conditions applying to the setting aside of forfeiture in paragraph (2) of this subdivision. (IT'S LIKE "FOR GOOD CAUSE" – AN INTERRUPTIVE ADVERBIAL PHRASE IN THE MIDDLE OF THE VERB PHRASE. IN (C), MIGHT BETTER MOVE IT TO THE BEGINNING OF THE SENTENCE.)	(3) ***Enforcement.*** (A) *Default Judgment and Execution.* If it does not set aside a bail forfeiture, the court must, upon the government's motion, enter a default judgment. (B) *Jurisdiction and Service.* By entering into a bond, each surety submits to the district court's jurisdiction and irrevocably appoints the district clerk as its agent to receive service of any filings affecting its liability. (C) *Motion to Enforce.* The court may, upon the government's motion, enforce the surety's liability without an independent action. The government must serve any motion, and notice as the court prescribes, on the district clerk. If so served, the clerk must promptly mail a copy to the surety at its last known address. (4) ***Remission.*** After entering a judgment under Rule 46(f)(3), the court may remit, in whole or in part, the judgment under the same conditions specified in Rule 46(f)(2).

(NOT SMOOTH.)

(f) Exoneration. When a condition of the bond has been satisfied or the forfeiture thereof has been set aside or remitted, the court shall exonerate the obligors and release any bail. A surety may be exonerated by a deposit of cash in the amount of the bond or by a timely surrender of the defendant into custody.	**(g) Exoneration.** The court must exonerate the surety and release any bail when a bond condition has been satisfied or when the court has set aside or remitted the forfeiture. The court must exonerate a surety who deposits cash in the amount of the bond or timely surrenders the defendant into custody.
(g) Supervision of Detention Pending Trial. The court shall exercise supervision over the detention of defendants and witnesses within the district pending trial for the purpose of eliminating all unnecessary detention. The attorney for the government shall make a biweekly report to the court listing each defendant and witness who has been held in custody pending indictment, arraignment, or trial for a period in excess of ten days. As to each witness so listed the attorney for the government shall make a statement of the reasons why such witness should not be released with or without the taking of a deposition pursuant to Rule 15(a). As to each defendant so listed the attorney for the government shall make a statement of the reasons why the defendant is still held in custody. (Why plural? Against our guidelines.)	**(h) Supervising Detention Pending Trial.** (1) ***In General.*** To eliminate unnecessary detention, the court must supervise the detention within the district of any defendants awaiting trial and of any persons held as material witnesses. (2) ***Reports.*** The attorney for the government must report biweekly to the court, listing each material witness held in custody for more than 10 days pending indictment, arraignment, or trial. For each material witness listed in the report, the attorney for the government must state why the witness should not be released with or without a deposition being taken under Rule 15(a).
(h) Forfeiture of Property. Nothing in this rule or in chapter 207 of title 18, United States Code, shall prevent the court from disposing of any charge by entering an order directing forfeiture of property pursuant to 18 U.S.C. 3142(c)(1)(B)(xi) if the value of the property is an amount that would be an appropriate sentence after conviction of the offense charged and if such forfeiture is authorized by statute or regulation.	**(i) Forfeiture of Property.** The court may dispose of a charged offense by ordering forfeiture of 18 U.S.C. § 3142(c)(1)(B)(xi) property under 18 U.S.C. § 3146(d), if a fine in the amount of the property's value would be an appropriate sentence for the charged offense.
(i) Production of Statements. **(1) In General.** Rule 26.2(a)-(d) and (f) applies at a detention hearing held under 18 U.S.C. § 3142, unless the court, for good cause shown, rules otherwise in a particular case. **(2) Sanctions for Failure to Produce Statement.** If a party elects not to comply with an order under Rule 26.2(a) to deliver a statement to the moving party, at the detention hearing the court may not consider the testimony of a witness whose statement is withheld.	**(j) Producing Statements.** (1) ***In General.*** Unless the court for good cause rules otherwise, Rule 26.2(a)–(d) and (f) applies at a detention hearing under 18 U.S.C. § 3142. Not Producing (2) ***Sanctions for ~~Failure to Produce a~~ Statement.*** If a party disobeys a Rule 26.2~~(a)~~ order to produce a witness's statement, the court must not consider that witness's testimony at the detention hearing.

(Same as others cited in 26.2(g).)

COMMITTEE NOTE

The language of Rule 46 has been amended as part of the general restyling of the Criminal Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only, except as noted below.

Although the general rule is that an appeal to a circuit court deprives the district court of jurisdiction, Rule 46(c) recognizes the apparent exception to that rule — that the district court retains jurisdiction to decide whether the defendant should be detained, even if a notice of appeal has been filed. *See, e.g., United States v. Meyers*, 95 F.3d 1475 (10th Cir. 1996), *cert. denied*, 522 U.S. 1006 (1997) (initial decision of whether to release defendant pending appeal is to be made by district court); *United States v. Affleck*, 765 F.2d 944 (10th Cir. 1985); *Jago v. United States District Court*, 570 F.2d 618 (6th Cir. 1978) (release of defendant pending appeal must first be sought in district court). *See also* Federal Rule of Appellate Procedure 9(b) and the accompanying Committee Note.

Revised Rule 46(h) deletes the requirement that the attorney for the government file bi-weekly reports with the court concerning the status of any defendants in pretrial detention. The Committee believed that the requirement was no longer necessary in light of the Speedy Trial Act provisions. 18 U.S.C. §§ 3161, et. seq. On the other hand, the requirement that the attorney for the government file reports regarding detained material witnesses has been retained in the rule.

Rule 46(i) addresses the ability of a court to order forfeiture of property where a defendant has failed to appear as required by the court. The language in the current rule, Rule 46(h), was originally included by Congress. The new language has been restyled with no change in substance or practice intended. Under this provision, the court may only forfeit property as permitted under 18 U.S.C. §§ 3146(d) and 3142(c)(1)(B)(xi). The term "appropriate sentence" means a sentence that is consistent with the Sentencing Guidelines.

Rule 47. Motions	Rule 47. Motions and Supporting Affidavits
An application to the court for an order shall be by motion. A motion other than one made during a trial or hearing shall be in writing unless the court permits it to be made orally. It shall state the grounds upon which it is made and shall set forth the relief or order sought. It may be supported by affidavit.	(a) **In General.** A party applying to the court for an order must do so by motion. (b) **Form and Content of a Motion.** A motion — except when made during a trial or hearing — must be in writing unless the court permits the party to make the motion by other means. A motion must state the grounds on which it is based and the relief or order sought. A motion may be supported by affidavit.
	(c) **Timing of a Motion.** A party must serve a written motion — other than one that the court may hear ex parte — and any hearing notice at least 5 days before the hearing date, unless a rule or court order sets a different period. For good cause, the court may set a different period upon ex parte application. (d) **Affidavit Supporting a Motion.** The moving party must serve any supporting affidavit with the motion. A responding party must serve any opposing affidavit at least ~~one~~ day before the hearing, unless the court permits later service.

COMMITTEE NOTE

The language of Rule 47 has been amended as part of the general restyling of the Criminal Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only, except as noted below.

In Rule 47(b), the word "orally" has been deleted. The Committee believed first, that the term should not act as a limitation on those who are not able to speak orally and second, a court may wish to entertain motions through electronic or other reliable means. Deletion of the term also comports with a similar change in Rule 26, regarding the taking of testimony during trial. In place of that word, the Committee substituted the broader phrase "by other means."

Rule 48. Dismissal	Rule 48. Dismissal
(a) By Attorney for Government. The Attorney General or the United States attorney may by leave of court file a dismissal of an indictment, information, or complaint and the prosecution shall thereupon terminate. Such a dismissal may not be filed during the trial without the consent of the defendant. **(b) By Court.** If there is unnecessary delay in presenting the charge to the grand jury or in filing an information against a defendant who has been held to answer to the district court, or if there is unnecessary delay in bringing a defendant to trial, the court may dismiss the indictment, information, or complaint.	**(a) By the Government.** The government may with leave of court dismiss an indictment, information, or complaint. The government may not dismiss the prosecution during trial without the defendant's consent. **(b) By the Court.** The court may dismiss an indictment, information, or complaint if unnecessary delay occurs in: **(1)** presenting a charge to a grand jury; **(2)** filing an information against a defendant; or **(3)** bringing a defendant to trial.

COMMITTEE NOTE

The language of Rule 48 has been amended as part of the general restyling of the Criminal Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

The Committee considered the relationship between Rule 48(b) and the Speedy Trial Act. *See* 18 U.S.C. §§ 3161, et seq. Rule 48(b), of course, operates independently from the Act. *See, e.g., United States v. Goodson*, 204 F.3d 508 (4th Cir. 2000) (noting purpose of Rule 48(b)); *United States v. Carlone*, 666 F.2d 1112, 1116 (7th Cir. 1981) (suggesting that Rule 48(b) could provide alternate basis in an extreme case to dismiss an indictment, without reference to Speedy Trial Act); *United States v. Balochi*, 527 F.2d 562, 563-64 (4th Cir. 1976) (per curiam) (Rule 48(b) is broader in compass). In re-promulgating Rule 48(b), the Committee intends no change in the relationship between that rule and the Speedy Trial Act.

Rule 49. Service and Filing of Papers	Rule 49. Serving and Filing Papers
(a) **Service: When Required.** Written motions other than those which are heard *ex parte*, written notices, designations of record on appeal and similar papers shall be served upon each of the parties.	(a) **When Required.** A party must serve on every other party any written motion (other than one to be heard ex parte), written notice, designation of the record on appeal, or similar paper.
(b) **Service: How Made.** Whenever under these rules or by an order of the court service is required or permitted to be made upon a party represented by an attorney, the service shall be made upon the attorney unless service upon the party personally is ordered by the court. Service upon the attorney or upon a party shall be made in the manner provided in civil actions.	(b) **How Made.** Service must be made in the manner provided for a civil action. When these rules or a court order requires or permits service on a party represented by an attorney, service must be made on the attorney instead of the party unless the court orders otherwise.
(c) **Notice of Orders.** Immediately upon the entry of an order made on a written motion subsequent to arraignment the clerk shall mail to each party a notice thereof and shall make a note in the docket of the mailing. Lack of notice of the entry by the clerk does not affect the time to appeal or relieve or authorize the court to relieve a party for failure to appeal within the time allowed, except as permitted by Rule 4(b) of the Federal Rules of Appellate Procedure.	(c) **Notice of a Court Order.** When the court issues an order on any post-arraignment motion, the clerk must provide notice in a manner provided for a civil action. Except as Federal Rule of Appellate Procedure 4(b) provides otherwise, the clerk's failure to give notice does not affect the time to appeal, or relieve — or authorize the court to relieve — a party's failure to appeal within the allowed time.
(d) **Filing.** Papers required to be served shall be filed with the court. Papers shall be filed in the manner provided in civil actions.	(d) **Filing.** A party must file with the court a copy of any paper the party is required to serve. A paper must be filed in the manner provided for a civil action.
[(e) Abrogated April 27, 1995, eff. December 1, 1995]	

COMMITTEE NOTE

The language of Rule 49 has been amended as part of the general restyling of the Criminal Rules to make them more easily understood and to make style and terminology consistent throughout the rules.

Rule 49(c) has been amended to reflect proposed changes in the Federal Rules of Civil Procedure that permit (but do not require) a court to provide notice of its orders and judgments through electronic means. *See* Federal Rules of Civil Procedure 5(b) and 77(d). As amended, Rule 49(c) now parallels a similar extant provision in Rule 49(b), regarding service of papers.

Rule 50. Calendars; Plan for Prompt Disposition	Rule 50. Prompt Disposition
(a) Calendars. The district courts may provide for placing criminal proceedings upon appropriate calendars. Preference shall be given to criminal proceedings as far as practicable. **(b) Plans for Achieving Prompt Disposition of Criminal Cases.** To minimize undue delay and to further the prompt disposition of criminal cases, each district court shall conduct a continuing study of the administration of criminal justice in the district court and before United States magistrate judges of the district and shall prepare plans for the prompt disposition of criminal cases in accordance with the provisions of Chapter 208 of Title 18, United States Code.	Scheduling preference must be given to criminal proceedings as far as practicable.

COMMITTEE NOTE

The language of Rule 50 has been amended as part of the general restyling of the Criminal Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only, except as noted below.

The first sentence in current Rule 50(a), which says that a court may place criminal proceedings on a calendar, has been deleted. The Committee believed that the sentence simply stated a truism and was no longer necessary.

Current Rule 50(b), which simply mirrors 18 U.S.C. § 3165, has been deleted in its entirety. The rule was added in 1971 to meet congressional concerns in pending legislation about deadlines in criminal cases. Provisions governing deadlines were later enacted by Congress and protections were provided in the Speedy Trial Act. The Committee concluded that in light of those enactments, Rule 50(b) was no longer necessary.

Rule 51. Exceptions Unnecessary.	Rule 51. Preserving Claimed Error
Exceptions to rulings or orders of the court are unnecessary and for all purposes for which an exception has heretofore been necessary it is sufficient that a party, at the time the ruling or order of the court is made or sought, makes known to the court the action which that party desires the court to take or that party's objection to the action of the court and the grounds therefor; but if a party has no opportunity to object to a ruling or order, the absence of an objection does thereafter prejudice that party.	(a) **Exceptions Unnecessary.** Exceptions to rulings or orders of the court are unnecessary. (b) **Preserving a Claim of Error.** A party may preserve a claim of error by informing the court — when the court ruling or order is made or sought — of the action the party wishes the court to take, or the party's objection to the court's action and the grounds for that objection. If a party does not have an opportunity to object to a ruling or order, the absence of an objection does not later prejudice that party. A ruling or order that admits or excludes evidence is governed by Federal Rule of Evidence 103.

COMMITTEE NOTE

The language of Rule 51 has been amended as part of the general restyling of the Criminal Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

The Rule includes a new sentence that explicitly states that any rulings regarding evidence are governed by Federal Rule of Evidence 103. The sentence was added because of concerns about the Supersession Clause, 28 U.S.C. § 2072(b), of the Rules Enabling Act, and the possibility that an argument might have been made that Congressional approval of this rule would supersede that Rule of Evidence.

Rule 52. Harmless Error and Plain Error	Rule 52. Harmless and Plain Error
(a) **Harmless Error.** Any error, defect, irregularity, or variance which does not affect substantial rights shall be disregarded.	(a) **Harmless Error.** Any error, defect, irregularity, or variance that does not affect substantial rights must be disregarded.
(b) **Plain Error.** Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.	(b) **Plain Error.** A plain error or defect that affects substantial rights may be considered even though it was not brought to the court's attention.

COMMITTEE NOTE

The language of Rule 52 has been amended as part of the general restyling of the Criminal Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

Rule 53. Regulation of Conduct in the Court Room.	Rule 53. Courtroom Photographing and Broadcasting Prohibited
The taking of photographs in the court room during the progress of judicial proceedings or radio broadcasting of judicial proceedings from the court room shall not be permitted by the court.	Except as otherwise provided by statute or these rules, the court must not permit the taking of photographs in the courtroom during judicial proceedings or the broadcasting of judicial proceedings from the courtroom.

COMMITTEE NOTE

The language of Rule 53 has been amended as part of the general restyling of the Criminal Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only, except as noted below.

Although the word "radio" has been deleted from the rule, the Committee does not believe that the amendment is a substantive change but rather one that accords with judicial interpretation applying the current rule to other forms of broadcasting and functionally equivalent means. *See, e.g., United States v. Hastings*, 695 F.2d 1278, 1279, n. 5 (11th Cir. 1983) (television proceedings prohibited); *United States v. McVeigh*, 931 F. Supp. 753 (D. Colo. 1996) (release of tape recordings of proceedings prohibited). Given modern technology capabilities, the Committee believed that a more generalized reference to "broadcasting" is appropriate.

Also, although the revised rule does not explicitly recognize exceptions within the rules themselves, the restyled rule recognizes that other rules might permit, for example, video teleconferencing, which clearly involves "broadcasting" of the proceedings, even if only for limited purposes.

REPORTER'S NOTES

In publishing the "style" changes to the Federal Rules of Criminal Procedure, the Committee decided to publish separately any rule that includes what it considered at least one major substantive change. The purpose for this separate publication is to highlight for the bench and the bar any proposed amendments that the Committee believes will result in significant changes in current practice. That separate publication includes substantive amendments to Rules 5 and 10 that would permit video teleconferencing of initial appearances and arraignments and to Rule 26 that would permit remote transmission of live testimony. Those amendments would thus impact on Rule 53.

Rule 54. Application and Exception	Rule 54. (Reserved)[5]
(a) **Courts.** These rules apply to all criminal proceedings in the United States District Courts; in the District Court of Guam; in the District Court for the Northern Mariana Islands, except as otherwise provided in articles IV and V of the covenant provided by the Act of March 24, 1976 (90 Stat. 263); and in the District Court of the Virgin Islands; in the United States Courts of Appeals; and in the Supreme Court of the United States; except that the prosecution of offenses in the District Court of the Virgin Islands shall be by indictment or information as otherwise provided by law.	

[5]All of Rule 54 was moved to Rule 1.

(b) Proceedings.

(1) Removed Proceedings. These rules apply to criminal prosecutions removed to the United States district courts from state courts and govern all procedure after removal, except that dismissal by the attorney for the prosecution shall be governed by state law.

(2) Offenses Outside a District or State. These rules apply to proceedings for offenses committed upon the high seas or elsewhere out of the jurisdiction of any particular state or district, except that such proceedings may be had in any district authorized by 18 U.S.C. § 3238.

(3) Peace Bonds. These rules do not alter the power of judges of the United States or of United States magistrate judges to hold security of the peace and for good behavior under Revised Statutes, § 4069, 50 U.S.C. § 23, but in such cases the procedure shall conform to these rules so far as they are applicable.

(4) Proceedings Before United States Magistrate Judges. Proceedings involving misdemeanors and other petty offenses are governed by Rule 58.

(5) Other Proceedings. These rules are not applicable to extradition and rendition of fugitives; civil forfeiture of property for violation of a statute of the United States; or the collection of fines and penalties. Except as provided in Rule 20(d) they do not apply to proceedings under 18 U.S.C. Chapter 403 — Juvenile Delinquency — so far as they are inconsistent with that chapter. They do not apply to summary trials for offenses against the navigation laws under Revised Statutes §§ 4300-4305, 33 U.S.C. §§ 391-396, or to proceedings involving disputes between seamen under Revised Statutes §§ 4079-4081, as amended, 22 U.S.C. §§ 256-258, or to proceedings for fishery offenses under the Act of June 28, 1937, c. 392, 50 Stat. 325-327, 16 U.S.C. §§ 772-772i, or to proceedings against a witness in a foreign country under 28 U.S.C. § 1784.

(c) Application of Terms. As used in these rules the following terms have the designated meanings.

"Act of Congress" includes any act of Congress locally applicable to and in force in the District of Columbia, in Puerto Rico, in a territory or in any insular possession.

"Attorney for the government" means the Attorney General, an authorized assistant of the Attorney General, a United States Attorney, an authorized assistant of a United States Attorney, when applicable to cases arising under the laws of Guam the Attorney General of Guam or such other person or persons as may be authorized by the laws of Guam to act therein, and when applicable to cases arising under the laws of the Northern Mariana Islands the Attorney General of the Northern Mariana Islands or any other person or persons as may be authorized by the laws of the Northern Marianas to act therein.

"Civil action" refers to a civil action in a district court.

The words "demurrer," "motion to quash," "plea in abatement," "plea in bar" and "special plea in bar," or words to the same effect, in any act of Congress shall be construed to mean the motion raising a defense or objection provided in Rule 12.

"District court" includes all district courts named in subdivision (a) of this rule.

"Federal magistrate judge" means a United States magistrate judge as defined in 28 U.S.C. §§ 631-639, a judge of the United States or another judge or judicial officer specifically empowered by statute in force in any territory or possession, the Commonwealth of Puerto Rico, or the District of Columbia, to perform a function to which a particular rule relates.

"Judge of the United States" includes a judge of the district court, court of appeals, or the Supreme Court.

"Law" includes statutes and judicial decisions.

"Magistrate judge" includes a United States magistrate judge as defined in 28 U.S.C. §§ 631-639, a judge of the United States, another judge or judicial officer specifically empowered by statute in force in any territory or possession, the Commonwealth of Puerto Rico, or the District of Columbia, to perform a function to which a particular rule relates, and a state or local judicial officer, authorized by 18 U.S.C. § 3041 to perform the functions prescribed by Rules 3, 4, and 5. "Oath" includes affirmations. "Petty offense" is defined in 18 U.S.C. § 19. "State" includes District of Columbia, Puerto Rico, territory and insular possession. "United States magistrate judge" means the officer authorized by 28 U.S.C. §§ 631-639.	

COMMITTEE NOTE

Certain provisions in current Rule 54 have been moved to revised Rule 1 as part of a general restyling of the Criminal Rules to make them more easily understood and to make style and terminology consistent throughout the rules. Other provisions in Rule 54 have been deleted as being unnecessary.

Rule 55. Records	Rule 55. Records
The clerk of the district court and each United States magistrate judge shall keep records in criminal proceedings in such form as the Director of the Administrative Office of the United States Courts may prescribe. The clerk shall enter in the records each order or judgment of the court and the date such entry is made.	The clerk of the district court must keep records of criminal proceedings in the form prescribed by the Director of the Administrative Office of the United States Courts. The clerk must enter in the records every court order or judgment and the date of entry.

COMMITTEE NOTE

The language of Rule 55 has been amended as part of the general restyling of the Criminal Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

Rule 56. Courts and Clerks	Rule 56. When Court Is Open
The district court shall be deemed always open for the purpose of filing any proper paper, of issuing and returning process and of making motions and orders. The clerk's office with the clerk or a deputy in attendance shall be open during business hours on all days except Saturdays, Sundays, and legal holidays, but a court may provide by local rule or order that its clerk's office shall be open for specified hours on Saturdays or particular legal holidays other than New Year's Day, Birthday of Martin Luther King, Jr., Washington's Birthday, Memorial Day, Independence Day, Labor Day, Columbus Day, Veterans Day, Thanksgiving Day, and Christmas Day.	(a) **In General.** A district court is considered always open for any filing, and for issuing and returning process, making a motion, or entering an order. (b) **Office Hours.** The clerk's office — with the clerk or a deputy in attendance — must be open during business hours on all days except Saturdays, Sundays, and legal holidays. (c) **Special Hours.** A court may provide by local rule or order that its clerk's office will be open for specified hours on Saturdays or legal holidays other than New Year's Day, Martin Luther King, Jr.'s Birthday, Presidents' Day, Memorial Day, Independence Day, Labor Day, Columbus Day, Veterans' Day, Thanksgiving Day, and Christmas Day.

COMMITTEE NOTE

The language of Rule 56 has been amended as part of the general restyling of the Criminal Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

In Rule 56(c) the term "Presidents' Day" is used in lieu of the term, "Washington's Birthday." Although the latter term is used in the statute, the former reflects the prevalent modern usage and is the term used in the recently restyled Federal Rules of Appellate Procedure. *See also* Rule 45(a).

(See 17(c).)

Rule 57. Rules by District Courts	Rule 57. District Court Rules
(a) In General (1) Each district court acting by a majority of its district judges may, after giving appropriate public notice and an opportunity to comment, make and amend rules governing its practice. A local rule shall be consistent with — but not duplicative of — Acts of Congress and rules adopted under 28 U.S.C. § 2072 and shall conform to any uniform numbering system prescribed by the Judicial Conference of the United States. (2) A local rule imposing a requirement of form shall not be enforced in a manner that causes a party to lose rights because of nonwillful failure to comply with the requirement. (COMPARE 45(b)(1)(B).)	**(a) In General.** CREATING LOCAL RULES (1) Each district court acting by a majority of its district judges may, after giving appropriate public notice and an opportunity to comment, make and amend rules governing its practice. A local rule must be consistent with — but not duplicative of — federal statutes and rules adopted under 28 U.S.C. § 2072 and must conform to any uniform numbering system prescribed by the Judicial Conference of the United States. LIMIT ON ENFORCING (2) A local rule imposing a requirement of form must not be enforced in a manner that causes a party to lose rights because of an unintentional failure to comply with the requirement.
(b) Procedure When There Is No Controlling Law. A judge may regulate practice in any manner consistent with federal law, these rules, and local rules of the district. No sanction or other disadvantage may be imposed for noncompliance with any requirement not in federal law, federal rules, or the local district rules unless the alleged violator has been furnished in the particular case with actual notice of the requirement.	(b) C? **Procedure When There Is No Controlling Law.** A judge may regulate practice in any manner consistent with federal law, these rules, and the local rules of the district. No sanction or other disadvantage may be imposed for noncompliance with any requirement not in federal law, federal rules, or the local district rules unless the alleged violator was furnished with actual notice of the requirement before the noncompliance.
(c) Effective Date and Notice. A local rule so adopted shall take effect upon the date specified by the district court and shall remain in effect unless amended by the district court or abrogated by the judicial council of the circuit in which the district is located. Copies of the rules and amendments so made by any district court shall upon their promulgation be furnished to the judicial council and the Administrative Office of the United States Courts and shall be made available to the public.	(c) b? **Effective Date and Notice.** A local rule adopted under this Rule takes effect on the date specified by the district court and remains in effect unless amended by the district court or abrogated by the judicial council of the circuit in which the district is located. Copies of local rules and their amendments, when promulgated, must be furnished to the judicial council and the Administrative Office of the United States Courts and must be made available to the public.

COMMITTEE NOTE

The language of Rule 57 has been amended as part of the general restyling of the Criminal Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

(They have been lowercase throughout. E.g. 12.2(e) 12.3(d) & (e).

Could omit "under this Rule.")

179

Rule 58. Procedure for Misdemeanors and Other Petty Offenses	Rule 58. Petty Offenses and Other Misdemeanors
(a) Scope. **(1) In General.** This rule governs the procedure and practice for the conduct of proceedings involving misdemeanors and other petty offenses, and for appeals to district judges in such cases tried by United States magistrate judges. **(2) Applicability of Other Federal Rules of Criminal Procedure.** In proceedings concerning petty offenses for which no sentence of imprisonment will be imposed the court may follow such provisions of these rules as it deems appropriate, to the extent not inconsistent with this rule. In all other proceedings the other rules govern except as specifically provided in this rule. **(3) Definition.** The term "petty offenses for which no sentence of imprisonment will be imposed" as used in this rule, means any petty offenses as defined in 18 U.S.C. § 19 as to which the court determines, that, in the event of conviction, no sentence of imprisonment will actually be imposed.	**(a) Scope.** (1) ***In General.*** These rules apply in petty offense and other misdemeanor cases and on appeal to a district judge in a case tried by a magistrate judge, unless this rule provides otherwise. (2) ***Petty Offense Case Without Imprisonment.*** In a case involving a petty offense for which no sentence of imprisonment will be imposed, the court may follow any provision of these rules that is not inconsistent with this rule and that the court considers appropriate. (3) ***Definition.*** As used in this rule, the term "petty offense for which no sentence of imprisonment will be imposed" means a petty offense for which the court determines that, in the event of conviction, no sentence of imprisonment will be imposed.
(b) Pretrial Procedures. **(1) Trial Document.** The trial of a misdemeanor may proceed on an indictment, information, or complaint or, in the case of a petty offense, on a citation or violation notice.	**(b) Pretrial Procedure.** (1) ***Charging Document.*** The trial of a misdemeanor may proceed on an indictment, information, or complaint. The trial of a petty offense may also proceed on a citation or violation notice.

(2) **Initial Appearance.** At the defendant's initial appearance on a misdemeanor or other petty offense charge, the court shall inform the defendant of: **(A)** the charge, and the maximum possible penalties provided by law, including payment of a special assessment under 18 U.S.C. § 3013, and restitution under 18 U.S.C. § 3663; **(B)** the right to retain counsel; **(C)** the right to request the appointment of counsel if the defendant is unable to retain counsel, unless the charge is a petty offense for which an appointment of counsel is not required; **(D)** the right to remain silent and that any statement made by the defendant may be used against the defendant; **(E)** the right to trial, judgment, and sentencing before a district judge, unless: (i) the charge is a Class B misdemeanor motor-vehicle offense, a Class C misdemeanor, or an infraction; or (ii) the defendant consents to trial, judgment, and sentencing before the magistrate judge; **(F)** the right to trial by jury before either a United States magistrate judge or a district judge, unless the charge is a petty offense; and **(G)** the right to a preliminary examination in accordance with 18 U.S.C. § 3060, and the general circumstances under which the defendant may secure pretrial release, if the defendant is held in custody and charged with a misdemeanor other than a petty offense.	(2) ***Initial Appearance.*** At the defendant's initial appearance on a petty offense or other misdemeanor charge, the magistrate judge must inform the defendant of the following: (A) the charge, and the minimum and maximum penalties, including any special assessment under 18 U.S.C. § 3013 and restitution under 18 U.S.C. § 3556; (B) the right to retain counsel; (C) the right to request the appointment of ~~counsel~~ if the defendant is unable to retain ~~counsel~~ — unless the charge is a petty offense for which the appointment of ~~counsel~~ is not required; (D) the right to remain silent and that the prosecution may use against the defendant any statement that the defendant makes; (E) the right to trial, judgment, and sentencing before a district judge — unless: (i) the charge is a Class B misdemeanor motor-vehicle offense, a Class C misdemeanor, or an infraction; or (ii) the defendant consents to trial, judgment, and sentencing before a magistrate judge; (F) the right to a jury trial before either a magistrate judge or a district judge — unless the charge is a petty offense; and (G) if the defendant is held in custody and charged with a misdemeanor other than a petty offense, the right to a preliminary hearing under Rule 5.1, and the general circumstances, if any, under which the defendant may secure pretrial release.

(3) Consent and Arraignment. **(A) Plea Before a United States Magistrate Judge.** A magistrate judge shall take the defendant's plea in a Class B misdemeanor charging a motor vehicle-offense, a class C misdemeanor, or an infraction. In every other misdemeanor case, a magistrate judge may take the plea only if the defendant consents either in writing or orally on the record to be tried before the magistrate judge and specifically waives trial before a district judge. The defendant may plead not guilty, guilty, or with the consent of the magistrate judge, nolo contendere. **(B) Failure to Consent.** In a misdemeanor case — other than a Class B misdemeanor charging a motor-vehicle offense, a Class C misdemeanor, or an infraction — magistrate judge shall order the defendant to appear before a district judge for further proceedings on notice, unless the defendant consents to the trial before the magistrate judge.	(3) *Arraignment.* (A) *Plea Before a Magistrate Judge.* A magistrate judge may take the defendant's plea in a Class B misdemeanor charging a motor vehicle-offense, a class C misdemeanor, or an infraction. In every other misdemeanor case, a magistrate judge may take the plea only if the defendant consents either in writing or on the record to be tried before a magistrate judge and specifically waives trial before a district judge. The defendant may plead not guilty, guilty, or (with the consent of the magistrate judge) nolo contendere. (COMPARE 11(a)(1).) (B) *Failure to Consent.* Except for a Class B misdemeanor charging a motor-vehicle offense, a Class C misdemeanor, or an infraction, the magistrate judge must order a defendant who does not consent to trial before a magistrate judge to appear before a district judge for further proceedings.

(c) Additional Procedures Applicable Only to Petty Offenses for Which No Sentence of Imprisonment Will be Imposed. With respect to petty offenses for which no sentence of imprisonment will be imposed, the following additional procedures are applicable: **(1) Plea of Guilty or Nolo Contendere.** No plea of guilty or nolo contendere shall be accepted unless the court is satisfied that the defendant understands the nature of the charge and the maximum possible penalties provided by law. **(2) Waiver of Venue for Plea and Sentence.** A defendant who is arrested, held, or present in a district other than that in which the indictment, information, complaint, citation, or violation notice is pending against that defendant may state in writing a wish to plead guilty or nolo contendere, to waive venue and trial in the district in which the proceeding is pending, and to consent to disposition of the case in the district in which that defendant was arrested, is held, or is present. Unless the defendant thereafter pleads not guilty, the prosecution shall be had as if venue were in such district, and notice of same shall be given to the magistrate judge in the district where the proceeding was originally commenced. The defendant's statement of a desire to plead guilty or nolo contendere is not admissible against the defendant.	**(c) Additional Procedures in Certain Petty Offense Cases.** The following procedures also apply ~~in cases~~ involving a petty offense for which no sentence of imprisonment will be imposed: (1) ***Guilty or Nolo Contendere Plea.*** The court must not accept a guilty or nolo contendere plea unless satisfied that the defendant understands the nature of the charge and the maximum possible penalty. (2) ***Waiving Venue.*** (A) *Conditions of Waiving Venue.* If a defendant is arrested, held, or present in a district different from the one where the indictment, information, complaint, citation, or violation notice is pending, the defendant may state in writing a desire to plead guilty or nolo contendere, to waive venue and trial in the district where the proceeding is pending, and to consent to the court's disposing of the case in the district where the defendant was arrested, is held, or is present.
	(B) *Effect of Waiving Venue.* Unless the defendant later pleads not guilty, the prosecution will proceed in the district where the defendant was arrested, is held, or is present. The district clerk must notify the clerk in the original district of the defendant's waiver of venue. The defendant's statement of a desire to plead guilty or nolo contendere is not admissible against the defendant.

(3) **Sentence.** The court shall afford the defendant an opportunity to be heard in mitigation. The court shall then immediately proceed to sentence the defendant, except that in the discretion of the court, sentencing may be continued to allow an investigation by the probation service or submission of additional information by either party.	(3) ***Sentencing.*** The court must give the defendant an opportunity to be heard in mitigation and then proceed immediately to sentencing. The court may, however, postpone sentencing to allow the probation service to investigate or to permit either party to submit additional information.
(4) **Notification of Right to Appeal.** After imposing sentence in a case which has gone to trial on a plea of not guilty, the court shall advise the defendant of the defendant's right to appeal including any right to appeal the sentence. There shall be no duty on the court to advise the defendant of any right of appeal after sentence is imposed following a plea of guilty or nolo contendere, except the court shall advise the defendant of any right to appeal the sentence.	(4) ***Notice of a Right to Appeal.*** After imposing sentence in a case tried on a not-guilty plea, the court must advise the defendant of a right to appeal the conviction and of any right to appeal the sentence. If the defendant was convicted on a plea of guilty or nolo contendere, the court must advise the defendant of any right to appeal the sentence.

(Difference Intended?)

(d) Securing the Defendant's Appearance; Payment in Lieu of Appearance. **(1) Forfeiture of Collateral.** When authorized by local rules of the district court, payment of a fixed sum may be accepted in suitable cases in lieu of appearance and as authorizing termination of the proceedings. Local rules may make provision for increases in fixed sums not to exceed the maximum fine which could be imposed. **(2) Notice to Appear.** If a defendant fails to pay a fixed sum, request a hearing, or appear in response to a citation or violation notice, the clerk or a magistrate judge may issue a notice for the defendant to appear before the court on a date certain. The notice may also afford the defendant an additional opportunity to pay a fixed sum in lieu of appearance, and shall be served upon the defendant by mailing a copy to the defendant's last known address. **(3) Summons or Warrant.** Upon an indictment or a showing by one of the other documents specified in subdivision (b)(1) of probable cause to believe that an offense has been committed and that the defendant has committed it, the court may issue an arrest warrant or, if no warrant is requested by the attorney for the prosecution, a summons. The showing of probable cause shall be made in writing upon oath or under penalty of perjury, but the affiant need not appear before the court. If the defendant fails to appear before the court in response to a summons, the court may summarily issue a warrant for the defendant's immediate arrest and appearance before the court.	**(d) Paying a Fixed Sum in Lieu of Appearance.** (1) ***In General.*** If the court has a local rule governing forfeiture of collateral, the court may accept a fixed-sum payment in lieu of the defendant's appearance and end the case, but the fixed sum may not exceed the maximum fine allowed by law. (2) ***Notice to Appear.*** If the defendant fails to pay a fixed sum, request a hearing, or appear in response to a citation or violation notice, the district clerk or a magistrate judge may issue a notice for the defendant to appear before the court on a date certain. The notice may give the defendant an additional opportunity to pay a fixed sum in lieu of appearance. The district clerk must serve the notice on the defendant by mailing a copy to the defendant's last known address. (3) ***Summons or Warrant.*** Upon an indictment, or upon a showing by one of the other charging documents specified in Rule 58(b)(1) of probable cause to believe that an offense has been committed and that the defendant has committed it, the court may issue an arrest warrant or, if no warrant is requested by the attorney for the government, a summons. The showing of probable cause must be made under oath or under penalty of perjury, but the affiant need not appear before the court. If the defendant fails to appear before the court in response to a summons, the court may summarily issue a warrant for the defendant's arrest.
(e) Record. Proceedings under this rule shall be taken down by a reporter or recorded by suitable sound equipment.	(e) **Record.** The court must record any proceedings under this rule by using a court reporter or suitable recording device.
(f) New Trial. The provisions of Rule 33 shall apply.	(f) **New Trial.** Rule 33 applies to a motion for a new trial.

Recording the Proceedings

185

(g) Appeal. **(1) Decision, Order, Judgment or Sentence by a District Judge.** An appeal from a decision, order, judgment or conviction or sentence by a district judge shall be taken in accordance with the Federal Rules of Appellate Procedure. **(2) Decision, Order, Judgment or Sentence by a United States Magistrate Judge.** **(A) Interlocutory Appeal.** A decision or order by a magistrate judge which, if made by a district judge, could be appealed by the government or defendant under any provision of law, shall be subject to an appeal to a district judge provided such appeal is taken within 10 days of the entry of the decision or order. An appeal shall be taken by filing with the clerk of court a statement specifying the decision or order from which an appeal is taken and by serving a copy of the statement upon the adverse party, personally or by mail, and by filing a copy with the magistrate judge. **(B) Appeal from Conviction or Sentence.** An appeal from a judgment of conviction or sentence by a magistrate judge to a district judge shall be taken within 10 days after entry of judgment. An appeal shall be taken by filing with the clerk of the court a statement specifying the judgment from which an appeal is taken, and by serving a copy of the statement upon the United States Attorney, personally or by mail, and by filing a copy with the magistrate judge.	**(g) Appeal.** (1) ***From a District Judge's Order or Judgment.*** The Federal Rules of Appellate Procedure govern an appeal from a district judge's order or a judgment of conviction or sentence. (2) ***From a Magistrate Judge's Order or Judgment.*** (A) *Interlocutory Appeal.* Either party may appeal an order of a magistrate judge to a district judge within 10 days of its entry if a district judge's order could similarly be appealed. The party appealing must file a notice with the clerk specifying the order being appealed and serve a copy on the adverse party. (B) *Appeal from a Conviction or Sentence.* A defendant may appeal a magistrate judge's judgment of conviction or sentence to a district judge within 10 days of its entry. To appeal, the defendant must file a notice with the clerk specifying the judgment being appealed and serve a copy on the attorney for the government.

(C) Record. The record shall consist of the original papers and exhibits in the case together with any transcript, tape, or other recording of the proceedings and a certified copy of the docket entries which shall be transmitted promptly to the clerk of court. For purposes of the appeal, a copy of the record of such proceedings shall be made available at the expense of the United States to a person who establishes by affidavit the inability to pay or give security therefor, and the expense of such copy shall be paid by the Director of the Administrative Office of the United States Courts.	(C) *Record.* The record consists of the original papers and exhibits in the case; any transcript, tape, or other recording of the proceedings; and a certified copy of the docket entries. For purposes of the appeal, a copy of the record of the proceedings must be made available to a defendant who establishes by affidavit an inability to pay or give security for the record. The Director of the Administrative Office of the United States Courts must pay for those copies.
(D) Scope of Appeal. The defendant shall not be entitled to a trial de novo by a district judge. The scope of appeal shall be the same as an appeal from a judgment of a district court to a court of appeals.	(D) *Scope of Appeal.* The defendant is not entitled to a trial de novo by a district judge. The scope of the appeal is the same as in an appeal to the court of appeals from a judgment entered by a district judge.
(3) **Stay of Execution; Release Pending Appeal.** The provisions of Rule 38 relating to stay of execution shall be applicable to a judgment of conviction or sentence. The defendant may be released pending an appeal in accordance with the provisions of law relating to release pending appeal from a judgment of a district court to a court of appeals.	(3) ***Stay of Execution and Release Pending Appeal.*** Rule 38 applies to a stay of a judgment of conviction or sentence. The court may release the defendant pending appeal under the law relating to release pending appeal from a district court to a court of appeals.

COMMITTEE NOTE

The language of Rule 58 has been amended as part of the general restyling of the Criminal Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

The title of the rule has been changed to "Petty Offenses and Other Misdemeanors." In Rule 58(c)(2)(B) (regarding waiver of venue), the Committee amended the rule to require that the "district clerk," instead of the magistrate judge, inform the original district clerk if the defendant waives venue and the prosecution proceeds in the district where the defendant was arrested. The Committee intends no change in practice.

In Rule 58(g)(1) and (g)(2)(A), the Committee deleted as unnecessary the word "decision" because its meaning is covered by existing references to an "order, judgment, or sentence" by a district judge or magistrate judge. In the Committee's view, deletion of that term does not amount to a substantive change.

Rule 59. Effective Date	~~Rule 59. Effective Date~~
These rules take effect on the day which is 3 months subsequent to the adjournment of the first regular session of the 79th Congress, but if that day is prior to September 1, 1945, then they take effect on September 1, 1945. They govern all criminal proceedings thereafter commenced and so far as just and practicable all proceedings then pending.	~~[Abrogated.]~~

COMMITTEE NOTE

Rule 59, which dealt with the effective date of the Federal Rules of Criminal Procedure, is no longer necessary and has been abrogated.

Rule 60. Title	~~Rule 60. Title~~
These rules may be known and cited as the Federal Rules of Criminal Procedure.	~~[Abrogated.]~~

COMMITTEE NOTE

The language of Rule 60, which reflected the title of the Federal Rules of Criminal Procedure, has been deleted as being unnecessary.

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

FROM: **Professor Dave Schlueter, Reporter**

RE: **Rule 1: Whether to Restore Reference to 28 USC § 1784 in Rule 1(a)(5)**

DATE: **September 26, 2000**

Attached is a memo from Mr. Pauley raising the question whether the reference to 28 USC § 1784 should be restored to Rule 1. Current Rule 54(b)(5) states that the Rules of Criminal Procedure do not apply to proceedings brought under § 1784. The list of excluded proceedings in that rule was transferred to restyled Rule 1. But, as Mr. Pauley notes, the reference to that statute (which deals with contempt for failing to obey a subpoena under § 1783) was deleted at some point in the restyling effort. Thus, as published, the Rules of Criminal Procedure would apply to contempt proceedings brought under § 1784.

Mr. Pauley recommends that the Committee consider restoring the reference to § 1784.

U.S. Department of Justice

Criminal Division

Washington, DC 20530-0001

June 9, 2000

MEMORANDUM

To: Criminal Rules Committee

From: Roger A. Pauley RAP

Subject: Whether the Federal Rules of Criminal Procedure Should Remain Inapplicable To 28 U.S.C. 1784 Criminal Contempt Proceedings

As published for comment, Rule 1(a)(5) would eliminate the present exemption from the Federal Rules of Criminal Procedure of criminal contempt proceedings under 28 U.S.C. 1784. The elimination was probably inadvertent.[1] Nevertheless, the question arises whether the Committee lurched into a result that is correct as a matter of policy. As will be seen, I conclude not, although the matter is not free from doubt. The statute and issue are interesting; although only a handful of criminal prosecutions have occurred in the three-quarter century history of the provision, one case went to the Supreme Court while another involved a notorious figure.

28 U.S.C. 1784, along with its companion provision now codified at 28 U.S.C. 1783, were first enacted in 1926, in slightly different form, as the Walsh Act. Section 1783 allows a district court to subpoena a resident or national of the United States who is in a foreign country either to testify or produce documents for use, inter alia, in federal criminal proceedings. Service is governed by the Federal Rules of Civil Procedure relating to service of process in a foreign country.

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[1]The Committee's action in determining which of the current exemptions from the applicability of the criminal rules are obsolete was based on a letter I sent to the Reporter in December 1998 analyzing each of the current exemptions. The letter recommended several for elimination, but noted that "the other exempted statutes, 22 U.S.C. 256-258 and 28 U.S.C. 1784 seem up to date and proper." For some reason, 28 U.S.C. 1784 proceedings were nevertheless made applicable to the rules, a fact that I did not notice until shortly before the Standing Committee meeting in June.

Section 1784 deals with contempt for failing to obey a subpoena under section 1783. It provides for issuance of an order to show cause (to be served in same manner as the subpoena), and includes a special procedure allowing the alleged contemnor's property in the United States to be seized and held to satisfy any judgment that may be rendered against him in the contempt proceeding. If found in contempt, the person may be fined not more than $100,000, which may be satisfied by sale of any of the person's property that was seized. Evidently, this is the sole penalty; no imprisonment sanction for violating the statute is set forth, although whether a prosecution may be also be brought under the general contempt statute 18 U.S.C. 401 (which does carry imprisonment penalties) is unclear.[2] Other than specifying the manner of initiating the contempt proceeding, no procedures for conducting it are set forth in the statutes, and as previously indicated such proceedings have always been expressly exempted from the application of the Federal Rules of Criminal Procedure.

The constitutionality of the Walsh Act came before the Supreme Court in 1932, with the principal challenge being to Congress's power to compel a citizen abroad to return to the United States to testify. The defendant had declined to obey the subpoena and had remained in France where he had resided for several years. The Court sustained the statute and conviction, holding that Congress possessed the power to compel citizens to honor their duty to participate in judicial proceedings. Blackmer v. United States, 284 U.S. 421. In the course of its opinion, the Court also rejected an argument, pertinent to the issue before the Committee, that the conviction offended due process because the defendant was at no time present at the trial, stating that since it was well settled that criminal contempt proceedings are not "criminal prosecutions within the Sixth Amendment," the "requisite amount of due process in such a case is satisfied by suitable notice and adequate opportunity to appear and be heard" as had occurred in that case. Id., at 440.

Clearly, the legal underpinning of Blackmer's characterization of criminal contempt proceedings as not criminal prosecutions for purposes of the Sixth Amendment

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[2]The government sought in one case to enforce a failure to obey a subpoena under section 1783 by bringing a contempt prosecution under 18 U.S.C. 401. The defendant was Meyer Lansky. But the court of appeals, in reversing the conviction on other grounds, reserved ruling on the defendant's contention that section 1784 is the sole avenue for enforcing disobedience of subpoenas issued under section 1783. United States v. Lansky, 496 F.2d 1063 (5th Cir. 1974).

(which was accurate at the time) has subsequently been eroded if not altogether discarded. The Supreme Court, in Bloom v. Illinois, 391 U.S. 194 (1968), stated broadly, in holding that alleged contemnors sentenced to more than six months' imprisonment have a constitutional right to jury trial, that "criminal contempt is a crime in every fundamental respect." 391 U.S., at 201. But the Court has never overruled the specific holding in Blackmer that an out of country alleged contemnor has no constitutional right to be present at the outset of his trial under 28 U.S.C. 1784 if absent after having been given notice of the proceeding. Moreover, even if Blackmer's holding of a lack of right of a duly notified defendant to be present at a petty offense contempt proceeding is deemed dubious under today's jurisprudence, the result in Blackmer may still survive if viewed in effect as a holding that a defendant under section 1784 could waive the right to be present at trial by absenting himself, after due notice, from the outset.

It is here that the question whether section 1784 contempt proceedings should come within the purview of the Criminal Rules has practical significance. Obviously, if Rule 43, F.R.Crim.P., were applicable to 28 U.S.C. 1784 contempts, the result in cases like Blackmer would be different, since the Supreme Court has construed Rule 43 not to permit a trial in absentia where the defendant, although adequately advised of the proceedings, is absent from the inception. Crosby v. United States, 506 U.S. 255 (1993).

Thus, in the end, the question whether the Criminal Rules should remain inapplicable to 28 U.S.C. 1784 contempts depends largely on the determination whether Rule 43, as construed in Crosby, must or should apply to the statute.[3] As to whether the rule *must* apply, the answer is unclear since the constitutional question is unresolved. The Supreme Court has never decided whether the Sixth Amendment right to be present at all critical stages of a trial can be waived by conscious absence from the proceeding after due notice; indeed the Court expressly reserved that question in Crosby, supra. 506 U.S., at 262.[4] As to the policy issue, if ever a valid case can be made

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[3]The right to a jury trial is not implicated, since under Bloom v. Illinois, supra, no constitutional jury trial right attaches to this contempt statute which carries no imprisonment sanction. Cf. also United States v. Nachtigal, 507 U.S. 1 (1993). And since no other statute grants a jury trial right, neither Rule 42 nor Rule 58 confers such a right.

[4]Crosby was a felony prosecution. A separate issue would exist whether, even if the Court found a Sixth Amendment

for permitting waiver of the right to be present from the beginning of a criminal trial, surely a petty offense contempt proceeding under 28 U.S.C. 1784 presents one of the strongest scenarios for this result. As the defendant is out of the country, and his return cannot be compelled,[5] an application of Rule 43 to section 1784 contempts would mean that a defendant living abroad could effectively bar his trial simply by remaining at his or her home outside the United States.

Since the holding in Blackmer, in effect rejecting the Crosby interpretation of Rule 43 as applied to section 1784 contempts, has not been overturned, I believe that the relevant considerations favor continuing the existing exemption of 28 U.S.C. 1784 from the Federal Rules of Criminal Procedure. When all is said and done, no clear-cut case has been made for amending the rule in this respect, and barring such a case the prudent course is to maintain the exemption, which has been in effect since the advent of the Criminal Rules. Indeed, the initial Criminal Rules date not too long after the Blackmer decision, and it is likely that section 1784's specific exclusion from the rules reflects a recognition of the Blackmer holding and the fact that in many respects the Walsh Act is unique. If the Committee agrees, this means that our pending Rule 1(a)(5) should be amended to restore mention of section 1784 as exempted from the application of the Criminal Rules.

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unwaivable right to be present at the outset of a felony trial, that same right would attach in the context of a petty offense prosecution.

[5]I am advised by the Department's Office of International Affairs that section 1784 is not an extraditable offense under our treaties.

MEMO TO: Members, Criminal Rules Advisory Committee

FROM: Professor Dave Schlueter, Reporter

RE: Seven-Day Deadline for Motions Filed Under Rules 29, 33, and 34.

DATE: September 25, 2000

Judge Friedman has asked that Rules 29 (Motion for Judgment of Acquittal), 33 (New Trial), and 34 (Arresting Judgment) be added to the Committee's agenda. As he notes in his attached letter, he is concerned that the time for filing motions under those rules (7 days) may place an injustice on defendants where the judge may be dilatory or absent.

In each of those rules, the defendant is required to file the particular motion within 7 days of the verdict or finding of guilty. In addition, each rule provides that the court, within, the same 7-day period, may fix or set a different time. None of the rules requires the court to actually rule on the motions filed within the 7-day time frame. Presumably the only time where the judge's actions might prejudice a defendant would arise when the defendant seeks an extension of time within the 7-days and the judge is unavailable. In that case, counsel would be forced to either file a motion, and thus stop the 7-day clock, or insist on obtaining a ruling from the court on the requested extension and run the risk that the deadline would pass before the judge acted. The rule apparently anticipates that the court on its own motion could set a different time for filing such motions and the caselaw indicates that the courts treat the 7-day provisions as jurisdictional.

In Rules 29, 33 and 34 the original time set in those rules was five days. (As noted in the Committee Note to Rule 34, the pre-Rules time limit for motions to arrest a judgment had been 3 days). In 1966, all three rules were amended to reflect the current 7-day period of time, to conform those rules to an amendment to Rule 45(a) that indicated that Saturdays would not be counted in calculating the time periods in the rules. The amendment to Rule 45 was intended to conform that rule to Civil Rule 6(a). I am attaching copies of the Committee Notes where the 7-day period is discussed.

In amending Rule 35 in 1991, the Committee adopted the same 7-day period in recognition that it was preferable to establish shorter time limits for seeking post-sentencing relief from the trial court.

The issue presented in Rule 35 is not so much on whether the 7-day period is an appropriate standard, but rather, when the 7-day period starts for correcting a sentence. That issue is discussed in a separate memo on that rule, which is also on the agenda for the October meeting.

United States District Court
for the District of Columbia
Washington, D.C. 20001

Chambers of
Paul L. Friedman
United States District Judge

July 10, 2000

The Honorable W. Eugene Davis
United States Circuit Judge
United States Court of Appeals
for the Fifth Circuit
800 Lafayette Street
Suite 5100
Lafayette, Louisiana 70501

Dear Gene:

I see that you are putting Rule 35(b)(2) on the agenda for the fall meeting and have asked David Schlueter to provide some background on that rule. I wondered whether we might also consider -- either at this meeting or at another -- the language in Rules 29, 33 and 34 relating to motions for judgment of acquittal, new trial and arrest of judgment. All of these rules require not only that a defendant move for an extension of time to file such motions within seven days after verdict but also that the trial judge must grant the motion for extension of time within that seven-day period. While I do not know the history of these Rules, they seem to work a great injustice on defendants when judges themselves may be dilatory or (for example) on vacation or ill. I would hope that this is a matter we could discuss, with some background on the history of the Rules provided in advance.

Very best regards.

Sincerely,

Paul

Paul L. Friedman

cc: John K. Rabiej
Professor David Schlueter

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT
800 LAFAYETTE STREET
SUITE 5100
LAFAYETTE, LOUISIANA 70501

W. EUGENE DAVIS
CIRCUIT JUDGE

(318) 593-5280
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July 17, 2000

Hon. Paul L. Friedman
United States District Judge
United States District Court
for the District of Columbia
Washington, D.C. 20001

Dear Paul:

Thanks for your note relative to Rules 29, 33 and 34. By copy of this letter to Dave Schlueter, I ask that he also put these rules on the agenda for discussion in October.

Sincerely,

W. Eugene Davis

cc: John K. Rabiej
Prof. David A. Schlueter

a motion for judgment of acquittal may be made or renewed within 7 days after the jury is discharged or within such further time as the court may fix during the 7-day period. If a verdict of guilty is returned the court may on such motion set aside the verdict and enter judgment of acquittal. If no verdict is returned the court may enter judgment of acquittal. It shall not be necessary to the making of such a motion that a similar motion has been made prior to the submission of the case to the jury.

As amended Feb. 28, 1966, eff. July 1, 1966.

Notes of Advisory Committee on Rules

Note to Subdivision (a). 1. The purpose of changing the name of a motion for a directed verdict to a motion for judgment of acquittal is to make the nomenclature accord with the realities. The change of nomenclature, however, does not modify the nature of the motion or enlarge the scope of matters that may be considered.

2. The second sentence is patterned on New York Code of Criminal Procedure, sec. 410.

3. The purpose of the third sentence is to remove the doubt existing in a few jurisdictions on the question whether the defendant is deemed to have rested his case if he moves for a directed verdict at the close of the prosecution's case. The purpose of the rule is expressly to preserve the right of the defendant to offer evidence in his own behalf, if such motion is denied. This is a restatement of the prevailing practice, and is also in accord with the practice prescribed for civil cases by rule 50(a) of the Federal Rules of Civil Procedure, 28 U.S.C., Appendix

Note to Subdivision (b). This rule is in substance similar to rule 50(b) of the Federal Rules of Civil Procedure, 28 U.S. C., Appendix, and permits the court to render judgment for the defendant notwithstanding a verdict of guilty. Some Federal courts have recognized and approved the use of a judgment non obstante veredicto for the defendant in a criminal case. Ex parte United States, 101 F.2d 870, C.C.A.7th, affirmed by an equally divided court, United States v. Stone, 60 S.Ct. 177, 308 U.S. 519, 84 L.Ed 441. The rule sanctions this practice.

1966 Amendment

Subdivision (a).—A minor change has been made in the caption.

Subdivision (b).—The last three sentences are deleted with the matters formerly covered by them transferred to the new subdivision (c).

Subdivision (c).—The new subdivision makes several changes in the former procedure. A motion for judgment of acquittal may be made after discharge of the jury whether or not a motion was made before submission to the jury. No legitimate interest of the government is intended to be prejudiced by permitting the court to direct an acquittal on a post-verdict motion. The constitutional requirement of a jury trial in criminal cases is primarily a right accorded to the defendant. Cf. Adams v. United States, ex rel. McCann, 317 U.S. 269 (1942); Singer v. United States, 380 U.S. 24 (1965); Note, 65 Yale L.J. 1032 (1956).

The time in which the motion may be made has been changed to 7 days in accordance with the amendment to Rule 45(a) which by excluding Saturday from the days to be counted when the period of time is less than 7 days would make 7 days the normal time for a motion required to be made in 5 days. Also the court is authorized to extend the time as is provided for motions for new trial (Rule 33) and in arrest of judgment (Rule 34)

References in the original rule to the motion for a new trial as an alternate to the motion for judgment of acquittal and to the power of the court to order a new trial have been eliminated. Motions for new trial are adequately covered in Rule 33. Also the original wording is subject to the interpretation that a motion for judgment of acquittal gives the court power to order a new trial even though the defendant does not wish a new trial and has not asked for one.

leged invalidity of prior convictions and where such convictions had not been challenged in state court. Ryan v. U. S., C.A.Minn.1973, 485 F.2d 295, certiorari denied 94 S.Ct. 1568, 415 U.S. 979, 39 L.Ed. 2d 876.

747. —— Reversal of conviction

Where two defendants received concurrent sentences on two counts, but where fact of conviction of both counts might have affected the sentence imposed and where one conviction had been reversed, their cases would be remanded for reconsideration of sentencing. U. S. v. Sperling, C.A.N.Y.1974, 506 F.2d 1323, certiorari denied 95 S.Ct. 1351.

Where trial court imposed identical concurrent sentences on two counts and conviction on one count was reversed, it was appropriate that case be remanded to district court for review of sentence because of possibility that conviction on both counts might have affected punishment set for each. U. S. v. Mancuso, C. A.N.Y.1973, 485 F.2d 275.

Where the separate sentences imposed on each of the five counts were expressly made concurrent, the vacating of conviction on assault with a dangerous weapon count on ground that it was a lesser included offense of armed robbery did not require the remand of case for resentencing. U. S. v. Lewis, 1973, 482 F.2d 632, 157 U.S.App.D.C. 43.

748. —— New trial

Procedure, whereby defendant, while appeal from federal district court was pending, filed motion in district court requesting district court to certify to court of appeals that if case were remanded district court would grant new trial, was proper. Strauss v. Smith, C.A.Ind.1969, 417 F.2d 132

Rule 33. New Trial

The court on motion of a defendant may grant a new trial to him if required in the interest of justice. If trial was by the court without a jury the court on motion of a defendant for a new trial may vacate the judgment if entered, take additional testimony and direct the entry of a new judgment. A motion for a new trial based on the ground of newly discovered evidence may be made only before or within two years after final judgment, but if an appeal is pending the court may grant the motion only on remand of the case. A motion for a new trial based on any other grounds shall be made within 7 days after verdict or finding of guilty or within such further time as the court may fix during the 7-day period.

As amended Feb. 28, 1966, eff. July 1, 1966.

Notes of Advisory Committee on Rules

This rule enlarges the time limit for motions for new trial on the ground of newly discovered evidence, from 60 days to two years; and for motions for new trial on other grounds from three to five days. Otherwise, it substantially continues existing practice. See former Rule II of the Criminal Appeals Rules of 1933, 292 U.S. 661 [18 U.S.C. formerly following § 688]. Cf. Rule 59(a) of the Federal Rules of Civil Procedure, 28 U.S.C., Appendix.

1966 Amendment

The amendments to the first two sentences make it clear that a judge has no power to order a new trial on his own motion, that he can act only in response to a motion timely made by a defendant. Problems of double jeopardy arise when the court acts on its own motion. See United States v. Smith, 331 U.S. 469 (1947). These amendments do not, of course, change the power which the court has in certain circumstances, prior to verdict or finding of guilty, to declare a mistrial and order a new trial on its own motion. See e. g., Gori v. United States, 367 U.S. 364 (1961); Downum v. United States, 372 U.S. 734 (1963); United States v. Tateo, 377 U.S. 463 (1964). The amendment to the last sentence changes the time in which the motion may be made to 7 days. See the Advisory Committee's Note to Rule 29.

the remanding of case for a new
to ascertain defendant's present
cy to stand trial and for a new
forgery charge if defendant were
mpetent, rather than a nunc pro
ing for judicial determination of
's competency at time of his
trial. Holloway v. U. S., 1964,
265, 119 U.S.App.D.C. 396

conviction could not stand on
ecause of prejudicial variance,
defense, alibi, was rejected by
e would be no outright reversal,
would be remanded for new tri-
l v. U. S., C.A.Mo.1965, 342 F.2d

h motion for new trial had not
in trial court within five [now
ys after verdict as required by
court of appeals was authorized
such further proceedings to be
ay be just under circumstances
l remand case for trial court's
ation of ruling on admissibility
dicial statement. U. S. v. Col
.y.1964, 335 F.2d 547

defendant, who had been con-
unlawful interstate transporta
olen currency, and who filed a
new trial on ground of newly
evidence, and the government
ested an oral hearing on the
d both evidently thought such
advisable, if not absolutely
and federal district court cer-
d perhaps court of appeals,
n a better position to exercise
ions, if evidence was fully de-
an oral hearing, judgment of
urt denying motion for new
ut oral hearing would be va-
court of appeals and cause
remanded for an oral hearing.
S., C.A.Tex.1959, 272 F.2d 910.

appeals cannot grant new trial
emand case to trial court for
on of motion therefor. Heald
.A.Colo.1949, 175 F.2d 878, cer-
ied 70 S.Ct. 101, 338 U.S. 859,
26. See, also, Evans v. U. S.,
941, 122 F.2d 461, conforming
61 S.Ct. 548, 312 U.S. 651, 85
certiorari denied 62 S.Ct. 478,
, 86 L.Ed. 558; Wagner v. U.
d.1941, 118 F.2d 801, certiorari
.Ct. 75, 314 U.S. 622, 86 L.Ed.
ng denied 62 S.Ct. 358, 314 U.
.Ed. 568.

trict judge, having heard mo-
w trial on ground of newly
vidence while appeal is pend-
hat motion should be granted,
peals without itself determin-

ing whether motion should be granted should remand the cause in order that motion may be granted, unless no reasonable basis for motion exists and district judge abused his discretion in finding that new trial should be granted. Rakes v. U. S., C.C.A.Va.1947, 163 F.2d 771.

Where district judge after appeal had been taken from conviction of violation of section 21 et seq. of Title 12 determined that a new trial should be granted on ground that evidence had been discovered since trial that attempt was made to bribe one of jurors, cause would be remanded to district court in order that a new trial might be granted with direction that such trial be had forthwith. Id.

On confession of error by government in a criminal case, judgment must be reversed and remanded for a new trial. U. S. v. Kaplan, C.C.A.N.Y.1946, 156 F.2d 922.

Where circumstances appear subsequent to conviction that bear on validity of judgment, court of appeals may suspend appellate proceedings and remand cause to district court for purpose of entertaining and passing upon motion for new trial. Hamel v. U. S., C.C.A.Mich.1943, 135 F.2d 969.

Where affidavits in support of motion for new trial on ground of newly discovered evidence consisted largely of hearsay statements and of impeachment of testimony received in trial, the court of appeals would not in its discretion remand to trial court for its consideration of the motion. Wagner v. U. S., C.C.A.Cal.1941, 118 F.2d 801, certiorari denied 62 S.Ct. 75, 314 U.S. 622, 86 L.Ed. 500, rehearing denied 62 S.Ct. 358, 314 U.S. 713, 86 L.Ed. 568.

Defendants appealing from convictions under former section 408a of this title were not entitled to have cause remanded to district court to enable that court to entertain a motion for new trial on ground of newly discovered evidence, where that evidence merely affected credibility of one defendant who had testified for the government, and there was substantial evidence of defendants' guilt aside from the testimony of that defendant. U. S. v. Parker, C.C.A.N.J.1939, 103 F.2d 857, certiorari denied 59 S.Ct. 1044, 307 U.S. 642, 83 L.Ed. 1522.

Ex parte affidavit of defendant, who was a fugitive when codefendants were tried, exonerating codefendants and assuming all blame for unlawful acts charged, was insufficient to warrant remanding of cause on appeal so that trial court might consider codefendant's application for new trial. La Belle v. U. S., C.C.A.Fla.1936, 86 F.2d 911.

Rule 34. Arrest of Judgment

The court on motion of a defendant shall arrest judgment if the indictment or information does not charge an offense or if the court was without jurisdiction of the offense charged. The motion in arrest of judgment shall be made within 7 days after verdict or finding of guilty, or after plea of guilty or *nolo contendere*, or within such further time as the court may fix during the 7-day period.

As amended Feb. 28, 1966, eff. July 1, 1966.

Notes of Advisory Committee on Rules

This rule continues existing law except that it enlarges the time for making motions in arrest of judgment from 3 days to 5 days. See rule II(2) of Criminal Appeals Rules of 1933, 292 U.S. 661 [18 U.S.C. formerly following § 688].

1966 Amendment

The words "on motion of a defendant" are added to make clear here, as in Rule 33, that the court may act only pursuant to a timely motion by the defendant.

The amendment to the second sentence is designed to clarify an ambiguity in the rule as originally drafted. In Lott v. United States, 367 U.S. 421 (1961) the Supreme Court held that when a defendant pleaded nolo contendere the time in which a motion could be made under this rule did not begin to run until entry of the judgment. The Court held that such a plea was not a "determination of guilt." No reason of policy appears to justify having the time for making this motion commence with the verdict or finding of guilt but not with the acceptance of the plea of nolo contendere or the plea of guilty. The amendment changes the re-

sult in the Lott case and makes the periods uniform. The amendment also changes the time in which the motion may be made to 7 days. See the Advisory Committee's Note to Rule 29.

Cross References

Enlargement of time not permitted for motion under this rule, see rule 45.

United States Magistrates Rules

Trial of minor offenses in proceeding before United States Magistrate, see rule 1 et seq following the Appendix of Forms.

Wright, Federal Practice and Procedure

Arrest of judgment, see Criminal § 571 et seq

Library References

Criminal Law ⇐974(1, 2). C.J.S. Criminal Law §§ 1545, 1547.

Official Forms

Motion in arrest of judgment, see form 24, Appendix of Forms.

West's Federal Forms

Motion for judgment of acquittal, see prec. § 7484 Comment, § 7485 Comment.

Notes of Decisions

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1. Common law

At common law, a motion in arrest of judgment raised no objections which did not appear on the face of the record U. S. v. Zisblatt, C.A.N.Y.1949, 172 F.2d 740.

2. Construction with other laws

As a matter of interpretation, the Supreme Court has no right to give language of Criminal Appeals Act, section 3731 of this title, a meaning inconsistent with its

Veterans Day, Thanksgiving Day, Christmas Day, and any other day appointed as a holiday by the President or the Congress of the United States, or by the state in which the district court is held.

(b) Enlargement. When an act is required or allowed to be done at or within a specified time, the court for cause shown may at any time in its discretion (1) with or without motion or notice, order the period enlarged if request therefor is made before the expiration of the period originally prescribed or as extended by a previous order or (2) upon motion made after the expiration of the specified period permit the act to be done if the failure to act was the result of excusable neglect; but the court may not extend the time for taking any action under Rules 29, 33, 34 and 35, except to the extent and under the conditions stated in them.

(c) Rescinded. Feb. 28, 1966, eff. July 1, 1966.

(d) For Motions; Affidavits. A written motion, other than one which may be heard *ex parte,* and notice of the hearing thereof shall be served not later than 5 days before the time specified for the hearing unless a different period is fixed by rule or order of the court. For cause shown such an order may be made on *ex parte* application. When a motion is supported by affidavit, the affidavit shall be served with the motion; and opposing affidavits may be served not less than 1 day before the hearing unless the court permits them to be served at a later time.

(e) Additional Time after Service by Mail. Whenever a party has the right or is required to do an act within a prescribed period after the service of a notice or other paper upon him and the notice or other paper is served upon him by mail, 3 days shall be added to the prescribed period.

As amended Feb. 28, 1966, eff. July 1, 1966; Dec. 4, 1967, eff. July 1, 1968; Mar. 1, 1971, eff. July 1, 1971.

Notes of Advisory Committee on Rules

The rule is in substance the same as Rule 6 of the Federal Rules of Civil Procedure. It seems desirable that matters covered by this rule should be regulated in the same manner for civil and criminal cases, in order to preclude possibility of confusion.

Note to Subdivision (a). This rule supersedes the method of computing time prescribed by rule 13 of the Criminal Appeals Rules, promulgated on May 7, 1934, 292 U.S. 661.

Note to Subdivision (c). This rule abolishes the expiration of a term of court as a time limitation for the taking of any step in a criminal proceeding, as is done for civil cases by rule 6(c) of the Federal Rules of Civil Procedure, 28 U.S.C., Appendix. In view of the fact that the duration of terms of court varies among the several districts and the further fact that the length of time for the taking of any step limited by a term of court depends on the stage within the term when the time begins to run, specific time limitations have been substituted for the taking of any step which previously had to be taken within the term of court.

Note to Subdivision (d). Cf. Rule 47 (Motions) and rule 49 (Service and filing of papers)

1966 Amendment

Subdivision (a).—This amendment conforms the subdivision with the amend-

ments made effective on July 1, 1963, to the comparable provision in Civil Rule 6(a). The only major change is to treat Saturdays as legal holidays for the purpose of computing time.

Subdivision (b).—The amendment conforms the subdivision to the amendments made effective in 1948 to the comparable provision in Civil Rule 6(b). One of these conforming changes, substituting the words "extend the time" for the words "enlarge the period" clarifies the ambiguity which gave rise to the decision in United States v. Robinson, 361 U.S. 220 (1960). The amendment also, in connection with the amendments to Rules 29 and 37, makes it clear that the only circumstances under which extensions can be granted under Rules 29, 33, 34, 35, 37(a)(2) and 39(c) are those stated in them.

Subdivision (c).—Subdivision (c) of Rule 45 is rescinded as unnecessary in view of the 1963 amendment to 28 U.S.C. § 138 eliminating terms of court.

1968 Amendment

The amendment eliminates inappropriate references to Rules 37 and 39 which are to be abrogated.

1971 Amendment

The amendment adds Columbus Day to the list of legal holidays to conform the subdivision to the Act of June 28, 1968, 82 Stat. 250, which constituted Columbus Day a legal holiday effective after January 1, 1971.

The Act, which amended Title 5, U.S.C., § 6103(a), changes the day on which certain holidays are to be observed. Washington's Birthday, Memorial Day and Veterans Day are to be observed on the third Monday in February, the Last Monday in May and the fourth Monday in October, respectively, rather than, as heretofore, on February 22, May 30, and November 11, respectively. Columbus Day is to be observed on the second Monday in October. New Year's Day, Independence Day, Thanksgiving Day and Christmas continue to be observed on the traditional days.

Cross References

Motions generally, see rule 47.
Service and filing of papers, see rule 49.

Federal Rules of Appellate Procedure

Computation and extension of time, see rule 26, Title 28, Judiciary and Judicial Procedure.

Federal Rules of Civil Procedure

Time, see rule 6, Title 28, Judiciary and Judicial Procedure

United States Magistrates Rules

Trial of minor offenses in proceeding before United States Magistrate, see rule 1 et seq. following the Appendix of Forms.

Wright, Federal Practice and Procedure

Time, see Criminal § 751 et seq.

Library References

Time ⟸9(1), 10(1).

C.J.S. Time §§ 13(1) et seq., 14(1) et seq.

West's Federal Forms

General statement of policy, see prec. § 7831 Comment.
Motion,
Arrest of judgment, see prec. § 7601 Comment.
Correction or reduction of sentence, see prec. § 7611 Comment.
New trial, see prec. § 7591 Comment.

1. **Discretion of court**

The trial court has a w
discretion in exercising it
duty to control the trial o
case and keep it within rea
limits. Kansas City Star Co
A.Mo.1957, 240 F.2d 643, cert
77 S.Ct. 1381, 354 U.S. 923, 1
and mem.

2. **Computation of time**

Under former rule 13 of
Appeals Rules where trial
order extended time for fili
ceptions to and including a
which was Sunday, a bill
filed the following day was
since the phrase "for the pu
puting time" was plainly i
of general application and
naturally embraced whatev
was necessary to fix the
and was not limited to ca
extension was for a certain
od rather than to a specific
U. S , N.Y.1937, 57 S.Ct. 700
81 L.Ed. 976.

Saturdays are included
time within which to take
eral courts, even though off
district court is open only
Saturday or attorney in a
ter observes Saturday as
religious reasons. U. S. v
N.Y.1958, 251 F.2d 223.

Under this rule providi
event from which design
time begins to run shall
in computing time period
day of period so comput
cluded, federal district c
diction on March 28, 197
probation of defendant w
from custody on March 2
menced maximum five-
probationary term on sam
Strada, D.C.Mo.1974, 374
firmed 503 F.2d 1081.

Where trial was held
sioner [now magistrate]
appeal filed on August

II-D-3

MEMO TO: Members, Criminal Rules Advisory Committee

FROM: Professor Dave Schlueter, Reporter

RE: Amendments to Rule 35; Definition of Sentencing & the *Orozco* Issue

DATE: September 26, 2000

Attached are a series of memos addressing two potential problems with Rule 35. The memos are attached in chronological order. This will be on the agenda for the October meeting.

A. Rule 35(b). The *Orozco* Issue: Supplying Information Within One Year.

The first issue centers on the Committee's intent to address the *Orozco* issue in Rule 35(b)(2), which permits the defendant to receive sentencing relief if the information was provided to the government within the one-year limit, but was not realized until later. *United States v. Orozco*, 160 F.3d 1309 (11th Cir. 1998). At the Standing Committee meeting in June 2000 (Washington, D.C.) Judge Kravitch, and others raised questions about the purpose and meaning of proposed language in that rule. Judge Kravitch (who was on the panel that decided *Orozco*) believed that the proposal did not address the *Orozco* case. At least one other person believed there was ambiguity in the rule concerning who would have to "know" about the information in question.

Judge Davis and I were asked to confer with Judge Kravitch. After reviewing the case and talking with her, we agreed that the rule might be broader than the Committee intended. We suggested some language to her and she indicated that she would not favor of any attempt to go beyond *Orozco.* In that case, the defendant had actually furnished the information to the government within one year but it was not until much later that it was considered useful. Her point, and we tended to agree, was that the proposed rule presented to the Standing Committee was arguably not limited to information furnished within the one-year limit. Although we understood that an argument could be made that the Committee only intended to cover the situation in *Orozco*, we were not confident that the members of the Advisory Committee might not prefer the broader reading. By our count, at least one member of the Standing Committee, Prof. Hazard, seemed inclined to favor a broader rule that would permit sentence relief for assistance offered well after the one year has run.

Following additional discussion we decided to attempt a redraft of Rule 35 that would narrow the rule to match *Orozco*, with a view to including the change in the style package of rules being published for comment, with the understanding that the Committee

would review the matter at its October meeting. That attached memos trace the discussions on that process.

At this point, the published version of Rule 35(b)(2) seems to track the *Orozco* facts. If the Committee agrees, then no further action is required. If the new language does not meet with the Committee's views, then additional work on that rule may be required. Finally, Bob Josefsberg has indicated in his memo that he would support abolishment of the one-year time limit altogether.

B. Rule 35(a). When is Sentence Imposed for Purposes of Starting the 7-Day Deadline for Correcting a Sentence?

Several members of the Standing Committee raised the question whether Rule 35 should more explicitly address the issue of what constitutes "sentencing" for purposes of triggering the 7-day rule. As noted in my attached memo, the Committee has discussed this point several times but has never reached a conclusion what should be done with the rule.

In my June 14, 2000 memo, I discussed the issue and observed that the Committee Notes, etc. are silent on that point. My personal recollection is that it was understood (but not stated) that the Committee in 1991 envisioned the time to run from the oral announcement of the sentence. There are some references in the notes from those meetings that the time would run from "sentencing." As Mr. Pauley notes in his memo, June 9, 2000, the circuits are split on the issue; the majority position is that the time runs from oral announcement of the sentence.

Although this matter was raised at the Standing Committee meeting, no attempt was made to resolve the issue or change the proposed language in Rule 35. This issue needs to be resolved by the Committee.

U.S. Department of Justice

Criminal Division

Washington, DC 20530-0001

June 9, 2000

MEMORANDUM

To: Professor David A. Schlueter and John Rabiej

From: Roger A. Pauley RAP

Subject: Two Issues for the October Meeting

Now that the Standing Committee meeting is behind us, it's not too early to begin considering the issues relating to the (soon to be) published criminal rules that the Advisory Committee will need to resolve in October. In that regard, please find two memos (attached) which hopefully are helpful and which I urge be placed on the October agenda. One addresses the comments made at the Standing Committee about Rule 35, and if Judge Davis concurs, it should perhaps be sent to Judge Kravitch per Judge Scirica's direction to consult with her on the Orozco issue.

CC: Judge Davis

U.S. Department of Justice

Criminal Division

Washington, DC 20530-0001

June 9, 2000

MEMORANDUM

To: Criminal Rules Committee

From: Roger A. Pauley RAP

Subject: Rule 35 Suggestions in Light of Standing Committee Comments

At the Standing Committee meeting, two issues were raised concerning the substantive package version of Rule 35. One involved a question whether the language used in Rule 35(b)(2) and intended to overcome the result in the Orozco decision in fact accomplished this goal (which all agreed was appropriate); the other was that the rule neglected to resolve a conflict in circuits over the meaning of the term "sentencing," i.e. whether it referred to the oral imposition of sentence or instead to the judgment.

This memorandum proposes amendments to deal with both matters.

1. In Orozco[1] the defendant prior to his federal sentencing on drug charges in Georgia provided information to the prosecutor about Orozco's boss, a major cocaine distributor named Rodriguez. The prosecutor, however, concluded that Orozco was not entirely truthful about some of the information; moreover Rodriguez shortly became a fugitive so that the information was not immediately useful. The prosecutor accordingly declined at that time to file a substantial assistance motion. Five or six years later Rodriguez was apprehended and tried in federal court in Florida. Orozco testified for the government at Rodriguez's Florida trial, essentially relating the same information he had provided to the prosecutor in Georgia, i.e. that he had transported five

[1] 160 F.3d 1309. Judge Kravitch, a member of the Standing Committee, wrote a concurring opinion.

kilos of cocaine for Rodriguez. At the urging of the Florida prosecutor, the Georgia prosecutor then filed a Rule 35 substantial assistance motion, explaining that Orozco's information about Rodriguez when originally provided was not useful because Rodriguez could not then be located. The Eleventh Circuit, following the majority position among the circuits, held that the district court lacked authority under the existing rule to grant a substantial assistance motion under these circumstances where the motion was filed more than one year after sentencing, since the information provided by Orozco was not newly learned, and the rule contained no exception for information that did not become useful to the government until more than one year after sentencing.

In the "substantively" amended version of Rule 35 approved for publication, the Committee sought to overcome the result in Orozco by adding language to the rule allowing the court to consider a motion to reduce a sentence made one year or more after sentencing if the substantial assistance involved information either not known "or the usefulness of which could not reasonably have been anticipated" until more than one year after sentencing.

Someone at the Standing Committee meeting commented that the quoted language might not cure the Orozco problem, presumably because the government could have reasonably anticipated that Rodriguez would eventually be captured and tried and therefore the information about him supplied by Orozco would become useful.

I suspect that federal courts would not have difficulty, under the language published for comment, in reaching the result sought by the Committee under the facts in Orozco. Nevertheless, I believe the language of the rule can be clarified and perfected to make this outcome even more certain. This can be done by tracking the suggestion of the Orozco panel more closely than does the (to be) published version. In Orozco, the court (unhappy from a policy standpoint with the result it felt constrained to reach) said in a footnote that it hoped the rule would be amended to "address the apparent unforeseen situation presented in this case where a convicted defendant provides information to the government prior to the expiration of the jurisdictional, one-year period from sentence imposition, **but that information does not become useful to the government until more than a year after sentence imposition.**" 160 F.3d, at 1316n.13(emphasis supplied).

I recommend that Rule 35(b)(2), as published, be amended to read as follows (existing matter struck through; proposed new matter in bold):

"(2) Later Motion. The court may consider a government motion to reduce a sentence made one year or more after sentencing if the defendant's substantial assistance involved information not known - ~~or the usefulness of which could not reasonably have been anticipated~~ **or, if provided within one year of sentencing, information that did not become useful to the government** - until more than one year after sentencing."

2. As indicated, there was agreement at the Standing Committee that the amended rule should resolve a conflict in circuits over the meaning of the phrase "imposition of sentence in the existing rule." Although the (to be) published version has eliminated that phrase in favor of the simpler term "sentencing," it is likely that the same ambiguity - namely whether this refers to the initial pronouncement of the sentence or to its embodiment in the written judgment - will exist under the published version unless the matter is clarified.

At present, three circuits, the Second, Fourth, and Tenth, have construed the rule to refer to the pronouncement of sentence, while only one (the Seventh) has taken the contrary view. See United States v. Layman, 116 F.3d 105 (4th Cir. 1997)(collecting cases); see also United States v. Yost, 185 F.3d 1178, 1180n.3 (11th Cir. 1999)(noting issue but declining to decide it). The majority position is grounded on the arguments that at sentencing the defendant is normally present in exercise of his Sixth Amendment right, whereas when the judgment is entered only members of the clerk's office are present; and that it is "well established that a sentence orally imposed governs a conflicting, later-written sentence of the court." Layman, supra, 116 F.3d, at 108. Although some district judges might prefer the additional day or few days to correct a sentence for arithmetical or other clear error that a contrary interpretation would entail, I recommend that the Committee resolve the ambiguity and potential conflict as to what "sentencing" means by adopting the current, majority position of the circuits. This can be done by adding a new subdivision (c) to Rule 35, as follows:

"(c) **Definition.** For purposes of this rule, 'sentencing' means the pronouncement of sentence in the defendant's presence (unless presence is waived)."

[N.B. I wanted to stay away from the term "oral," which the Committee has generally eschewed, though using that term before "pronouncement" would simplify the amendment by enabling it to end after "sentence" and avoid having to talk about the defendant's presence. In any event, I'm not wedded to the language above; if others can improve it, all to the good.]

UNITED STATES COURT OF APPEALS

For the Fifth Circuit

DATE: June 9, 2000

TO: Roger A. Pauley

FROM: W. Eugene Davis

SUBJECT: Rule 35(b)(2)

==========

Dear Roger:

Dave Schlueter and I had a conversation at the Standing Committee meeting with Judge Kravitch about this amendment and whether our proposed language solves the Orozco problem. I agree that your proposed language is an improvement and would meet Judge Kravitch's objections. I do not believe any of us intended to allow the late motion in the Orozco situation unless the defendant provided the information within one year. If Judge Carnes, who proposed the amendment, Lucien Campbell, Dave Schlueter and John Rabiej agree with your proposed language, I feel comfortable in sending a letter to our committee members telling them that unless we hear objections from them we propose to revise the language of this rule before publication.

Sincerely,

cc: Hon. Edward C. Carnes
Lucien B. Campbell
David A. Schlueter
John K. Rabiej
(with Roger Pauley's memo of June 9, 2000)

MEMO TO:	**Judge Davis**	**318-593-5309**
	Judge Carnes	**334-223-7676**
	Roger Pauley	**202-514-4042**
	Lucien Campbell	**472-4454**
	John Rabiej	**202-502-1755**

FROM: **Dave Schlueter**

RE: **Proposed Amendments to Rule 35**

DATE: **June 14, 2000**

I am sorry that I am coming into this conversation late. I had a major writing project due this week and just finished it. I did speak with Roger on Monday and shared some of my initial thoughts with him.

A. What is Meant by "Sentencing" Issue:

As noted in Roger's memo, two major questions were raised at the Standing Committee. The first dealt with the issue of what the Committee meant by "sentencing" for purposes of correcting errors, etc. The Appellate rules committee questioned whether we really meant at the time the sentence is announced or when the judgment is signed; this was arguably part of a larger discussion at the Standing Committee about what triggers the various deadlines for appellate review, etc. I indicated that we would look at that issue because my recollection was about whether we in fact intended to start the clock running at the time the judge announced the sentence, orally. As Roger notes, the courts are split on the issue.

I reviewed my computer files, etc. and found the attached materials—the minutes of the special committee meeting held in Atlanta in 1990, chaired by Judge Hodges (later the chair of this committee); a memo in 1995 pointing out the ambiguity in using the term "imposition of sentence;" and the minutes of the April 1995 meeting at which that issue was discussed. As you can see, the Committee decided to wait until the "global changes" project (what we are doing now) to address the problem.

It is clear that the original intent of the rule was to keep it narrow and to require any correction of the sentence within the time allotted for filing a notice of appeal. If the time for filing a notice of appeal is now the formal entry of the sentence in a written document, then we could maintain the original intent by referring to that event, even where the formal judgment is not entered until weeks after the announcement of the sentence from the bench.

I am not sure what the Committee would say about this issue. As far as I can recall, we have never fully discussed this issue since April 1995—at least during the style project meetings. For now, we can publish the current language and wait for comments. If we decide to change it before publication, I would prefer Lucien's suggestion that we use the term "pronouncement" or "announcement" of sentence.

B. The Unrealized Substantial Assistance Issue.

The second issue discussed at the Standing Committee meeting was the proposed language in Rule 35(b)(2). Judge Kravitch, and others raised questions about the purpose and meaning of proposed language in that rule. Judge Kravitch (who was on the panel that decided *Orozco*) believed that the proposal did not address the *Orozco* case. At least one other person believed there was ambiguity in the rule concerning who would have to "know" about the information in question.

Judge Davis and I were asked to talk to Judge Kravitch and see if any amendment was necessary or desired. After looking again at the case and talking with her, Judge Davis and I agreed that there might be broader than the Committee intended. We played with some language and talked with Judge Kravitch; she indicated that she was not in favor of any attempt to go beyond *Orozco*. In that case, the defendant had actually furnished the information to the government within one year but it was not until much later that it was considered useful. The proposed rule, arguably, is not limited to information furnished within the one-year limit. While an argument could be made that the Committee only intended to cover the situation in *Orozco*, I am not confident that if presented with this specific issue, some members of the Advisory Committee might not prefer the broader reading—that the information need not be furnished within the one year. At least one member of the Standing Committee, Prof. Hazard, seemed inclined to favor a broader rule that would permit sentence relief for assistance offered well after the one year has run.

Roger's draft and Lucien's draft address the *Orozco* problem and assume the narrower application. But I offer yet another version to address the comments at the Standing Committee meeting that should address the ambiguity of who knows what and who furnishes what to whom. Assuming the Advisory Committee intended to address only the problem in *Orozco*, I recommend the following change.

(2) Later motion. The court may consider a government motion to reduce a sentence made one year ~~or more~~ more than after sentencing if the defendant's substantial assistance involved information—

(A) not known to the defendant until more than one year after sentencing, or

(B) ~~furnished~~ provided by the defendant to the government within one year of sentencing, but the usefulness of which was not realized by the government until more than one year after sentencing.

Regarding Lucien's additional changes, I think they improve the rule but I am not sure we need to make them now. I would prefer that we address those changes, and others that are bound to arise, during the comment period. Regarding the mis-numbered section, one of the members picked that up at the meeting.

THERE WAS NO SPRING 1990 MEETING OF THE ADVISORY COMMITTEE ON CRIMINAL RULES. INSTEAD, THE CHAIR APPOINTED A SUBCOMMITTEE TO ADDRESS THE ISSUE OF WHAT, IF ANY, CHANGES SHOULD BE MADE TO RULE 35 IN LIGHT OF RECOMMENDATIONS FROM THE FEDERAL COURT'S STUDY COMMITTEE. THAT SUBCOMMITTEE, CHAIRED BY JUDGE HODGES, MET IN ATLANTA ON MAY 25, 1990 TO STUDY THE ISSUE.

MINUTES
SUBCOMMITTEE ON RULE 35, ADVISORY COMMITTEE
FEDERAL RULES OF CRIMINAL PROCEDURE

May 25, 1990
Atlanta, Georgia

A subcommittee of the Advisory Committee on the Federal Rules of Criminal Procedure met in Atlanta, Georgia on May 25, 1990 to consider two proposed changes to Rule 35. These minutes reflect the actions taken at that meeting.

CALL TO ORDER

Judge Hodges called the meeting to order at 10:00 a.m. on Friday, May 25, 1990. The following members were present at the meeting:

Hon. William T. Hodges, Chairman of the Subcommittee
Hon. James DeAnda
Mr. Edward Marek, Esq.
Mr. Roger Pauley, Esq.

Prof. David A. Schlueter, Reporter

Also present at the meeting was Mr. David Adair from the Administrative Office.

CONSIDERATION OF RULE 35

The reporter briefly reviewed the background of the proposed changes to Rule 35 which had been generated by two proposals in the 1990 report of the Federal Courts Study Committee. The first proposal would permit a trial court to correct clear technical errors discovered shortly after sentencing. The second would permit the court to amend a sentence based upon new factual information presented by the defendant within 120 days after sentencing. Mr. Adair and the Reporter both noted that attempts to isolate the exact source and any other background information on the two proposals had been unsuccessful.

Discussion centered initially on the need for such changes, recognizing that under the former Rule 35, sentenced defendants had routinely filed motions for modification of the sentence. Judge DeAnda noted that no matter how narrowly any amendments were worded, there was a real danger of opening the floodgates to post-sentencing motions.

Turning first to the "technical error" proposal, the subcommittee briefly reviewed two decisions from the courts of appeals in which the trial court had corrected an obvious and acknowledged error in sentencing, United States v. Cook and United States v. Baron. Mr. Marek suggested that any proposed amendment should require some resolution of the error within the time for appeal so that a defendant could address the court's action, or the lack of action, in the appeal. It was noted, but not resolved, whether the court's corrective action would amount to a final ruling which could then be appealed. It was noted, however, that the amendment should contemplate the entry of an "order" by the trial court.

In order to avoid potential confusion over potential jurisdictional issues accompanying appeals, Judge Hodges suggested that the court be required to make its correction within 7 days of sentencing. A shorter period of time would also reduce the likelihood of abuse of the rule by limiting it its application to clear and obvious errors in sentencing. After some discussion, the subcommittee generally agreed on language which it believed would capture the results in both Cook and Baron

Judge Hodges also recommended that the Committee Note to the amendment clearly reflect the narrowness of the language and that the amendment not be used to reopen or relitigate the sentence.

Turning to the proposed amendment which would permit the defendant to present newly discovered facts to the court within 120 days of sentencing, Mr. Marek emphasized that such an amendment was necessary to prevent unjust sentences and to take account of significant changed circumstances. He argued that currently there is no vehicle readily available to a defendant to address a sentence which proves to be the result of an incorrect application of the sentencing guidelines in light of compelling newly discovered information. He noted that even the Bureau of

Prisons has the authority under 18 U.S.C. 3582 to modify the terms of imprisonment if there are compelling and extraordinary reasons for doing so and that similar authority should be available for other sentences which can have an equally profound impact on a defendant. He believed that the rule could be narrowly drafted, using Rule 33 standards for new trials as a model and that such standards would serve to discourage defendants from filing frivolous motions as they have done with respect to Rule 33 motions for new trials based upon newly discovered evidence.

Mr. Pauley responded that the analogy to Rule 33 was not applicable because the justness of a "conviction" was greater than the appropriateness of a sentence. He added that on balance the class of persons who would potentially benefit from this amendment would be relatively small in comparison to the flood of litigation that would result. He also emphasized the Congressional intent to make sentencing final and determinate. He added that if any amendment regarding new facts were to be adopted it should be available to the prosecution as well. Mr. Marek and Mr. Pauley then exchanged views on the potential double jeopardy issues which might arise if the court later increased a sentence based upon such new facts.

Judge DeAnda expressed strong reservations about this proposed change. Unlike the first proposed change regarding technical errors, he noted that in his experience and that of his colleagues, he was unaware of any cases in which there was new factual information which would result in a modified sentence. That fact, he observed, would not prevent virtually every sentenced defendant from raising the issue after sentencing and placing a greater burden on trial courts to handle the motions. He believed that it was premature to consider the proposed change.

Following further discussion of the matter, there was a consensus, with Mr. Marek dissenting, that the proposed amendment dealing with new factual information should be deferred pending more facts or experience. The Subcommittee thus agreed not to propose any language to the full Advisory Committee on this amendment.

The meeting adjourned at 2:30 p.m.

MEMO TO: **Advisory Committee on Criminal Rules**

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

RE: **Rule 35(c); Possible Amendment to Clarify "Imposition of Sentence"**

DATE: **March 5, 1995**

In *United States v. Navarro-Espinosa*, 30 F.3d 1169 (9th Cir. 1994), the trial court corrected the defendant's sentence almost one month after announcing his sentence, but before formally entering the judgment and sentence. On appeal, the Ninth Circuit noted that the term "imposition of sentence" is a term of art generally referring to the time that the sentence is orally announced. The court noted that the district court, however, apparently read the Advisory Committee Note accompanying Rule 35(c) to mean that "imposition of sentence" actually referred to the formal entry of the judgment. Without deciding whether the correction in this case was timely, the appellate court stated: that:

> The interpretation of Rule 35 is a difficult issue, for while the intention of the drafters seems fairly clear, the language chosen doe not further it. We hope that the Advisory Committee on Criminal Rules will be able to clarify this point. 30 F.3d at 1171.

I have reviewed my notes, correspondence, etc. concerning the Rule 35(c) amendment some years ago and I cannot find any dispositive language which might shed light on this issue. The subcommittee's and Committee's focus on the amendment was the need to develop a time frame for such corrections which would not interfere with notices of appeal. Although the Ninth Circuit did not mention it, the Advisory Committee Note also contains the following statement:

> Rule 35(c) provides an efficient and prompt method for correcting obvious technical errors that are called to the court's attention *immediately after sentencing*.(emphasis mine)

That language seems to reinforce the view that the time for acting runs from the oral announcement of the sentence because under Rule 4 a defendant may file a notice of appeal after the announcement of sentence, but before the entry of the judgment. It is worth noting that at about the time Rule 35(c) was added, Appellate Rule 4(b) was amended to note specifically:

> The filing a notice of appeal under this Rule 4(b) does not divest the trial court of jurisdiction to correct a sentence under Fed. R. Crim. P.35(c) nor does the filing of a motion under Fed. R. Crim. P.35(c) affect the validity of a notice of appeal filed before entry of the order disposing of the motion.

This matter will be on the agenda for the Committee's April meeting.

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

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

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

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

There was no motion to amend the Rules.

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

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

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

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

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

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

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

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

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

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

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

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

MEMORANDUM

FOR: Honorable Edward C. Carnes
Roger A. Pauley, Esq.
Professor David A. Schlueter
John K. Rabiej, Chief

FROM: Lucien B. Campbell

DATE: June 14, 2000

SUBJ: **Rule 35(b)(2)**

I write in response to Judge Davis's memo of June 9 on the subject of the *Orozco* fix for Rule 35(b).

I agree with the fix for the fix. I do have some additional thoughts on the best language to accomplish it, which I have incorporated into the attached redline, along with some explanatory notes. (This is a redline against the substantive version in the transmittal book, not against Roger's version.) I also point out a couple of other places where the substantive amendment of Rule 35 will need touching up at some point.

I can be reached by telephone at 210-472-6700, fax at 210-472-4454, or e-mail at <lucien_campbell@fd.org>.

Attachment

By facsimile only

Rule 35. Correcting or Reducing a Sentence

(a) Correcting Clear Error. Within 7 days after sentencing, the court may correct a sentence that resulted from arithmetical, technical, or other clear error.

(b) Reducing a Sentence for Substantial Assistance.

(1) ***In General.*** Upon the government's motion made within one year ~~of~~ after sentencing, the court may reduce a sentence if:

(A) the defendant, after sentencing, provided substantial assistance in investigating or prosecuting another person; and

(B) reducing the sentence accords with the Sentencing Commission's guidelines and policy statements.

(2) ***Later Motion.*** The court may consider a government motion to reduce a sentence made more than one year ~~or more~~ after sentencing if the defendant's substantial assistance involved:

~~information not known or the usefulness of which could not reasonably have been anticipated until more than one year after sentencing:~~

(A) information not known until more than one year after sentencing; or

(B) information provided within one year of sentencing, but which did not become useful to the government until more than one year after sentencing.

(3) ***Evaluating Substantial Assistance.*** In evaluating whether the defendant has provided substantial assistance, the court may consider the defendant's presentence assistance.

(4) ***Below Statutory Minimum.*** When acting under Rule 35(b), the court may reduce the sentence to a level below the minimum sentence established by statute.

(c) **Definition.** For purposes of this rule, "sentencing" means the pronouncement of sentence.

Notes:

1. Lines 6–7. Changes "within one year *of* sentencing" to "within one year *after* sentencing" for consistency within the rule (see lines 2 & 13).

2. Line 13. Changing "one year or more" to "more than one year" eliminates an overlap in the time periods.

3. Lines 18 22.

   a. Attempts greater readability by breaking the new material out into subparagraphs. Each subparagraph begins with "information," for clarity.

   b. Query: Should the phrase "information not known" in line 18 (usually, it was known to someone) be replaced with the more precise "information the defendant did not know," or is that clear enough from context?

4. Line 23. The version in the transmittal book misnumbered paragraph (b)(3) as (b)(b).

5. Lines 29–30. I'm hoping "pronouncement of sentence" is good enough because Roger's suggested version would, read hyperliterally, cancel out the definition if the defendant waived presence. I couldn't think of a better way to deal with that in the rule. Perhaps the note could say that the definition in Rule 35(c) adopts the majority view of the circuits, as explained.

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

Hon. Ed Carnes
U.S. Circuit Judge

Frank M. Johnson Jr. Federal Bldg.
& U.S. Courthouse
15 Lee Street, Room 408
Montgomery, Alabama 36104
(334) 223-7132

TO: **Judge W. Eugene Davis**

COPY TO: **Roger A. Pauley**
Lucien B. Campbell
David A. Schlueter
John K. Rabiej

FROM: **Ed Carnes**

RE: **Proposed Amendment to Rule 35**

DATE: **June 15, 2000**

Although I have no really strong feelings about it, I do prefer Dave Schlueter's proposed revision to Rule 35. I think we should clarify, as his proposed wording does, that it is the defendant to whom the information must have been unknown until more than one year after sentencing.

As for the issue of what we mean by "sentencing," that probably does need to be addressed with a global view in mind, and it may be best to do so at our next committee meeting, or after we receive public comments to the proposed revisions.

UNITED STATES COURT OF APPEALS

For the Fifth Circuit

DATE: June 19, 2000

TO: Judge Carnes
Roger Pauley
Dave Schlueter
Lucien Campbell
John Rabiej

FROM: W. Eugene Davis
SUBJECT: Amendments to Rule 35

==========

My thanks to all of you for taking another look at this rule.

Taking parts of Dave Schlueter's and Lucien Campbell's contributions, I propose that Rule 35(b)(2) go out for public comment reading as follows:

(2) **Later Motion.** The court may consider a government motion to reduce a sentence made more than one year after sentencing if the defendant's substantial assistance involved:

(A) information not known to the defendant until more than one year after sentencing;

or

(B) information provided by the defendant to the government within one year of sentencing, but which did not become useful to the government until more than one year after sentencing.

Someone on the standing committee suggested that we should make clear who was required to know and provide the information. I think that is a good suggestion.

The point of most of the discussion I heard about "sentencing" was when it occurred, that is, whether it occurred when the judge orally imposed sentence or when the judge signed the written commitment order. I think we should resolve this issue but I am reluctant to do it without some more study and a full discussion in our committee. We need to look at how our definition of sentencing fits with the use of the term elsewhere in the criminal rules as well as in the appellate rules. So I would put this on the agenda for the October meeting and try to resolve it then.

I ask John Rabiej to please have someone from his office set up a conference call toward the end of this week so we can all discuss Rule 35 and try to reach a consensus.

U.S. Department of Justice

Criminal Division

Washington, DC 20530-0001

June 19, 2000

MEMORANDUM

To: Judges Davis and Carnes, Professor Schlueter, Lucien Campbell, and John Rabiej

From: Roger A. Pauley

Subject: Rule 35

I would go with Lucien's version of Rule 35(b), which stylistically and otherwise is a great improvement over my suggestion. Dave agrees in his memo that Lucien's draft contains "improvements" over even his own. That being so, I don't understand why we should wait until after publication to adopt the best draft.

Thus, I recommend using Lucien's version of Rule 35(b). As to the definition of "sentencing," I again prefer Lucien's suggestion (in lieu of my own), but since the Committee never resolved this issue (unlike the Orozco issue reflected in 35(b)), I would leave this for the October meeting, unless by not including some version there's a risk that defining "sentencing" for the first time might be deemed by the Standing Committee to require republication. If Judge Davis or John Rabiej believe such a risk exists, I'd publish Lucien's 35(c) as well, after circulating it to the Advisory Committee for fast track comments.

MEMORANDUM

TO: HON. EUGENE DAVIS

FROM: ROBERT C JOSEFSBERG

RE Amended Rule 35B2

DATE: June 26, 2000

Dear Judge Davis:

I received your Memo of June 23, 2000. You invited anyone who disagrees to call or write you before July 3rd. I do not necessarily disagree with the amended Rule 35B2, but suggest an additional enlargement.

What happens if a prisoner had been at a meeting many years ago - the names of participants at the meeting are known to the prisoner but the government did not know that it was relevant to any investigation that they were conducting? More than one year after his sentencing, the government questions him about this meeting and he gives them not only gang-buster testimony but a picture of someone attending the meeting.[1] This is critical to a case that the government is prosecuting. Under the old rule, and even under the new rule, it appears that he cannot be rewarded if he knew the information before he was sentenced, and he did not give the government the information within one year of sentencing.

My problem with this, and other scenarios that I could create, is that what will probably occur is that the US Attorneys' office will file a motion under Rule 35B for substantial assistance reduction and will intentionally not write anything in the motion about timelessness. The Court, either inadvertently, or with a blind eye, will grant the motion. No one will oppose the motion. No one will argue that it is not timely. I have no problem with the US Attorneys' office and the Court rewarding this defendant. I think it is good for law enforcement However, I resent the farce that is conducted by the US Attorneys' office and the District Court in order to achieve this excellent goal. I believe that cooperators should be rewarded when their testimony is proven to be truthful. I think it is necessary for the US Attorneys office and the Court to reward them in order to further the goals of society.

---

[1]For the purpose of this discussion, I have eliminated issues of credibility. Everyone has concerns about cooperators "piling on" with questionable testimony in order to get a reduction. For purposes of this Memo, I am assuming the supplied information to be important, correct and corroborated.

Under the present rules, defendants have one year after sentencing within which to tell everything they know; because if they don't, they can never be rewarded. Isn't there someway that the government can reward cooperators and also comply with the rules? Or, do we want to let people serving prison sentences know that they have one year to tell everything and if they don't, their ability to help themselves is forever gone? As I stated before, I am not disagreeing with the rule, I just think it does not go far enough.

cc: Members of The Criminal Rules Committee

****

United States District Court
Northern District of Ohio
United States Courthouse
2 South Main Street
Akron, Ohio 44308

David D. Dowd, Jr.
Judge

(330) 375-5834
Fax: (330) 375-5628

June 27, 2000

Honorable W. Eugene Davis
United States Court of Appeals
5100 United States Courthouse
800 Lafayette Street
Lafayette, LA 70501

Dear Judge Davis,

Thank you for your letter of June 23, 2000, regarding the action of the Standing Committee on June 7. I am in complete agreement with the changes to Rule 35(b)(2). I believe the changes improve on the work of our committee.

Also congratulations on being appointed to another year as the chair of the committee. Your continued presence will be very important in completing the work of the committee in the restyling of the rules.

Yours very truly,

David D. Dowd, Jr.
U.S. District Judge

DDD:flm

cc: Mr. John Rabiej
Professor David A. Schlueter ✓

UNITED STATES COURT OF APPEALS

For the Fifth Circuit

DATE: July 5, 2000

TO: Robert C. Josefsberg
Roger A. Pauley

FROM: W. Eugene Davis

SUBJECT: Amended Rule 35(B)(2)

==========

Dear Bob and Roger:

Abolishing the one year time limit within which the government may move to reduce a defendant's sentence for substantial assistance would be a major change in policy that I would be reluctant to do without study and opportunity for full discussion by the Committee. By copy of this letter to David Schlueter, I ask him to put this on the agenda for the fall meeting.

cc: Members of the Criminal Rules Committee
David A. Schlueter
John K. Rabiej

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

FROM: **Professor Dave Schlueter, Reporter**

RE: **Rule 41; Warrants for Installation of Tracking Devices**

DATE: **September 26, 2000**

At the Spring 2000 meeting, the Committee discussed briefly the issue of whether Rule 41 should be amended to address the topic of issuing warrants for tracking devices. Judge Miller was asked to review the matter.

Judge Miller has prepared a comprehensive memo on the subject and has attached the memos from the "Rule 41 Subcommittee." In his memo, Judge Miller recommends several amendments to Rule 41.

This matter is on the agenda for the October meeting.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
SUITE 173
WALTER E. HOFFMAN UNITED STATES COURTHOUSE
600 GRANBY STREET
NORFOLK, VIRGINIA 23510-1915
(757) 222-7007

CHAMBERS OF
TOMMY E. MILLER
UNITED STATES MAGISTRATE JUDGE

FACSIMILE NO.
(757) 222-7027

MEMORANDUM

TO: THE HONORABLE W. EUGENE DAVIS
CHAIR, CRIMINAL RULES ADVISORY COMMITTEE

FROM: TOMMY E. MILLER, KATE STITH, LUCIEN B. CAMPBELL AND ROGER A. PAULEY

RE: TRACKING DEVICE WARRANTS

DATE: SEPTEMBER 8, 2000

You assigned to us the task of determining whether procedures for tracking device warrants should be contained within the Federal Rules of Criminal Procedure and, if so, how they should be integrated.

Our committee agrees that procedures for the installation and monitoring of tracking devices should be in the Rules. At present, the law enforcement agencies requesting orders and judges who issue orders authorizing installation and use of tracking devices are following ad hoc procedures based on case law and common sense. We received copies of a variety of orders from Magistrate Judges as examples. See generally U.S. v. Karo, 468 U.S. 705 (1984).

We further decided to incorporate the tracking device warrant procedures in Rule 41. Our working drafts and final subcommittee draft used the proposed version of Rule 41 which contains the substantive changes authorizing covert searches.

The members of the subcommittee thought that it would be useful to all committee members to see the progress of our thinking as we drafted the proposed rule. As a result, the following are attached in chronological order:

1. Memo from Roger Pauley dated May 19, 2000,

2. Memo from Lucien Campbell dated June 19, 2000,

3. Memo from Lucien Campbell dated June 22, 2000,

4. Discussion draft dated June 22, 2000,

5. E-mail from Tommy Miller to U.S. Magistrate Judges and their responses,

6. Discussion draft dated September 1, 2000,

7. Memo from Roger Pauley dated September 1, 2000,

8. Memo from Roger Pauley dated September 1, 2000 [more],

9. Memo from Roger Pauley dated September 6, 2000,

10. Subcommittee Proposed Tracking Device Amendments to Fed. R. Crim. P. 41 dated September 6, 2000 (comparison to the published substantive amendment of Rule 41).

Several issues need further clarification.

Proposed Rule 41(b)(3)

1. We decided to recommend that a state judge not be permitted to issue a tracking device warrant, since the monitoring may go across state and national boundaries.

2. We suggest that the note reference the holding in Dalia v. U.S., 441 U.S. 238 (1979), which permitted covert entry on private property for the purpose of installing an otherwise legal electronic listening device. The same logic applies to the installation of a tracking device.

Proposed Rule 41(e)(3)

The time limit of 30 days is in brackets for Committee discussion. Roger Pauley advocates a 60-day period. The other subcommittee members were more comfortable with a 30-day period.

Proposed Rule 41(f)(6)

1. The 7-day period is bracketed for Committee discussion. Again, Roger Pauley suggested

that a longer period would be appropriate.

2. We also suggest that the note state that each period of extension is not limited to just seven days, but is for a reasonable period as determined by the judge.

We look forward to the Committee's discussion on this issue.

Respectfully submitted,

Tommy E. Miller

TEM:plc

cc: Professor Kate Stith
Lucien B. Campbell, Esq.
Roger A. Pauley, Esq.
Professor David A. Schleuter
Mr. John K. Rabiej, Chief
Rules Committee Support Office

U.S. Department of Justice

Criminal Division

Washington, DC 20530-0001

May 19, 2000

MEMORANDUM

To: Rule 41 Subcommittee

From: Roger A. Pauley

Re: Tracking Device Warrants

Attached is a draft series of amendments to Rule 41 that would provide explicit authority, and promote more uniform practice, with respect to warrants for tracking devices. The draft incorporates in the re-stylized version of Rule 41 existing law (to the extent practicable) on the installation and use of such devices.

As you know, the courts have held that there are many occasions when a warrant is needed to install or monitor a mobile tracking device (although there also many other occasions when a warrant is not required). For example, a warrant would be needed to install the device if an entry onto private property were necessary to for the installation or to monitor the device if it revealed information unobtainable through lawful visual surveillance. See, United States v. Karo, 468 U.S. 705 (1984). Rule 41 does not currently contemplate searches involving tracking devices (among other reasons, because such searches require that, like so-called "sneak and peek" searches, there be a delay in notification), and thus does not address the variety of issues surrounding such searches. In preparing the draft, I had recourse to state statutes, the rule developed by one magistrate judge who responded to Judge Miller's inquiry, and to other sources; but I found none particularly helpful, and the attached draft is not closely derived from any existing model. Instead, it builds upon the version of Rule 41 recently approved by the Committee for publication to the bench and bar.

The draft addresses the major issues surrounding the use of tracking devices. In a new paragraph (b)(3), the draft explicitly authorizes the issuance of a warrant for the use of a tracking device (as defined in 18 U.S.C. 3117) to monitor a person or property. For easy reference, paragraph (b)(3) also restates the rule, already codified at 18 U.S.C. 3117, that a court may

authorize the use of a tracking device both within the district or outside the district if the device is installed within the district.

Although the standard for judges to use in assessing whether to issue a tracking device warrant when one is required is not wholly settled, the draft adopts the familiar "probable cause" test (rather than a lesser standard) which is in common use.[1]

The draft also addresses the length of time for the use of the device,[2] the need, on occasion, for persons to assist law enforcement officers in the installation of such a device, and delayed notification to the person being tracked or owner of the property being tracked. In paragraph (e)(2)(D)(i), the draft provides that the warrant for use of the tracking device must not exceed 90 days unless the court grants an extension for good cause. I considered 90 days a reasonable maximum period for such warrants, since monitoring over a protracted period is often needed. Notably, in Karo the officers monitored the tracking device for well over four months and it is implicit in the Court's holding that such a warrant would satisfy Fourth Amendment concerns.

Paragraph (e)(2)(D)(ii) provides that, upon the government's motion, the warrant must direct the assistance of others in the installation and use of the device (subject to the government's providing reasonable compensation). This provision is similar to that applicable to title III wiretaps requiring assistance of third parties, see 18 U.S.C. 2518(4), although the need for assistance in the tracking device context is likely to be less frequent. In

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[1]The government argued in Karo that reasonable suspicion was the appropriate standard. The Court, while characterizing the monitoring of a tracking device while it was inside a private home as "less intrusive than a full-scale search," did not rule on the government's contention, reserving the issue for another day. Karo, supra, 468 U.S. at 718n.5. Notwithstanding that more than fifteen years have elapsed since Karo, I could find no post-Karo reported federal case purporting to resolve the question. This may be because federal prosecutors and agents, not wishing to jeopardie a case, are not pressing the use of the "reasonable suspicion" standard. For a discussion of pre-Karo cases which reached differing conclusions, see Wayne R. La Fave, Search and Seizure, A Treatise on the Fourth Amendment, §2.7(e)(3rd ed. 1999).

[2]The Court in Karo stated that a tracking device warrant should normally specify the "length of time for which ... surveillance is requested." 468 U.S., at 718.

addition, this provision requires that those assisting law enforcement not disclose the existence of the device until the court permits, a feature that seemed appropriate for two reasons. First, 18 U.S.C. 2232 (which makes it a crime to give notice of certain electronic surveillance searches with intent to impede the search) does not reach tracking device searches.[3] Second, such a non-disclosure provision is common in statutes addressing analogous circumstances in which information is sought by the government, whether by warrant, subpoena, or other court order, from a third party custodian of the information. See, e.g., 18 U.S.C. 2705(b). Finally, paragraph (f)(6) provides for delayed notification — on the same or a similar basis the Committee has approved for covert observation searches — to the person who was monitored or whose object was monitored.[4]

I believe this draft is responsive to the magistrate judges and others who commented favorably on Judge's Miller's request for views on the desirability of developing procedures for issuing warrants for tracking devices. I look forward to your thoughts on the draft.

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[3]The statute requires an intent to prevent the interception of a communication or the seizure of a person or property and thus does not cover improper notifications designed to prevent other types of searches whose purpose is not to seize but merely to observe or locate property.

[4]I have bracketed the initial number of days (7) for which notice may be delayed. There appears to be no regular practice in this regard for tracking device warrants, and the seven days specified in the pending amendment for covert observation searches may be too limited in this context.

Tracking Devices

The following is based on the version of restyled Rule 41 approved by the Committee. Only those subdivisions in which changes are proposed are set forth.

(b) Authority to Issue a Warrant.

(1) a magistrate judge ....; ~~and~~

(2) a magistrate judge ... ; **and**

(3) a magistrate judge having authority in the district, or if none is reasonably available a judge of a state court of record in the district, may issue a warrant for the installation and use of a tracking device, as defined in 18 U.S.C.§ 3117(b), to monitor a person or property located within the district. The warrant may authorize the installation and use of the device within the district or outside the district if it is installed within the district.

(d) Obtaining a Warrant.

(1) Probable Cause.

After receiving an affidavit or other information, a magistrate judge or a judge of a state court of record, must issue the warrant if:

(i) there is probable cause to search for and seize, ~~or~~ covertly observe, **or install and use a tracking device to monitor,** a person or property under Rule 41(c);[1]

(e) Issuing the Warrant.

(2) Contents of the Warrant. The warrant must identify the person or place to be searched or covertly observed, **or monitored by means of a tracking device,** must identify any person or property to be seized, and must designate the magistrate judge to whom the return must be made. The warrant must command the officer to:

(B) execute the warrant during the daytime, unless the judge for good cause expressly authorizes execution of the warrant at another time; ~~and~~

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[1]The phrase "under Rule 41(c)" which appears already in clause (d)(1)(i) seems inaccurate. Rule 41(c) specifies the kinds of things, e.g., evidence, for which a warrant may be issued. Hence, a search is not properly described as "under Rule 41(c)." Rather, that subdivision sets forth the permissible goals for which a warrant may be issued once the necessary standard has been met. It is in effect another condition precedent to issuing a warrant. Thus, instead of "under Rule 41(c)" a phrase such as "consistent with Rule 41(c)" may be preferable.

(C) return the warrant to the magistrate judge designated in the warrant; and

(D) in the case of a warrant for the installation and use of a tracking device, use the device for not to exceed 90 days unless the court, for good cause, grants one or more extensions not to exceed 90 days. Upon the government's motion and for good cause, the judge may direct a person to provide assistance in the installation and use of the device (and order that the government pay compensation for any reasonable expenses incurred) and that any person so assisting not disclose the existence of the device until the warrant is delivered to the person under Rule 41(f)(6) or a judge permits disclosure.

(f) Executing and Returning the Warrant.

(6) Tracking Devices.

If the warrant authorizes solely the installation and use of a tracking device, the government must, within [7] days after the installation and use have ended, deliver a copy of the warrant to the person who was monitored or whose object was monitored. On the government's motion, the court may, on one or more occasions, for good cause extend the time to deliver the warrant for a reasonable period.

[Proposed New Matter in Bold]

MEMORANDUM

FOR: Rule 41 Subcommittee
Honorable Tommy E. Miller
Professor Kate Stith
Roger A. Pauley, Esq.

FROM: Lucien B. Campbell

DATE: June 19, 2000

SUBJ: **Tracking Device Warrants**

I write in response to Roger's May 19 memo on tracking device warrants. Accepting Roger's invitation, I provide some thoughts on his draft in advance of our conference call on June 22. My points center on the authorization, the contents of the request, and the contents of the warrant.

1. The proposed Rule 41(b)(3) (authority to issue the warrant) needs some study.

a. First, we should consider whether we want to authorize a state judge to issue what may be, or become, a multi-state tracking. In Rule 41(b)(2), we reserved to a magistrate judge the authority to issue a warrant for a person or property outside the district. Should the tracking-device authority be similarly limited?

b. The language of the proposed (b)(3) is difficult. There is a contradiction in the last sentence, which would "authorize the installation . . . of the device . . . outside the district if it is installed within the district." This sentence also uses the disjunctive, when I think the conjunctive—as used in 18 U.S.C. § 3117(a)—is intended.

c. I read § 3117(a), reduced to its essence, to say that a lawful warrant may authorize installation of a tracking device within the jurisdiction, and may authorize its use both within and outside the jurisdiction.

Based on these considerations, I propose the following language (reserving the question of state-judge authority):

(b) Authority to Issue a Warrant.

. . . .

(3) a magistrate judge having authority in the district[, or if none is reasonably available, a judge of a state court of record in the district,] may issue a warrant to install within the district a tracking device, as defined in 18 U.S.C. § 3117(b). The warrant may authorize use of the tracking device to monitor a person or property located within the district, and outside the district.

2. In his memo, Roger touches on *Karo*'s requirement that a tracking-device warrant specify the length of time for which tracking is requested, and he has added that to the contents of the warrant in (e)(2)(D). *Karo* also says, however, that the *request* should state the length of time that tracking is requested, and a couple of other particulars.[1] If our work is to be the codification of tracking-device procedure, it might be well to incorporate the *Karo* requirements for the request, even if they are dictum. That could be done by adding a new Rule 41(d)(2) and renumbering accordingly:

(d) Obtaining a Warrant.

(1) ***Probable Cause.*** . . . .

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1 Dispensing with a Government argument, the Court said it is "possible to describe the object into which the beeper is to be placed, the circumstances that led agents to wish to install the beeper, and the length of time for which beeper surveillance is requested. In our view, this information will suffice to permit issuance of a warrant authorizing beeper installation and surveillance." *United States v. Karo*, 468 U.S. 705, 718 (1984). These requirements are similar—though not identical—to the requirements for a wiretap in 18 U.S.C. § 2518(1).

(2) ***Additional Requirements for a Tracking-Device Warrant.*** In addition to complying with Rule 41(d)(1), a request for a warrant to install and use a tracking device must state:

(A) where the tracking device will be placed;

(B) the circumstances that require use of a tracking device; and

(C) the length of time ~~that use of~~ the tracking device will be ~~required.~~

Put in Notes

While it is best to adhere as closely to the Supreme Court's language as possible, I found it necessary to make the language a little more generic.

3. Roger's draft would make some changes to Rule 41(e)(2) (contents of the warrant) that are not highlighted in bold. One I think is inadvertent because it causes a problem; the others are improvements. I also suggest a change in punctuation.

a. Instead of the approved substantive-amendment language "The warrant must identify the person or *property* to be searched . . ." the draft starts out "The warrant must identify the person or *place* to be searched . . . " (emphases added). This doesn't fit with the proposed addition of "or monitored by means of a tracking device," because some of the targets of tracking are not really "places"—e.g., a drum of chemicals, a package in transit. I assume we're sticking with "person or property."

b. Roger's draft repeats the "musts" with each clause. I think this improves readability.

c. Because one of the three unnumbered prongs of (e)(2) would become compound with a comma, for clarity the three prongs should be separated by semicolons instead of commas.[2]

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2 See Bryan A. Garner, THE ELEMENTS OF LEGAL STYLE 24 (1991).

It would look like this:

(e) Issuing the Warrant.

. . . .

(2) ***Contents of the Warrant.*** The warrant must identify the person or property to be searched or covertly observed, or monitored by means of a tracking device; must identify any person or property to be seized; and must designate the magistrate judge to whom the return must be made. The warrant must command the officer to:

4. Roger's draft would add the special requirements for the contents of a tracking-device warrant in a new Rule 41(e)(2)(D). A problem with this draft is discontinuity. The lead-in from (e)(2) is "The warrant must command the officer to:" but new (e)(2)(D) includes: the judge may direct a person to assist, the judge may order the government to compensate the person, and the judge may order the person not to disclose. Another problem is using, in the last sentence, the word "person" to refer to two very different people: the person assisting law enforcement and the person who is the target of the search.

I propose addressing all of these points in a new (e)(3) that also includes some stylistic changes (and renumbering accordingly):

(e) Issuing the Warrant.

. . . .

(3) ***Additional Contents of a Tracking-Device Warrant.*** In addition to the requirements of Rule 41(e)(2), a warrant to install and use a tracking device may:

(A) authorize the use of the tracking device for no more than 90 days, unless the court for good cause grants one or more extensions of no more than 90 days;

(B) upon the government's motion and for good cause, direct a person to assist in installing and using the tracking device,

and may order the government to compensate the person for reasonable expenses incurred; and

(C) order any person assisting the government under Rule 41(e)(3)(B) not to disclose the existence of the tracking device until the warrant is delivered under Rule 41(f)(6), or until a judge permits disclosure.

I look forward to discussing this project on our conference call.

By facsimile only

MEMORANDUM

FOR: Rule 41 Subcommittee
Honorable Tommy E. Miller
Professor Kate Stith
Roger A. Pauley, Esq.

FROM: Lucien B. Campbell

DATE: June 22, 2000

SUBJ: **Status Report on Tracking Device Warrants**

This will serve as a memorandum of our conference call of today on the subject of amending Federal Rule of Criminal Procedure 41 to treat tracking-device warrants. Participating in the conference were Judge Miller, Professor Stith, Roger Pauley, and Lucien Campbell. The starting point for the discussion was Roger Pauley's memo of May 19, 2000, entitled "Tracking Device Warrants," which proposed the amendment, explained the need, and reviewed pertinent legal authority. The Subcommittee also considered Lucien Campbell's memo of June 19, 2000, on the same subject.

1. At the outset, the Subcommittee first considered whether there was a need to go forward with this amendment. The Subcommittee unanimously decided the amendment should be considered, because Rule 41 presently lacks procedures addressing such searches, and consequently a divergence of practice exists among the districts. The Subcommittee also noted that tracking-device warrants have been reviewed extensively by the courts, and that some requirements of existing Rule 41 are incompatible with the needs of law enforcement installing and using tracking devices.

2. A major threshold issue is whether the authority to issue a tracking-device warrant should be limited to a magistrate judge (as Rule 41(b)(2) limits the authority to issue a warrant to search outside the district), or whether the authority should extend to a state court judge. A majority of the Subcommittee favored limiting the authority to a magistrate judge, but because of the importance of the issue, it was decided to bracket it for further discussion. Roger Pauley will research whether

existing federal law expressly authorizes a state judge to issue a tracking device warrant, and how often such federal warrants are sought from state judges.

3. The Subcommittee revised draft Rule 41(b)(3) to state clearly that the installation must occur within the district, but that use of the device may be authorized within the district, outside the district, or both. *See* 18 U.S.C. § 3117(a).

4. The Subcommittee next addressed the statement in *United States v. Karo* identifying three particulars of a request for a tracking-device warrant.[1] Believing that the first two of those are necessarily encompassed by the need to establish probable cause, a majority of the Subcommittee favored including in the rule only a requirement to state the length of time that the tracking device will be used.

5. The Subcommittee decided to set out the special contents of a tracking-device warrant in a new Rule 41(e)(3). There was no consensus on the maximum length of time the warrant should initially be issued for, so the period of 30 days is bracketed for further discussion.

6. In the same manner, the time for delivering the warrant, absent an extension, is set out in draft Rule 41(f)(6) as 7 days, but bracketed for further discussion.

7. Attached is a redline setting out the current state of the discussion draft. The comparison is not to the existing Rule 41, but to the substantive amendment of the rule approved by the Criminal Rules Advisory Committee. Only the portions to be changed, and necessary context, are shown.

Attachment

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[1]The Court said it is "possible to describe the object into which the beeper is to be placed, the circumstances that led agents to wish to install the beeper, and the length of time for which beeper surveillance is requested. In our view, this information will suffice to permit issuance of a warrant authorizing beeper installation and surveillance." *United States v. Karo*, 468 U.S. 705, 718 (1984).

Rule 41. Search and Seizure

* * *

(b) **Authority to Issue a Warrant.** At the request of a federal law enforcement officer or an attorney for the government:

(1) a magistrate judge having authority in the district—or if none is reasonably available, a judge of a state court of record in the district—may issue a warrant to search for and seize, or covertly observe on a noncontinuous basis a person or property located within the district; ~~and~~

(2) a magistrate judge may issue a warrant for a person or property outside the district if the person or property is located within the district when the warrant is issued but might move outside the district before the warrant is executed~~.~~; and

(3) a magistrate judge having authority in the district[, or if none is reasonably available, a judge of a state court of record in the district,] may issue a warrant to install within the district a tracking device, as defined in 18 U.S.C. § 3117(b). The warrant may authorize use of the tracking device to monitor a person or property located within the district, outside the district, or both.

(c) **Persons or Property Subject to Seizure.** A warrant may be issued for any of the following:

(1) evidence of the commission of a crime;

(2) contraband, fruits of crime, or other items illegally possessed;

(3) property designed for use, intended for use, or used in committing a crime; or

(4) a person to be arrested or a person who is unlawfully restrained.

(d) Obtaining a Warrant.

(1) ***Probable Cause.*** After receiving an affidavit or other information, a magistrate judge or a judge of a state court of record[1] must issue the warrant if there is probable cause to search for and seize, ~~or~~ covertly observe, or install and use a tracking device to monitor, a person or property ~~under~~ consistent with Rule 41(c).

(2) ***Additional Requirements for a Tracking-Device Warrant.*** In addition to complying with Rule 41(d)(1), a request for a warrant to install and use a tracking device must state the length of time that the tracking device will be used.

~~(2)~~ (3) ***Requesting a Warrant in the Presence of a Judge.*** * * *

~~(3)~~ (4) ***Requesting a Warrant by Telephonic or Other Means.*** * * *

(e) Issuing the Warrant.

* * *

(2) ***Contents of the Warrant.*** The warrant must identify the person or property to be searched or covertly observed, or monitored by means of a tracking device; must identify any person or property to be seized~~,~~; and must designate the magistrate judge to whom the return must be made. The warrant must command the officer to:

(A) execute the warrant within a specified time no longer than

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1 Reserving for discussion the question of whether a state judge should be authorized to issue a tracking-device warrant.

10 days;

(B) execute the warrant during the daytime, unless the judge for good cause expressly authorizes execution of the warrant at another time; and

(C) return the warrant to the magistrate judge designated in the warrant.

(3) ***Additional Contents of a Tracking-Device Warrant.*** In addition to the requirements of Rule 41(e)(2), a warrant to install and use a tracking device may:

(A) authorize the use of the tracking device for no more than [30] days, unless the court for good cause grants one or more extensions of no more than [30] days;

(B) upon the government's motion and for good cause, direct a person to assist in installing and using the tracking device, and may order the government to compensate the person for reasonable expenses incurred; and

(C) order any person assisting the government under Rule 41(e)(3)(B) not to disclose the existence of the tracking device until the warrant is delivered under Rule 41(f)(6), or until a judge permits disclosure.

~~(3)~~ (4) ***Warrant by Telephonic or Other Means.*** * * *

(f) Executing and Returning the Warrant.

* * *

(6) ***Tracking Devices.*** If the warrant authorizes solely the installation and use of a tracking device, the government must, within [7] days

after the installation and use have ended, deliver a copy of the warrant to the person whose person or property was tracked. Upon the government's motion, the court may, on one or more occasions, for good cause extend the time to deliver the warrant for a reasonable period.

Author: Tommy Miller at ~4DC-VAE-NORFOLK
Date: 7/21/2000 3:57 PM
TO: MAGISTRATES-L@LISTSERVER.AO.DCN at ~INTERNET
TO: members@fedjudge.org at ~INTERNET
CC: lucien_campbell@fd.org at ~INTERNET
CC: kate.stith@yale.edu at ~INTERNET
CC: Roger.Pauley@usdoj.gov at ~INTERNET
Subject: Tracking Device Warrants
---------- Message Contents

Colleagues:

Last year I solicited your advice on the subject of authorizing warrants or issuing orders to place tracking devices in private places. I communicated the results to the Advisory Committee on Criminal Rules. We decided to table the issue while we finished the proposed restyling of the Criminal Rules. The restlyed rules will be in you mailbox next month for your comment.

The tracking device issue has come off the table and the Committee will consider the issue at its October 19-20, 2000 meeting.

Attached is a redline version of proposed language that sets out a procedure in Rule 41 for the installation of tracking devices. You will immediately recognize that the Rule 41 in the attachment does not look like the Rule 41 that you have come to know and love (hate) since it is the restyled version that you will receive next month.

Also attached is a memorandum of a conference call of the subcommittee considering this issue that explains some of our thinking.

Please give me your comments by August 3, 2000.

Thank you very much and for those of you who read this far be advised that the COLA passed out of committee to the floor of the House this week.

Tommy Miller

ATTACHMENT 5

Author: Bernard_Zimmerman@ce9.uscourts.gov at ~Internet
Date: 7/24/2000 11:37 AM
TO: tommy miller at ~4dc-vae-norfolk
Subject: Re:Tracking Device Warrants
---------- Message Contents

When I had an application presented to me about 6 months ago, my research suggested tracking devices could not be installed if the installation violated the car owner's Fourth Amendment rights. The government wanted me to authorize the agents to break into the car to install and monitor the device. This I would not do. I asked the government if they had any authority to support a surreptitious entry and they did not - other than an internal Justice Dept. memo. I'm not clear the proposed rule deals with this issue. When I sent out an e-mail on our list server, I heard from 3-4 judges who had authorized break-ins but no one had any authority.

Author: william_sherrill@flnd.uscourts.gov at ~Internet
Date: 7/28/2000 8:47 AM
TO: tommy miller at ~4dc-vae-norfolk
Subject: Re: Tracking Device Warrants
---------- Message Contents

Tommy,

The length of time seems to me to be the most important aspect since cause and the degree of intrusion, change over time. A presumptively reasonable period of time of 30 days probably should be in the rule, to set a standard, but with extensions based upon good cause.

Bill Sherrill (N.D. Fla., Tallahassee)

Author: "David Noce" <david_noce@moed.uscourts.gov> at ~Internet
Date: 8/1/2000 12:57 PM
TO: tommy miller at ~4dc-vae-norfolk
Subject: Re: Tracking Device Warrants
---------- Message Contents

Tommy, the "tracking device" language looks fine to me. Is there any interest or value in also redrafting the rule to cover pen registers and trap and trace devices (18 USC ss 3121-3127)? We issue a lot of such orders. They, too, are in the nature of "monitoring" devices. I guess the general caption for Rule 41 might have to be changed to "Search, Seizure, and Monitoring." What about the other investigative process we issue, such as IRS information orders? Can or should the rule be redrafted to include general procedures that cover more than just the tracking devices?

On a personal note, I hope all is well with you and yours.

Dave Noce.

Author: "Mary Ann Medler" <mary_ann_medler@moed.uscourts.gov> at ~Internet
Date: 8/7/2000 2:12 PM
TO: tommy miller at ~4dc-vae-norfolk
Subject: Re: Tracking Device Warrants
---------- Message Contents

Hi Tommy! I know I'm a few days late responding to your e-mail about tracking devices, but all last week I was in the trial from hell. The jury deliberated 6 hours on Friday (til 11:30 PM!) and 2 more hours this morning before sending me a note saying they were hung. I guess that makes all last week an agonizing waste of time! Anyway I do have some comments, and I hope I'm not toooo late. First, does the warrant provided for in the rule authorize trespass and surreptitious entry to install? Regular search warrants permit trespass so am I safe in assuming that these warrants do too? I had one instance in which the government had to "borrow" the target car to install the device. It was parked in a parking lot and the agents thought it would be too obvious to fiddle with the car in public, so they briefly removed it, installed the device and brought the car back. All this info was contained in the warrant application so at least they gave notice of what they did, but it made me pretty uncomfortable.
Do you read the rule broadly enough to allow this?
I also assume the rule has no effect on the warrantless use of tracking devices; that is, those which do not invade any expectation of privacy.
Also, and probably most important is that I don't think the rule adequately provides for tracking devices used in long term investigations. I would propose language which tracks the language for notice on wiretaps. 18 USC Sec. 2518(8)(d):

"Within a reasonable time but not later than 30 days after the installation and use have ended deliver a copy of the warrant to the person whose person or property was tracked.

On an ex parte showing of good cause to the judge who issued the warrant or to a judge of competent jurisdiction the delivery of the warrant may be postponed."

For those run of the mill beeper orders this provides the issuing judge the authority to lessen the 30 days to what ever time the judge deems "reasonable." The 30 days provides a framework which will cover many, if not most, of the orders. The ex parte provision is for the long term investigations, especially those which are using Global Positioning System (GPS) as an investigative tool. The GPS is now used frequently in long term narcotics investigations as it allows the case agent to track the travel of the drug courier anywhere in the nation. (We had one in which the government had to get 28 extensions!)

Please keep us informed about your work with the Advisory Cte on Criminal Rules (and the progress of the COLA!!!) Thanks for the opportunity to have input! Mary Ann

Author: JUDGE_ELIASON@ncmd.uscourts.gov at ~Internet
Date: 8/17/2000 3:49 PM
TO: tommy miller at ~4dc-vae-norfolk
Subject: Re: Tracking Device Warrants
---------- Message Contents

Dear Tommy,

This reply may come too late,and for than I am sorry, but I had a death in the family. I am just catching up and have not had time to completely consider the matter but thought it best to reply as soon as possible.

I agree that Rule 41 needs to include installation of monitoring and tracking devices. My experience is such that the matter of tracking devices has sufficient complication that granting co-authority to state judges may not be wise. For example, the agents who bring these warrants to me usually grant themselves the power to use any means to install the device. I have to be careful to restrict the warrant to "installation" and inform them that they would need a separate warrant to enter property to install. Also I require more probable cause if the agent will make entry into the container, especially something like a motor vehicle.

Next, I note that proposed Rule 41(e)(3) permits the government to make a motion for a court to compel a private person to install the device and compel the government to compensate the person. I question whether the judiciary should be in the business of compelling private citizens to act in potentially dangerous situations. Why doesn't the government simply train its own people or hire them. The situation may be different when public service companies are involved. I guess I found the language to be awfully broad.

I have a concern over the return of the warrant and when it is a pulic record. I treat any warrant as a non-public record until the agent makes a return. In the case of a tracking device warrant, the return could be made prior to the end of the monitoring period. I would prefer language that the warrant is not a public record until some number of days after the end of the monitoring period (perhaps 7) in order to clarify the matter and that the U.S. Attorney would have to show good cause to obtain extentions of time.

Last, I was confused concerning the language in Rule 41(f)(6) about warrants which would not solely authorize the installation of a tracking. I am not sure what other matters could or should be combined with a tracking warrant. As noted above, I require a separate warrant to enter onto private property for purposes of installation. There may of course be other pertinent matters which I have not considered. At first blush, I believe that I would prefer that other matters not be included in a tracking device warrant because it can make matters unduly complicated for both the court and the agents and that the confusion could lead to errors.

Thanks for all your good work on these and other matters.

Russell Eliason

Author: Diane_Markley@innd.uscourts.gov at ~Internet
Date: 7/26/2000 1:51 PM
TO: tommy miller at ~4dc-vae-norfolk
Subject: Tracking Device Warrants
---------- Message Contents

Dear Tommy:

Thank you for your July 21 e-mail concerning the proposed amendments to Criminal Rule 41. I have two comments on the proposed amendments.

First, Rule 41(b)(1) refers to "covertly observe . . . ." Rule 41(b)(3) also refers to the installation of a "tracking device." Is the reference to "covertly observe" intended to cover surveillance cameras in areas where a suspect has a reasonable expectation of privacy? I assume that the proposed amendments to Rule 41(b) are not intended to place restrictions on routine surveillance, but that certainly is not clear from the current wording.

My second concern deals with the removal of any tracking device. For example, a wire tap can be removed from a phone without entering the premises of the suspect. In some instances, a tracking device can be placed on a vehicle while it is parked on a street. If the officers have to intrude on a suspect's reasonable expectation of privacy to install the tracking device, I assume that the original warrant can grant the necessary approval. Will the original warrant also permit the officers to enter a garage to remove the tracking device or will a separate warrant be required? There is always the possibility that the officers may time the removal of the tracking device to conduct what otherwise may be considered a search.

I appreciate receiving a copy of proposed Rule 41 and the opportunity to comment on it.

Andrew P. Rodovich
U.S. Magistrate Judge

Rule 41. Search and Seizure

* * *

(b) Authority to Issue a Warrant. At the request of a federal law enforcement officer or an attorney for the government:

(1) a magistrate judge having authority in the district—or if none is reasonably available, a judge of a state court of record in the district—may issue a warrant to search for and seize, or covertly observe on a noncontinuous basis a person or property located within the district; ~~and~~

(2) a magistrate judge may issue a warrant for a person or property outside the district if the person or property is located within the district when the warrant is issued but might move outside the district before the warrant is executed~~.~~; and

(3) a magistrate judge having authority in the district may issue a warrant to install within the district a tracking device, as defined in 18 U.S.C. § 3117(b). The warrant may authorize use of the tracking device to monitor a person or property located within the district, outside the district, or both.

(c) Persons or Property Subject to Seizure. A warrant may be issued for any of the following:

(1) evidence of the commission of a crime;

(2) contraband, fruits of crime, or other items illegally possessed;

(3) property designed for use, intended for use, or used in committing a crime; or

(4) a person to be arrested or a person who is unlawfully restrained.

(d) Obtaining a Warrant.

(1) ***Probable Cause.*** After receiving an affidavit or other information, a magistrate judge must issue the warrant if there is probable cause to search for and seize, ~~or~~ covertly observe, or install and use a tracking device to monitor, a person or property ~~under~~ consistent with Rule 41(c).

(2) ***Additional Requirements for a Tracking-Device Warrant.*** In addition to complying with Rule 41(d)(1), a request for a warrant to install and use a tracking device must state the length of time that the tracking device will be used.

~~(2)~~ (3) ***Requesting a Warrant in the Presence of a Judge.*** * * *

~~(3)~~ (4) ***Requesting a Warrant by Telephonic or Other Means.*** * * *

(e) Issuing the Warrant.

* * *

(2) ***Contents of the Warrant.*** The warrant must identify the person or property to be searched or covertly observed, or monitored by means of a tracking device; must identify any person or property to be seized~~,~~; and must designate the magistrate judge to whom the return must be made. The warrant must command the officer to:

(A) execute the warrant within a specified time no longer than 10 days;

(B) execute the warrant during the daytime, unless the judge for good cause expressly authorizes execution of the warrant at another time; and

(C) return the warrant to the magistrate judge designated in the warrant.

(3) ***Additional Contents of a Tracking-Device Warrant.*** In addition to the requirements of Rule 41(e)(2), a warrant to install and use a tracking device must authorize the use of the tracking device for no more than [30] days, unless the court for good cause grants one or more extensions of no more than [30] days.

~~(3)~~ (4) ***Warrant by Telephonic or Other Means.*** * * *

(f) Executing and Returning the Warrant.

* * *

(6) ***Tracking Devices.*** If the warrant authorizes the installation and use of a tracking device, the government must, within [7] days after the installation and use have ended, deliver a copy of the warrant to the person who, or whose property, was tracked. Upon the government's motion, the court may, on one or more occasions, for good cause extend the time to deliver the warrant for a reasonable period.

U.S. Department of Justice

Criminal Division

Washington, DC 20530-0001

September 1, 2000

MEMORANDUM

To: Honorable Tommy E. Miller, Professor Kate Stith, and Lucien Campbell, Esq.

From: Roger A. Pauley RAP

Subject: Tracking Device Warrants

I apologize for the late thought, but on re-reading our draft tracking device proposal, it occurred there may be a problem or at least an ambiguity, regarding a subdivision we did not discuss at our conference call yesterday, namely subdivision (e). The draft would add a reference to tracking device warrants to (e)(2) but would make no changes to the sub-paragraphs of that rule. The potential ambiguity arises with respect to (e)(2)(B), which requires that all warrants be "executed" in the daytime, unless the judge for good cause orders otherwise.

What does "execution" of the warrant mean with regard to tracking devices? If it includes monitoring the device, then the requirement for daytime execution is inappropriate, even with the provision allowing other than daytime execution for good cause. Clearly, with regard to tracking devices, the reasons for a daytime restriction, with a need to establish good cause for nighttime monitoring (e.g, of a package being driven somewhere) do not apply. If "execution" means only attaching the device, then the daytime limitation will sometimes (but not always) make sense. It will make sense if attaching the device itself requires a warrant (e.g. must be done to a car in the subject's garage at home); but it will not make sense if the need for the warrant does not turn on the device's installation (e.g. if that can be done to an object the subject has left in area where there is no reasonable expectation of privacy), but rather because the monitoring may extend to an area where there is a reasonable expectation of privacy, such as following the object into private premises.

In short, subdivision (e)(2)(B) seems inapposite to

tracking device warrants. I can think of no ready fix for this problem, given that (as explained above) the daytime restriction will occasionally (but not ordinarily) be appropriate, thus making an outright exception for tracking devices from the operation of (e)(2)(B) not quite correct either. Perhaps one or more of you will think of a solution. If so, please advise.

I also remain somewhat uncomfortable with the time limit on use of the device, which the draft has tentatively pegged at a maximum of thirty days, subject to extensions of a like period. The ABA standards (Standard 2-6.4, adopted in 1998), to which someone late yesterday called my attention, adopt sixty days (with a like period for extensions) as more appropriate. You will recall that my original proposal, based on the even longer period implicitly approved by the Court in *Karo*, had ninety days, but I allowed myself, in a moment of weakness, to be beaten down to thirty. However, inasmuch as the ABA by no stretch can be described as a law enforcement oriented organization, I solicit your reconsideration of this issue.

U.S. Department of Justice

Criminal Division

Washington, DC 20530-0001

September 1, 2000

MEMORANDUM

To: Honorable Tommy E. Miller, Professor Kate Stith, and Lucien Campbell, Esq.

From: Roger A. Pauley

Subject: Tracking Devices (more)

The more you look, sometimes the more you see. "Execution" of the warrant, as applied to tracking devices, cannot include the monitoring because subdivision (e)(2)(A), which requires that a warrant be executed within 10 days, would then be inconsistent with our (e)(3), which authorizes use of the warrant (i.e. monitoring it) for up to thirty days. If that is so, then notwithstanding my earlier memo of today, there is no problem about daytime execution. Where installation of a tracking device would infringe upon a reasonable expectation of privacy so as to require a warrant, the "execution" of the warrant (i.e. installation of the device) must take place in the daytime unless for good cause the magistrate orders otherwise. If no privacy interest is infringed by the installation, then it matters not what time of day the installation occurs.

Because it appears our rule is using "execution" in a perhaps unnatural way to refer only to the installation of the device, at the least the Note should make this clear (and Judge Miller's covering memo to the Committee should also, I believe, explain that we contemplate such a Note). Alternatively, we could include a definition of "execute" that would state that, in the case of a warrant to "install and use a tracking device" (picking up the formulation in (d)(2)), "execute" means only installing the device. This would resolve all doubts. What say you?

U.S. Department of Justice

Criminal Division

Washington, DC 20530-0001

September 6, 2000

MEMORANDUM

To: Honorable Tommy E. Miller, Professor Kate Stith, and Lucien Campbell, Esq.

From: Roger A. Pauley RAP

Subject: Tracking Device Warrants

Below is a rewrite of subdivision (e) that attempts to deal with the problem I noted that (e)(2)(A) and (B) in our current version are inapposite to tracking device warrants. The rewrite moves (e)(2)(C) into the main body of (e) and then limits (e)(2)(A) and (B) so that they do not apply to tracking device warrants. This solution clearly works for (e)(2)(A)(the ten-day execution requirement); the only question is whether exempting tracking device warrants from (e)(2)(B)(the daytime execution requirement) works when a warrant is needed to **install** a tracking device (the exemption clearly works for the monitoring phase, since a daytime execution requirement is never appropriate in that context). I don't know what the present practice is in that regard. The drafting becomes messy if it is concluded that a daytime requirement is appropriate for installation (but not monitoring); and perhaps the best solution (in that eventuality) is to deal with it in the Note.

Here's the rewrite:

"(e) Issuing the Warrant.

***

(2) Contents of the Warrant. The warrant must identify the person or property to be searched or covertly observed, or monitored by means of a tracking device; must identify any person or property to be seized; and must designate the magistrate judge to whom the return must be made. The warrant must command the officer to return the warrant to the magistrate judge designated in the warrant. In the case of a warrant other than a warrant to install and use a tracking device, the warrant

must also command the officer to:

(A) execute the warrant within a specified time no longer than 10 days; and

(B) execute the warrant during the daytime, unless the judge for good cause expressly authorizes execution of the warrant at another time.

(3) [Identical to current draft, except I suggest for reasons stated in earlier memo that the bracketed maximum use period be increased from 30 to 60 days]."

Rule 41. Search and Seizure

* * *

(b) Authority to Issue a Warrant. At the request of a federal law enforcement officer or an attorney for the government:

(1) a magistrate judge having authority in the district—or if none is reasonably available, a judge of a state court of record in the district—may issue a warrant to search for and seize, or covertly observe on a noncontinuous basis a person or property located within the district; ~~and~~

(2) a magistrate judge may issue a warrant for a person or property outside the district if the person or property is located within the district when the warrant is issued but might move outside the district before the warrant is executed.; and

(3) a magistrate judge having authority in the district may issue a warrant to install within the district a tracking device, as defined in 18 U.S.C. § 3117(b). The warrant may authorize use of the tracking device to monitor a person or property located within the district, outside the district, or both.

(c) Persons or Property Subject to Seizure. A warrant may be issued for any of the following:

(1) evidence of the commission of a crime;

ATTACHMENT 10

(2) contraband, fruits of crime, or other items illegally possessed;

(3) property designed for use, intended for use, or used in committing a crime; or

(4) a person to be arrested or a person who is unlawfully restrained.

(d) Obtaining a Warrant.

(1) ***Probable Cause.*** After receiving an affidavit or other information, a magistrate judge or a judge of a state court of record must issue the warrant if there is probable cause to search for and seize, ~~or~~ covertly observe, or install and use a tracking device to monitor, a person or property ~~under~~ consistent with Rule 41(c).

(2) ***Additional Requirements for a Tracking-Device Warrant.*** In addition to complying with Rule 41(d)(1), a request for a warrant to install and use a tracking device must state the length of time that the tracking device will be used.

~~(2)~~ (3) ***Requesting a Warrant in the Presence of a Judge.*** * * *

~~(3)~~ (4) ***Requesting a Warrant by Telephonic or Other Means.*** * * *

(e) Issuing the Warrant.

* * *

(2) ***Contents of the Warrant.*** The warrant must identify the person or property to be searched or covertly observed, or monitored by means of a tracking device; must identify any person or property to be seized~~,~~; and must designate the magistrate judge to whom the

return must be made. The warrant must command the officer to return the warrant to the magistrate judge designated in the warrant. In the case of a warrant other than a warrant to install and use a tracking device, ~~T~~the warrant must also command the officer to:

(A) execute the warrant within a specified time no longer than 10 days; and

(B) execute the warrant during the daytime, unless the judge for good cause expressly authorizes execution of the warrant at another time~~; and~~.

~~(C) return the warrant to the magistrate judge designated in the warrant.~~

(3) ***Additional Contents of a Tracking-Device Warrant.*** In addition to the requirements of Rule 41(e)(2), a warrant to install and use a tracking device must authorize the use of the tracking device for no more than [30] days, unless the court for good cause grants one or more extensions of no more than [30] days.

~~(3)~~ (4) ***Warrant by Telephonic or Other Means.*** * * *

(f) Executing and Returning the Warrant.

* * *

(6) ***Tracking Devices.*** If the warrant authorizes the installation and use of a tracking device, the government must, within [7] days

after the installation and use have ended, deliver a copy of the warrant to the person who, or whose property, was tracked. Upon the government's motion, the court may, on one or more occasions, for good cause extend the time to deliver the warrant for a reasonable period.

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

August 16, 2000

MEMORANDUM TO PROFESSOR DAVID A. SCHLUETER

SUBJECT: *Tracking Device*

For your information, I am attaching a memorandum from an assistant U.S. attorney on proposed amendments to Rule 41 regulating tracking devices. It appears that the reply responds to some new draft proposal floated by some of our committee members. It refers to an accompanying report from Lucien Campbell on some if the issues. I forward the memorandum to you for your review.

John K. Rabiej

Attachment

U.S. Department of Justice

United States Attorney
District of New Jersey

970 Broad Street, Suite 700
Newark, NJ 07102

(973)645-2700

August 2, 2000

Hon. Ronald J. Hedges
United States Magistrate Judge
U.S. Courthouse
Martin Luther King, Jr., Building
50 Walnut Street
Newark, New Jersey 07102

RE: Proposed Amendments to Fed. R. Crim. P. 41

Dear Judge Hedges:

Thank you for soliciting our comments regarding the proposed amendments to Rule 41 of the Federal Rules of Criminal Procedure. The proposed rule changes generally appear consistent with the case law and the provisions of 18 U.S.C. § 3117. Our only comments deal with (1) state judges' authority to issue such warrants; (2) timing; and (3) notification.

First, as noted in the memorandum of Lucien Campbell, a state court judge may not have the authority to enter orders permitting the use of tracking devices when the device is going to be used out of the District. We have not researched this issue as the memorandum reflects that someone is going to examine the law on the topic.

Second, the current rule requires that the warrant be executed within ten days and the amendment discusses authorizing the use of the device "for no more than [30] days," unless the Court grants an extension. The rule should be clarified to reflect that the thirty-day period begins to run after the device is installed. For example, if the agents were to execute the warrant and install the device on Day 5 of the ten-day period described in Fed. R. Crim. P. 41(e)(2), then the thirty-day period for use and monitoring should begin on that date and run until the 35th day after the application is granted. Otherwise, the usage period would be reduced by five days. This suggestion is similar to that used in court-ordered wiretaps, wherein the statute gives the investigators thirty days to intercept conversations, with the thirty-day period beginning to run from the earlier of either of the following events: (1) ten days from the date the order is entered; or (2) the date interception

begins. 18 U.S.C. § 2518. Hence, the investigators are given up to ten days to install the device before the "30 day" use or interception clock begins to run. The following proposed language to Rule 41(e)(3)(A) would address this concern:

> authorized the use of the tracking device for no more than thirty days, unless the court for good cause grants one or more extensions of no more 30 days <u>each. The thirty-day periods shall begin on the earlier of the day on which law enforcement first begins to use the device or ten days after the application for the warrant is granted.</u>

Third, notification of the warrant should be required only if law enforcement is required to enter private property to install the device. If installation and monitoring only occur in public places, then it is akin to physical surveillance for which no notice is required. Oftentimes, the device is placed upon a vehicle parked in a public place or inside a parcel that is in the hands of law enforcement when permission to install the tracking device is sought. Thus, the notification requirement set forth in the proposed language for Rule 41(f)(6) should be modified as follows:

> If the warrant authorizes <u>law enforcement to enter private property to install the tracking device</u>, the government within [7] days after the installation and use have ended . . .

If we can provide any additional assistance, please feel free to call me at (973) 645-2726.

Respectfully,

ROBERT J. CLEARY
United States Attorney

Patty Shwartz

BY: Patty Shwartz
Assistant U.S. Attorney
Chief, Criminal Division

MEMO TO: Members, Criminal Rules Advisory Committee

FROM: Professor Dave Schlueter, Reporter

RE: Rules 45 & 56 (Washington's Birthday/Presidents' Day)

DATE: September 25, 2000

Current Rules 45 and 46 include a reference to Washington's Birthday. During the restyling effort, however, the Committee adopted the language used in the restyled Appellate Rules and changed the reference to read "Presidents' Day."

Attached is correspondence from Mr. W. Thomas McGough, Jr. to the effect that although the rules use the term Presidents' Day, the pertinent statute refers to Washington's Birthday. He also recounts the history of how the appellate rules committee happened to adopt the Presidents' Day designation. He notes that the Appellate Rules are, at least for now, the only rules that use that designation. He recommends that the Criminal Rules continue to use the more correct term, "Washington's Birthday."

This matter is on the agenda for the October meeting.

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

Chambers of
WILL GARWOOD
Circuit Judge

903 San Jacinto Boulevard
Austin, Texas 78701
512/916-5113

August 18, 2000

W. Thomas McGough, Jr., Esquire
Reed Smith Shaw & McClay, LLP
435 Sixth Avenue
Pittsburgh, Pennsylvania 15219-1886

Dear Tom:

Many thanks for your fine memo on Washington's Birthday/Presidents' Day.

Because the proposed restylization of the Criminal Rules is being published for public comment this summer, and includes a switch from Washington's Birthday to Presidents' Day. I have sent a copy of the memo to Judge Gene Davis, Chairman of the Advisory Committee on Criminal Rules.

With best personal regards.

Yours sincerely,

Will Garwood

cc. Judge Gene Davis

REED SMITH SHAW & MCCLAY LLP
MEMORANDUM

TO: W. Thomas McGough, Jr., Esquire DATE: 8/11//2000

FROM: Aaron Potter

RE: Washington's Birthday vs. Presidents' Day in the Federal Rules of Appellate Procedure

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First in war, first in peace, and first in the hearts of his countrymen.

—Congressman Richard Henry Lee,
shortly after the death of George Washington

There's hope a great man's memory
may outlive his life half a year.

—Shakespeare, *Hamlet*

When the birthday of Washington shall be forgotten,
liberty will have perished from the earth.

— President James Buchanan

December of 1999 marked the 200th year since the death of George Washington. The memory of this great man has survived the second millennium, but we may wonder whether it will endure the third. Though our country has observed Washington's Birthday as a national holiday for well over a century, subtle forces are now undermining this memorial to our Founding Father. Formerly inchoate, these forces have now established a beachhead in the Federal Rules of Appellate Procedure, which — since 1995 — have referred in Rules 26 and 45 to "Presidents' Day."

Recently, the Advisory Committee on the Federal Rules of Appellate Procedure received a letter from Jason Bezis, a law student at Boalt Hall School of Law, who pointed out

that the federal holidays statute[1] still identifies the third Monday in February as Washington's Birthday.[2] In his letter Mr. Bezis alleged that Appellate Rules 26 and 45 incorrectly designate Washington's Birthday as Presidents' Day. While recognizing that Mr. Bezis must have too much leisure time on his hands, the Advisory Committee decided this discrepancy merited further investigation. Why had it decided in 1995 to change the designation of Washington's Birthday to Presidents' Day? Whatever the reason for the change, which designation would be correct?

The answers to these questions require some historical background. President Chester Arthur made Washington's Birthday a national holiday in 1885. It was to be celebrated on February 22, which was probably the day Washington was born.[3] The United States observed Washington's birthday on February 22 until 1968, when Congress passed the Monday Holiday Law.[4] This enactment retained the title Washington's Birthday but moved its observance to the third Monday in February. And so it has remained since.

But popular culture, not content to detach President Washington's special day from February 22 to create a three-day weekend, has further demoted the Founder of Our Country. Since 1968, common usage has referred to the holiday as Presidents' Day —

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[1] *See id.* § 6103(a) ("The following are legal public holidays: . . . Washington's Birthday, the third Monday in February.").

[2] In this letter Mr. Bezis also complained that the same Appellate Rules (26 and 45) mistakenly name the holiday "Birthday of Martin Luther King, Jr." as "Martin Luther King, Jr.'s Birthday" and place an inappropriate apostrophe in "Veterans Day." He was correct (*compare* 5 U.S.C. § 6103(a) (1994) *with* FED. R. APP. P. 26 & 45), but the Appellate Committee deemed these peccadilloes negligible.

[3] Regarding uncertainty surrounding the actual date of Washington's birthday, the legislative history of the 1968 Monday Holiday Law notes the following:

> In recommending that Washington's birthday be observed on the third Monday in February, the committee took note of the fact that the exact date of Washington's birth is subject to conjecture. He was reported to have been born on February 11 according to the calendar in effect at the time of his birth. However, when the United States adopted the Gregorian Calender in 1752 all dates were advanced 11 days. Yet, according to Douglas' "American Book of Days," Washington's birthday was first celebrated on February 12 at the direction of Compte de Rochambeau, commander of the French forces during the American Revolution.

S. REP. NO. 1293 (1968), *reprinted in* 1968 U.S.C.C.A.N. 2335, 2337.

[4] This law is codified at 5 U.S.C. § 6103 (1994).

commemorating Washington's birthday, Lincoln's February 12th birthday, and, in some accounts, Franklin Roosevelt's January 30th birthday. Some states, too, have legally designated the holiday as Presidents' Day.[5]

Congress has been aware of the shift in usage, and has even (accidentally) written Presidents' Day into at least one statute. As originally written this statute — designated the 1999 Nation's Capital Bicentennial Designation Act[6] — "establish[ed] the *Presidents' Day* holiday in the year 2000 as a day of national celebration for the 200th anniversary of Washington, D.C."[7] Congress later realized and corrected its error by striking out the incorrect title and inserting the correct: "the *Washington's Birthday* holiday."[8] Still, not all members of Congress are so friendly to the holiday's age-honored title. Bills have recently been introduced that would change it to Presidents' Day.[9] Congress, however, has stood firm: The name of the holiday is Washington's Birthday.

Some members of Congress are trying to reverse the drift toward Presidents' Day. A bill recently introduced to the Senate deplores "efforts to degrade George Washington's Birthday into an amorphous and ultimately meaningless 'Presidents Day' holiday"[10] and proposes that Congress reaffirm the holiday as Washington's Birthday. Another bill would honor our First President by "requiring all entities and officials of the United States Government, as well as federally funded publications, to refer to [the] day as 'Washington's Birthday.'"[11] Though

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[5] *See* ALASKA STAT. § 44.12.010 (Mitchie 2000); ARIZ. REV. STAT. § 1-301 (2000) ("Lincoln/Washington Presidents' Day"); DEL. CODE ANN. tit. 1, § 501 (2000); HAW. REV. STAT. § 8-1 (2000); 205 ILL. COMP. STAT. 630/17 (West 2000); NEB. REV. STAT. ANN. § 25-2221 (Mitchie 2000); N.M. STAT. ANN. § 12-5-2 (Mitchie 2000); N.D. CENT. CODE § 49-23-01 (2000); OKLA. STAT. tit. 25, § 82.1 (2000); OR. REV. STAT. § 187.010 (1997); 44 PA. CONS. STAT. § 11 (1999); TEX. GOV'T CODE ANN. § 662.003 (2000); UTAH CODE ANN. § 63-13-2 (2000) ("Washington and Lincoln Day"); WASH. REV. CODE ANN. § 1.16.050 (2000). *But see* MASS. ANN. LAWS ch. 6, § 15VV (2000) (establishing May 29 as Presidents' Day, in honor of the four United States presidents who were from Massachusetts).

[6] Pub. L. No. 105-100 § 147, 111 Stat. 2180 (1997).

[7] *Id.* (emphasis added).

[8] Pub. L. No. 105-277 § 163, 112 Stat. 2681-149 (1998).

[9] *See, e.g.*, S. 429, 106th Cong. (1999) (proposing that the holiday be designated Presidents' Day in honor of Washington, Lincoln, and Roosevelt).

[10] S.J. Res. 543, 106th Cong. (1999).

[11] 145 CONG. REC. S4897 (daily ed. May 6, 1999) (statement of Senator Warner, introducing the George Washington Bicentennial Act of 1999, S. 978, 106th Cong. (1999)).

Congress has not adopted these proposals, it has nevertheless chosen to maintain the name, and the meaning, that President Arthur gave the holiday long ago.

One-hundred and ten years after the inception of the holiday, the Advisory Committee (in an October 20, 1995 meeting[12]) considered whether it should follow the drift of public usage and remove Washington's Birthday from the Appellate Rules. At that meeting Mr. Bryan Garner, a consultant to the Standing Committee, proposed changing the holiday's title as part of the original comprehensive stylistic revision of the Appellate Rules. A footnote in Mr. Garner's report said the change was a "necessary update." Judge Easterbrook, the liaison from the Standing Committee, asked where the apostrophe should appear in the holiday's title — whether it should be "President's" or "Presidents'." The Advisory Committee chose the latter, since more than one president was implicated. Someone asked Mr. Garner from what authority the change had come. He explained that he had followed the *Random House Dictionary*'s designation of Washington's Birthday as Presidents' Day.[13] Professor Carol Mooney, the Advisory Committee's reporter, commented that the statute[14] actually said Washington's Birthday; this produced a laugh, but nothing more. The Advisory Committee then approved the change, accepting Mr. Garner's implicit explanation that Presidents' Day was more current and reflected existing practices.

The *Random House Dictionary*, Mr. Garner's authority for the revision, assumes that the text of the Monday Holiday Law changed Washington's Birthday to Presidents' Day. The dictionary defines Washington's Birthday as follows: "(1) February 22, *formerly observed as a legal holiday* in most states of the United States in honor of the birth of George Washington. (2) See Presidents' Day."[15] It defines Presidents' Day as "the third Monday in February, *a legal holiday* in the United States, commemorating the birthdays of George Washington and Abraham

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[12] The written minutes of this meeting only summarize the proceedings. The account presented here is derived from the audio recording of the meeting, as related by John K. Rabiej, Chief of the Rules Committee Support Office of the Administrative Office of the United States Courts.

[13] *See* THE RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE 2145 (2d ed. 1987) (hereinafter DICTIONARY) (defining "Washington's Birthday"); *id.* at 1530 (defining "Presidents' Day").

[14] Professor Mooney was apparently referring to 5 U.S.C. § 6103 (1994).

[15] DICTIONARY, *supra* note 13, at 2145 (emphasis added).

Lincoln."[16] But the dictionary is wrong. Presidents' Day is not a federal holiday, and only a handful of states have legally adopted it.[17]

At present, the Federal Rules of Appellate Procedure are the only federal procedural rules to use the term Presidents' Day. Washington's Birthday is used by the Federal Rules of Civil Procedure (Rules 6 and 77), the Federal Rules of Criminal Procedure (Rules 45 and 56), the Federal Rules of Bankruptcy Procedure (Rule 9006), the Rules of the United States Court of Appeals for Veterans Claims (Rule 26), the Rules of Practice and Procedure of the United States Tax Court (Rule 25), the Rules of the United States Court of International Trade (Rules 6 and 82), and the Rules of the United States Court of Federal Claims (Rules 6 and 77).

Thus, to the extent the Advisory Committee aspired in 1995 to initiate a trend, its leadership has apparently gone without federal followers. The 1995 change remains a novelty, a widowed precedent that conflicts with the federal statute. Absent an unlikely change of heart by Congress, the Advisory Committee should consider amending Rules 26 and 45 to restore the designation of the holiday as Washington's Birthday.

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[16] *Id.* at 1530 (emphasis added).
[17] *See supra* footnote 5 (listing states that have formally adopted the title Presidents' Day).

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

FROM: **Professor Dave Schlueter, Reporter**

RE: **Rules Governing § 2254 and § 2255 Proceedings**

DATE: **September 26, 2000**

Following the Standing Committee's approval of the Section 2254 and Section 2255 Rules, a law professor at American University spotted a minor, technical, problem with those rules and forwarded his comments to Mr. Peter McCabe. As noted in the attached memo, the corrections were made to the rules before they were published.

More recently, the Committee has received a memo from two counsel suggesting that the appropriate Committee consider modifying the model form for motions under § 2255 proceedings. That memo is attached. As far as I know, the Criminal Rules Committee has not, at least in the last 12 years, ever focused on the standard forms that accompany those rules. Indeed, as noted in the attached opinion, those forms have not been amended since 1982.

If the Committee is inclined to consider amendments to the standard forms, it might be worth considering whether the rules themselves should be "restyled" at some point. At least one member of the Standing Committee noted at the June 2000 meeting that the § 2254 and § 2255 Rules are not gender-neutral.

Both of these items are on the agenda for the October meeting.

MEMO TO: **Judge Davis (Fax 318-593-5280)**

FROM: **Professor Dave Schlueter, Reporter**

RE: **"Habeas Corpus" Rules--Publication**

DATE: **July 12, 2000**

In the habeas rules package that was approved by the Standing Committee for publication in June, we changed a cite to 18 U.S.C. § 3006A(g) to § 3006, because the cite to the more specific paragraph number was no longer correct. That change is supposed to take place in Rule 6(a) of the Rules Governing Section 2254 Proceedings and Rule 8(c) of the Rules Governing Section 2255 Proceedings. This is really in the nature of what we have often referred to as a conforming or technical change.

We have a potential problem. Professor Ira Robbins of American University School of Law apparently read the proposed changes and noticed a glitch. He agrees that the cite should be changed in the two rules cited above, but noted that the cite to § 3006A(g) also appears in two other rules that the Advisory Committee did not catch. Similar changes should be made to Rule 8(c) of the Section 2254 Rules and Rule 6(a) of the Section 2255 Rules.

Peter McCabe alerted me to the problem and I asked him to check with the Habeas Subcommittee for their views. Both Judge Miller and Judge Carnes agree that the change should be made and both believe that we should make the change now, before publication. I tend to agree.

This is a minor, noncontroversial and nonsubstantive change and can be fixed by simply inserting the two additional rules and the accompanying notes.

If you agree that we should fix this now, we probably need to alert Judge Scirica and determine if the Standing Committee needs to approve formally the change before publication.

We should probably resolve this in the next week.

Cc **Judge Carnes (Fax 334-223-7676)**
Judge Miller (Fax 757-222-7027)
Peter McCabe (Fax 202-502-1755

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Leonidas Ralph Meacham, Director
Administrative Office of the United States Courts
One Columbus Circle, N.E.
Washington, D.C. 20544

Re: Model Form for Motions Under 28 U.S.C. § 2255

Dear Mr. Meacham:

We write to suggest that the Administrative Office of the United States Courts (the "AO") or the appropriate rules committee consider modifying the model form for motions under 28 U.S.C. § 2255.

In a recent decision, the Third Circuit considered that form in light of the 1996 enactment of the Antiterrorism and Effective Death Penalty Act. In *United States v. Thomas*, No. 98-3460, 2000 U.S. App. LEXIS 18338 (3d Cir. Aug. 1, 2000), the Honorable Maryanne Trump Barry wrote:

> CJA Counsel argue that the form distributed to habeas petitioners by the Clerk of the Court for the Western District of Pennsylvania should be changed. Counsels' point is well-taken. The form instructs petitioners to "[s]tate *concisely* every ground," to "allege facts in support of the ground or grounds," and to "[t]ell your story *briefly*". App. at 8 (emphasis in original). These directives, which emphasize brevity, may well place a petitioner in a "Catch-22" situation, wherein he or she may strive to meet that requirement at the risk of summary dismissal for failure to plead sufficient grounds or facts. Moreover, this form resembles the Model form contained in the habeas rules, a form which has not been changed since 1982. Prior to the AEDPA, a petitioner whose factual allegations were too brief had the opportunity to come back in without bumping up against a statute of limitations. Accordingly, we recommend that the district courts amend their forms in the following ways. First, the form might encourage petitioners to specifically plead facts sufficient to support their claims. Second, the form might warn petitioners that, due to the AEDPA's period of limitations, they may not have the opportunity to amend their petitions at a later date. Further, the form could perhaps instruct petitioners that while an amendment to clarify or to offer further factual support

1482

> may be permitted at the discretion of the District Court, an amendment which seeks to introduce a new claim or a new theory into the case will not be permitted after the statute of limitations has expired.
>
> These types of amendments to the standard habeas forms would be in keeping with this Court's recognition in *United States v. Miller*, 192 F.3d 644, 649 (3d Cir. 1999), that the AEDPA has "dramatically altered" the nature of federal habeas proceedings. They would also be in keeping with the prophylactic rule announced in *Miller, see id.* at 646, which was aimed both at promoting judicial efficiency in these proceedings, and insuring that federal habeas petitioners fairly have their one chance to obtain collateral relief, *see id.* at 651.

Thomas, supra, at n. 6 (a copy of the slip opinion is enclosed).

The model form that accompanies the Rules Governing Section 2255 Proceedings includes the admonitions about brevity and conciseness. Our research indicates that many district courts distribute AO 243, which includes the references that concerned the Third Circuit in *Thomas*. Even those courts that do not use the AO form generally use a similar form that includes the same instructions about brevity. For example, the District of Maryland's form instructs inmates to "State BRIEFLY ever ground on which you claim you are being held unlawfully. BRIEFLY summarize the facts supporting each ground." (emphasis original). The Northern District of Texas' form instructed that inmates should "State concisely ever ground on which you claim you are being held unlawfully. Summarize briefly the facts supporting each ground." (emphasis original). The Northern District of Mississippi's form includes a space to write supporting facts but instructs that the movant should "Tell your story *briefly* without citing legal cases or other authority)." (emphasis original). While we have not canvassed all of the district courts, it seems certain that a majority of them distribute forms for use by Section-2255 movants that implicate the concerns described in *Thomas*.

We are aware that, as a member of the court that decided *Thomas,* the chair of the Committee on Rules of Practice and Procedure, Judge Scirica, is undoubtedly aware of the concerns raised by the panel in that case. Nonetheless, we thought it appropriate to send this letter to the AO in order to suggest the need for some action in light of the Third Circuit's recommendation.

Very truly yours,

Robert L. Byer

Robert L. Byer

David R. Fine

Enclosure

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*2000 U.S. App. LEXIS 18338, **

UNITED STATES OF AMERICA, Appellee v. LEROY THOMAS, a/k/a Sheeba Leroy Thomas, Appellant

No. 98-3460

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

2000 U.S. App. LEXIS 18338

April 26, 2000, Argued

August 1, 2000, Filed

PRIOR HISTORY: [*1] ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA. D.C. Crim. No.: 95-cr-00068-3. District Judge: Honorable William L. Standish.

DISPOSITION: Vacated and remanded for proceedings in accordance with this opinion.

COUNSEL: David R. Fine, Esq., (Argued) Robert L. Byer, Esq. James T. Tallman, Esq., Kirkpatrick & Lockhart, L.L.P., Pittsburgh, Pennsylvania Attorneys for Appellant.

Bonnie R. Schleuter, (Argued) Assistant United States Attorney, United States Attorney's Office, Western District of Pennsylvania, Pittsburgh, Pennsylvania Attorney for Appellee.

JUDGES: Before: BECKER, Chief Judge, BARRY, and BRIGHT,* Circuit Judges

* The Honorable Myron H. Bright, United States Circuit Judge for the Eighth Circuit, sitting by designation.

OPINIONBY: BARRY

OPINION:

OPINION OF THE COURT

BARRY, Circuit Judge:

This appeal requires us to decide whether the relation back of amendments provision of Rule 15 of the Federal Rules of Civil Procedure ("Fed. R. Civ. P.") is consistent with 28 U.S.C. § 2255 and the rules governing § 2255 proceedings, such that an amendment to a timely filed § 2255 petition may relate back to the date [*2] of the petition after the expiration of the one-year period of limitations prescribed by the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"). We hold that it can. Under Fed. R. Civ. P. 15 (c), an amendment which, by way of additional facts, clarifies or amplifies a

claim or theory in the petition may, in the District Court's discretion, relate back to the date of that petition if and only if the petition was timely filed and the proposed amendment does not seek to add a new claim or to insert a new theory into the case. Accordingly, we will vacate the District Court's summary dismissal of Thomas's petition and will remand for the Court to determine whether petitioner's proposed amendment does or does not relate back to the date of his petition.

I.

The facts underlying this appeal are simply stated. In 1995, a jury in the Western District of Pennsylvania found petitioner Leroy Thomas ("Thomas") guilty of conspiracy to distribute cocaine and cocaine base in violation of 21 U.S.C. § 846. Thomas was sentenced to 135 months in prison to be followed by five years of supervised release. He appealed, and we affirmed his conviction and sentence. The Supreme [*3] Court denied Thomas's petition for a writ of certiorari on May 12, 1997.

Thomas, pro se, thereafter timely filed a § 2255 petition. The petition consisted of a standardized form provided by the Clerk of the Court for the Western District of Pennsylvania which directs petitioners to:

> (9) State concisely every ground on which you claim that you are being held unlawfully. CAUTION: If you fail to set forth all grounds in this motion, you may be barred from presenting additional grounds at a later date. You must allege facts in support of the ground or grounds which you choose. A mere statement of grounds without facts will be rejected.
>
> (a) Grounds
>
> (b) Supporting FACTS (Tell your story briefly without citing cases or law).

App. at 8 (emphasis in original). Thomas completed the form and, in response to item 9(a), outlined a veritable laundry list of grounds in a two-page attachment. n1 In response to item 9(b), soliciting supporting facts, Thomas wrote: "facts will be presented in a separate memorandum of law in support of petition." On May 6, 1998, one day after mailing his § 2255 petition and six days prior to the expiration of the AEDPA's one-year [*4] period of limitations, Thomas filed a "Motion to Hold 2255 Petition in Abeyance until Petitioner Submits Memorandum of Law in Support of the Petition," which he represented would be submitted within sixty to ninety days. He argued that he needed additional time because the "issues are complicated, requiring an extensive review" of the record and because his time was limited due to a prison work assignment.

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n1 Thomas listed twenty-six separate grounds, but misnumbered two, resulting in an undercount such that there appear to be only twenty-four. Accordingly, in quoting the grounds in full below, we have labeled the erroneously double-counted issues as 8[A], 8[B], 14[A] and 14[B]:

> Issue Number 1: Defense counsel was ineffective in failing to argue that the sentence and conviction were fruit from a poisonous tree and

is[,] therefore[,] in violation of the Fourth Amendment of the Constitution.

Issue Number 2: Counsel was ineffective in failing to argue that the indictment was illegal because it was fruit from a poisonous tree.

Issue Number 3: Defense counsel was ineffective in failing to move for dismissal of the indictment because it was not brought about within 30 days from my arrest.

Issue Number 4: Defense counsel was ineffective in failing to file a motion to dismiss the indictment where it was not signed by the foreperson of the grand jury and where it was not properly sealed.

Issue Number 5: Defense counsel was ineffective where he failed to request a mistrial when the prosecution promised to call witness but failed to subsequently call such witness.

Issue Number 6: Defense counsel was ineffective in failing to call defense witnesses after he promised petitioner that he would.

Issue Number 7: Defense counsel was ineffective in failing to advise [ ] petitioner that it was his right to decide whether to testify in his defense.

Issue Number 8[A]: The Government violated the Jencks and Brady Act by failing to turn over certain statements of its witness[es] after [they] testified.

Issue Number 8[B]: The prosecution committed serious misconduct by misrepresenting and defrauding the court and defense.

Issue Number 9: The government committed prosecutorial misconduct in the closing argument.

Issue Number 10: Defense counsel was ineffective in failing to argue before the court that the sole government [witness] before the grand jury committed perjury which was material to the matter at hand.

Issue Number 11: The prosecution committed misconduct at trial by presenting perjured testimonies of its witnesses:

1. Troy Saunders
2. Benjamin Day
3. Larry Humphries
4. Edward Shied

Issue Number 12: Defense counsel was ineffective in failing to [object to] the introduction of the guns allegedly found in apartment next door to petitioner.

Issue Number 13: The prosecution committed misconduct by advising defense counsel that it will not be introducing guns into trial and then by turning around and introducing the same weapons into evidence.

Issue Number 14[A]: The prosecution violated Rule 16 of the Discovery Rule by failing to advise the defense of the evidence it intended to

introduce as its case-in-chief at trial.

Issue Number 14[B]: Defense counsel was ineffective in failing to interview the prosecution witnesses before trial.

Issue Number 15: Defense counsel was ineffective in failing to interview defense witnesses.

Issue Number 16: The government failed to prove that the substance allegedly involved in the offense was crack as defined in the sentencing guidelines.

Issue Number 17: Defense counsel was ineffective in failing to appeal order denying probable cause motion.

Issue Number 18: Defense counsel was ineffective in failing to appeal the court's order denying petitioner's motion to dismiss indictment based on perjured testimony.

Issue Number 19: Defense counsel was ineffective in failing to argue on appeal that the evidence was insufficient as a matter of law.

Issue Number 20: Petitioner's sentence and conviction is in violation of double jeopardy and the due process clause of the Constitution of the United States.

Issue Number 21: The government violated Brady by failing to disclose to the defense that it had made deals with its witnesses.

Issue Number 22: Defense counsel was ineffective in failing to object to the variance between the evidence presented to the grand jury and the evidence presented at trial.

Issue Number 23: Defense counsel was ineffective in not objecting to the Government's witnesses's in-court identification of petitioner.

Issue Number 24: Defense counsel was ineffective in failing to impeach the prosecution's witnesses with their prior inconsistent testimonies and statements.

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[*5]

The government, in its response to the motion, contended that Thomas's request for extra time and permission to file a memorandum of law constituted an impermissible end-run around the AEDPA's one-year period of limitations. It maintained, as well, that the grounds set forth in Thomas's petition were vague, conclusory, and lacking in factual support and, therefore, were insufficient to entitle him to any relief whatsoever. The District Court agreed, and on June 29, 1998 denied Thomas's request to file his proposed memorandum because it would constitute an amendment beyond the AEDPA's period of limitations and dismissed the petition on the ground that it failed to set forth a cause of action as required by Rule 2 of the Federal Rules Governing § 2255 Proceedings. The Court stated:

> Defendant has attached a two-page statement setting forth 24 issues which he alleges to be the grounds for his motion. The statement of these issues, however, is entirely conclusory and details none of the supporting facts. As to the supporting facts, defendant alleges "facts will be presented in a separate Memorandum of Law in support of petition[.]" Were defendant to file a memorandum setting forth
> [*6] the facts supporting his grounds for the motion at the present time, or in the future, the memorandum would, in effect, amend

> defendant's motion in a material respect after the expiration of the one-year limitation period provided by Section 2255.

Memorandum Order at 2-3.

Thomas filed a motion for reconsideration pursuant to Fed. R. Civ. P. 59, asserting that under Rule 15(c)'s provision allowing the relation back of amendments, the District Court should have permitted him to amend his petition with a memorandum of law based on the same "conduct, transaction, or occurrence as alleged in the original complaint." The Court denied Thomas's motion for reconsideration and subsequently denied his request for a certificate of appealability.

On September 17, 1999, this Court granted a certificate of appealability as to the following issues: (1) whether the District Court erred in determining that it lacked the discretion to accept petitioner's memorandum of law because it would be filed out of time; and (2) whether Rule 15 is inconsistent with 28 U.S.C. § 2255 and with the rules governing § 2255 and is, therefore, inapplicable to § 2255 petitions. We also [*7] appointed counsel ("CJA Counsel") to represent petitioner, and they have ably done so both in their briefs and at oral argument. Simultaneously with the filing of their opening brief, CJA counsel moved to expand the scope of the certificate of appealability to include consideration of the factual sufficiency of Thomas's petition. This Court granted the request, including in the certification: (1) whether the original § 2255 petition included sufficient facts to avoid summary dismissal; and (2) whether, in light of the strict one-year time limit imposed by the AEDPA, district courts confronted with § 2255 petitions which the courts deem to include too few facts should allow additional filings only for the purpose of clarifying and recording factual detail.

II.

The District Court had jurisdiction pursuant to 28 U.S.C. §§ 2255 and 1331. We have jurisdiction under 28 U.S.C. § 1291. Typically, we would review a District Court's order denying a motion to amend for abuse of discretion. See United States v. Duffus, 174 F.3d 333, 336 (3d Cir. 1999), cert. denied, 145 L. Ed. 2d 138, 120 S. Ct. 163 (1999). Here, however, [*8] the District Court did not exercise its discretion in denying the amendment but, rather, apparently believed that it did not have the authority to apply Rule 15 to a § 2255 petition. The question of whether Rule 15 applies to § 2255 petitions implicates the interpretation and application of legal precepts; therefore, our standard of review is plenary. See Cooney v. Fulcomer, 886 F.2d 41, 43 (3d Cir. 1989). We also exercise plenary review over the legal conclusions which prompted the District Court to summarily dismiss Thomas's petition. See Rios v. Wiley, 201 F.3d 257, 262 (3d Cir. 2000).

A.

The Federal Rules of Civil Procedure apply to habeas corpus proceedings "to the extent that the practice in such proceedings is not set forth in statutes of the United States and has heretofore conformed to the practice in civil actions." Fed. R. Civ. P. 81(a)(2). In addition, the rules governing § 2255 proceedings provide that:

> If no procedure is specifically prescribed by these rules, the district court may proceed in any lawful manner not inconsistent with these rules, or any applicable statute, and may apply the Federal Rules of Criminal Procedure or the Federal [*9] Rules of Civil Procedure, whichever it deems most appropriate, to motions filed under these rules.

Fed. R. § 2255 Proceedings 12 (emphasis added). Neither 28 U.S.C. § 2255 nor the rules governing § 2255 proceedings explicitly proscribes the relation back of amendments. Rather, the statute and governing rules are silent.

The procedures applied to habeas petitions filed after April 24, 1996, the effective date of the AEDPA, and, indeed, the very raison d'etre of the AEDPA itself do, however, present a potential inconsistency with the language and spirit of Rule 15(c). On the one hand, district courts maintain a liberal policy in non-habeas civil proceedings of allowing amendments to correct a defective pleading or to amplify an insufficiently stated claim and relating those amendments back to the date of the original filing when the amendments might otherwise have been barred by the applicable statute of limitations. On the other hand, Congress clearly intended to limit collateral attacks upon judgments obtained in federal criminal cases, an intent evidenced by the AEDPA's limitations period for filing petitions of one year from "the date on which [*10] the judgment of conviction becomes final." 28 U.S.C. § 2255; see generally United States v. Miller, 197 F.3d 644, 651 (3d Cir. 1999). The government posits that the tension between Rule 15(c) and the AEDPA requires us to hold that Rule 15(c) cannot apply to habeas proceedings in the same manner in which it applies to other civil proceedings. We disagree.

In United States v. Duffus, 174 F.3d 333 (3d Cir. 1999), cert. denied, 145 L. Ed. 2d 138, 120 S. Ct. 163 (1999), this Court addressed the apparent inconsistency between Rule 15(a) and the AEDPA. There, Duffus, proceeding pro se, filed a § 2255 petition seeking relief from his federal conviction and sentence for various offenses, including conspiracy to distribute cocaine, RICO and money laundering. The petition was deemed timely because Duffus had filed it within the one-year grace period afforded petitioners after the AEDPA's effective date. In the petition, Duffus asserted that his attorney had been ineffective in failing to contend on appeal that the evidence against Duffus was insufficient to convict him of money laundering and in failing to object to the District [*11] Court's use of the sentencing guidelines in effect at the time of sentencing as opposed to those in effect at the time Duffus allegedly withdrew from the conspiracy. In addition, Duffus asserted that at sentencing the District Court had miscalculated the quantity of drugs attributable to him.

More than six months after filing his petition, and after the one year grace period accorded petitioners after AEDPA's effective date of April 24, 1996 had run, Duffus moved to amend the petition to add another ineffective assistance of counsel claim, this one arising from his attorney's alleged failure to move to suppress drug evidence. Adopting the Magistrate Judge's Report and Recommendation, the District Court denied Duffus's motion to amend because of Duffus's delay in presenting that claim and dismissed the petition without an evidentiary hearing. The District Court had earlier allowed Duffus thirty to sixty days to supplement his petition, but Duffus waited six months before seeking leave to amend. Additionally, he had had the benefit of the six years since his conviction, the one-year grace period following the enactment of the AEDPA, and the six months since the filing of his petition. [*12] "There was nothing in [Duffus's] motion to amend," found the Court, "that could not have been included in the original motion." Id. at 336.

On appeal, this Court noted that under Rule 15(a), a petitioner may amend his or her pleading once as a matter of course at any time before a responsive pleading is served. n2 The government, however, had already filed a responsive pleading in Duffus's case. Therefore, Duffus could only amend his pleading "by leave of court which leave shall be freely given when justice so requires." Id . at 337 (quoting Fed. R. Civ. P. 15(a)). We stated that leave to amend should be freely granted unless there is evidence of "undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowing the amendment or futility of amendment." Id. (citing Foman v. Davis, 371 U.S. 178, 182, 9 L. Ed. 2d 222, 83 S. Ct. 227 (1962)). Moreover, we noted that "ordinarily delay alone is not a basis to deny

a motion to amend." Duffus, 174 F.3d at 337. Nevertheless, we affirmed the District Court's [*13] denial of Duffus's motion to amend in light of the "special situation" created by the AEDPA's one-year period of limitations with its recognized grace period. Had the District Court granted Duffus's motion to add a new claim, we reasoned, it would have "frustrated the intent of Congress that claims under 28 U.S.C. § 2255 be advanced within one year after a judgment of conviction becomes final[.]" Id.

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n2 Rule 15(a) states in relevant part:

> (a) Amendments. A party may amend the party's pleading once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, the party may so amend it at any time within 20 days after it is served. Otherwise a party may amend the party's pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires.

Fed. R. Civ. P. Rule 15(a).

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Duffus stated, however, albeit in dictum, that in certain circumstances, a district court could allow an amendment to a § 2255 petition after the expiration of the one-year period of limitations. Specifically, we noted that, while it would frustrate the intent of Congress to allow Duffus to amend his petition by adding a "completely new" ground for relief after the one-year period of limitations had run, "certainly the court could have permitted an amendment to clarify a claim initially made." Id. (emphasis added). "While Duffus asserted in his initial motion that his attorney had been ineffective, the particular claim with respect to failing to move to suppress evidence was completely new. Thus, the amendment could not be deemed timely under the 'relation back' provisions of Fed. R. Civ. P. 15(c)." Id. The facts of this case cause us to go where Duffus did not have to go and to determine whether Duffus's dictum regarding the applicability of Rule 15(c) to a § 2255 petition should become the law of this Circuit.

The purpose of Rule 15 "is to provide maximum opportunity for each claim to be decided on its merits rather than on procedural technicalities. This is demonstrated [*15] by the emphasis Rule 15 places on the permissive approach that the district courts are to take to amendment requests, no matter what their character may be[.]" 6 Charles Alan Wright & Arthur R. Miller, Federal Practice & Procedure § 1471 (2d ed. 1990)(2000 Supp.) (footnotes omitted) (hereinafter "Fed. Prac. & Proc."). In the context of non-habeas civil proceedings, a party may not allege an entirely new claim by amendment after the expiration of the statute of limitations. A party may, however, attempt to raise and to relate back a new claim which would otherwise have been barred by the statute of limitations as long as the claim "arose out of the conduct, transaction, or occurrence set forth . . . in the original pleading." Fed. R. Civ. P. 15(c)(2). n3 The one-year period of limitations contained in the AEDPA is a statute of limitations like any other statute of limitations in a civil proceeding. See Kapral v. United States, 166 F.3d 565, 567 (3d Cir. 1999). And Duffus teaches that, as in non-habeas civil proceedings, a party cannot amend a § 2255 petition to add a completely new claim after the statute of limitations has expired. Here, we are dealing with yet another [*16] type of amendment:

one which, if we take Thomas at his word, merely seeks to correct a pleading deficiency by expanding the facts but not the claims alleged in the petition. n4 An amendment for that purpose would clearly fall within Rule 15(c). See 6 Fed. Prac. & Proc. § 1474.

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n3 Rule 15(c) provides in relevant part: (c) Relation Back of Amendments. An amendment of a pleading relates back to the date of the original pleading when (1) relation back is permitted by the law that provides the statute of limitations applicable to the action, or (2) the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading[.] Fed. R. Civ. P. Rule 15(c).

n4 Although we do not know precisely what Thomas would have set forth in the memorandum he sought to submit, it is probably fair to say, as he said, that he intended to amplify his twenty-six grounds with additional facts. See App. at 8 ("facts will be presented in a separate memorandum of law in support of petition"). Because he has not declared an intention to raise a new claim, we need not reach the issue of whether a new claim would be proscribed if that claim "arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading." Rule 15(c)(2). We note, however, that at least two other circuits have applied Rule 15(c)(2)'s "conduct, transaction, or occurrence" test to cases in which § 2255 petitioners sought to add new claims to their original petitions after the expiration of the statute of limitations. See United States v. Pittman, 209 F.3d 314, 317 (4th Cir. 2000)(applying Rule 15(c)(2) and affirming denial of permission to amend because proposed amendment arose from separate occurrence); United States v. Craycraft, 167 F.3d 451, 457 (8th Cir. 1999)(applying Rule 15(c)(2) and affirming denial of permission to amend because proposed claim was "distinctly separate" from claims already pled).

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[*17]

A § 2255 petition provides a federal prisoner the opportunity to seek one full collateral review of his or her conviction and sentence. While we certainly do not suggest that a prisoner can willy nilly file papers at his or her whim, to eliminate or to compromise what will likely be a prisoner's only opportunity to collaterally challenge a sentence by refusing to even consider whether a proposed amendment relates back to his or her petition would be to elevate procedural rules over substance. Thus, we hold that Rule 15(c)(2) applies to § 2255 petitions insofar as a District Court may, in its discretion, permit an amendment to a petition to provide factual clarification or amplification after the expiration of the one-year period of limitations, as long as the petition itself was timely filed and the petitioner does not seek to add an entirely new claim or new theory of relief.

The District Court's denial of Thomas's request to file a memorandum of law and its dismissal of his petition pre-dated our ruling in Duffus. We assume that the District Court, without Duffus's guidance, was operating under the erroneous impression that it did not have the authority under Rule 15 to allow [*18] an amendment to a habeas petition. As a result, the Court did not seek to determine whether Thomas would have advanced a new claim or new theory or whether he was merely seeking to add meat to the bare bones of the numerous grounds he listed in his petition.

In any event, post-Duffus, it is clear that a District Court does have the authority under Rule 15(a) to consider a motion to amend a habeas petition and, post-Thomas, to consider whether the proposed amendment relates back to the filing date of the petition after the expiration of the statute of limitations. Whether Thomas's proposed amendment should be permitted to relate back to the

date of his petition is a question for the District Court to consider on remand. n5

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n5 The government argues that remand would be futile because it is inevitable that the District Court will deny Thomas permission to amend. This argument is based on the government's assumption that Thomas's stated reason for the amendment -- the need for more time -- is inadequate because he had sufficient time to familiarize himself with the facts of his own case. We express no opinion on the adequacy or inadequacy of Thomas's reason for requesting an extension of time, but we disagree that the District Court need not address the issue.

- - - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - - -

[*19]

B.

Prior to oral argument, this Court enlarged the scope of the certificate of appealability to include the issue of whether Thomas's § 2255 petition pled sufficient facts to avoid summary dismissal. n6 This is a question of some significance because were we to find that none of the grounds alleged in the petition would entitle Thomas to relief, the petition would be subject to summary dismissal. See Fed. R. § 2255 Proceedings 4(b). n7 Indeed, we have previously held that vague and conclusory allegations contained in a § 2255 petition may be disposed of without further investigation by the District Court. See United States v. Dawson, 857 F.2d 923, 928 (3d Cir. 1988). Were all of Thomas's claims vague or conclusory, it could well be argued that any later filing would, in effect, constitute an attempt to add a new claim or theory, an addition which Duffus would prohibit.

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n6 CJA Counsel argue that the form distributed to habeas petitioners by the Clerk of the Court for the Western District of Pennsylvania should be changed. Counsels' point is well-taken. The form instructs petitioners to "state concisely every ground," to "allege facts in support of the ground or grounds," and to "tell your story briefly". App. at 8 (emphasis in original). These directives, which emphasize brevity, may well place a petitioner in a "Catch-22" situation, wherein he or she may strive to meet that requirement at the risk of summary dismissal for failure to plead sufficient grounds or facts. Moreover, this form resembles the Model form contained in the habeas rules, a form which has not been changed since 1982. Prior to the AEDPA, a petitioner whose factual allegations were too brief had the opportunity to come back in without bumping up against a statute of limitations. Accordingly, we recommend that the district courts amend their forms in the following ways. First, the form might encourage petitioners to specifically plead facts sufficient to support their claims. Second, the form might warn petitioners that, due to the AEDPA's period of limitations, they may not have the opportunity to amend their petitions at a later date. Further, the form could perhaps instruct petitioners that while an amendment to clarify or to offer further factual support may be permitted at the discretion of the District Court, an amendment which seeks to introduce a new claim or a new theory into the case will not be permitted after the statute of limitations has expired.

These types of amendments to the standard habeas forms would be in keeping with this Court's recognition in United States v. Miller, 197 F.3d 644, 649 (3d Cir. 1999), that the AEDPA has "dramatically altered" the nature of federal habeas proceedings. They would also be in keeping with the prophylactic rule announced in Miller, see id. at 646, which was aimed both at promoting judicial efficiency in these proceedings, and insuring that federal habeas petitioners

fairly have their one chance to obtain collateral relief, see id. at 651. [*20]

n7 Rule 4(b) states, in relevant part:

> The motion, together with all the files, records, transcripts, and correspondence relating to the judgment under attack, shall be examined promptly by the judge to whom it is assigned. If it plainly appears from the face of the motion and any annexed exhibits and the prior proceedings in the case that the movant is not entitled to relief in the district court, the judge shall make an order for its summary dismissal[.]

Fed. R. § 2255 Proceedings 4(b).

- - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - -

The District Court held that Thomas's petition was legally insufficient because Thomas failed to set forth facts supporting the grounds alleged. We certainly agree that more than a few of Thomas's twenty-six grounds appear to be quite conclusory and too vague to warrant further investigation. See, e.g., Issues Five, Fourteen and Fifteen (claims involving the alleged failure to interview and to call certain witnesses, with no potential witnesses identified). Some of the grounds, however, do allege sufficient supporting facts. See, e.g., Issues Three (claim that indictment was not brought [*21] within 30 days of arrest), Four (claim that indictment was not properly signed and sealed), Seven (claim that defense counsel failed to advise Thomas of his right to testify) and Eleven (claim that several prosecution witnesses committed perjury and naming the specific witnesses). Needless to say, the District Court may well find that at least some of the claims which do allege sufficient facts are, nevertheless, frivolous. Certain claims, however, such as the claim that defense counsel failed to advise petitioner that he had the right to testify in his own defense, at least on their face present substantial issues upon which the District Court could have proceeded.

We hold, therefore, that the District Court erred in summarily dismissing the petition in its entirety. Rather, the District Court should have taken the less drastic approach of paring down the extraordinarily lengthy list of grounds and proceeding on those -- perhaps only a few in number -- which did allege sufficient facts. And, of course, had the District Court granted Thomas's application to file the memorandum in which he promised to present additional facts, that list, and the facts supporting that list, may well [*22] have changed.

III.

For the foregoing reasons, we hold that under Fed. R. Civ. P. 15(c), a District Court may, in its discretion, permit an amendment which clarifies or amplifies a claim or theory in a timely filed § 2255 petition after the AEDPA's one-year period of limitations has expired. Because the District Court erred in summarily dismissing the petition and in failing to consider whether Thomas's proposed amendment, which we trust he will submit forthwith, relates back to the date of the petition, we will vacate and remand for proceedings in accordance with this opinion.

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

August 25, 2000

Robert L. Byer, Esquire
David R. Fine, Esquire
Kirkpatrick & Lockhart, L.L.P.
Payne Shoemaker Building
240 North Third Street
Harrisburg, Pennsylvania 17101-1507

Dear Messrs. Byer and Fine:

Thank you for your suggestion to modify the model form for motions under 28 U.S.C. § 2255. A copy of your letter was sent to the chair and reporter of the Advisory Committee on Criminal Rules for their consideration.

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

Sincerely,

Peter G. McCabe
Secretary

cc: Honorable W. Eugene Davis
Professor David A. Schlueter

July 18, 2000
Via Fax

MEMORANDUM TO STANDING RULES COMMITTEE

SUBJECT: *Publication of Habeas Corpus Rules for Comment*

In the habeas rules package that was approved for publication in June, a cite to 18 U.S.C. § 3006A(g) was changed to § 3006 in several rules, because the cite to the more specific paragraph number was no longer correct. That change was approved for Rule 6(a) of the Rules Governing Section 2254 Proceedings and Rule 8(c) of the Rules Governing Section 2255 Proceedings.

Professor Ira Robbins of American University School of Law read the proposed changes and advised the Administrative Office that the change should also be made to two other rules that include a cite to the same statute. He agrees that the citation should be changed in the two rules identified above, but suggests that similar changes should be made to Rule 8(c) of the Section 2254 Rules and Rule 6(a) of the Section 2255 Rules.

The Habeas Subcommittee of the Advisory Committee on Criminal Rules (Judge Tommy Miller and Judge Ed Carnes) reviewed the matter and readily concluded that the suggestion should be adopted. The subcommittee recommended that the corrected citations now be included in the package for public comment, because they are consistent with the other changes to the rules and involve only a minor, technical problem.

On behalf of the advisory committee, Judge Davis concurred with the subcommittee's recommendations and requests that the Standing Rules Committee approve including the corrected citations in Rule 8(c) of the Section 2254 Rules and Rule 6(a) of the Section 2255 Rules. Judge Scirica concurs with the committee's recommendations. Please advise my office **no later than July 25**, if you have any concerns with the recommendations.

John K. Rabiej

III-A

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 11, 2000

MEMORANDUM TO STANDING RULES COMMITTEE

SUBJECT: *Financial Disclosure*

The Standing Rules Committee requested the Advisory Committees on Appellate, Bankruptcy, Civil, and Criminal Rules to prepare appropriate rules governing disclosure of financial interests. The Appellate, Civil, and Criminal Rules Committees have drafted pertinent rules and Notes for publication for public comment, which are included in each of the respective committee reports and are attached for convenience. The Bankruptcy Rules Committee continues to work on a draft rule. The complexity inherent in regulating the disclosure of financial interests of interested persons in bankruptcy proceedings requires more time for study.

After the advisory rule committees met in the spring, Judge Scirica asked the reporters to attempt to achieve more uniformity in the language of the three draft financial disclosure rules. The attached side-by-side comparison of the three rules, as revised by the reporters, represents their product. The respective committee chairs have reviewed the revised versions and are satisfied that revisions are consistent with the draft rules approved by their committees.

Although the language of the revised rules is now quite similar, a few differences continue. Some reflect the forum, e.g., district or circuit court, others are unique to a single set of rules, e.g., organizational victims in the criminal rules, while still another reflects the judgment that there is a greater likelihood of misdirected information in civil cases, i.e., the Civil Rules' version requires that a copy of the information be delivered to the individual judge.

A report from the Federal Judicial Center showing the wide variations among the extant local district court and court of appeals rules governing disclosure of financial interests is included. Also attached is a March 8, 2000, letter from Judge Carol Amon, chair of the Committee on Codes of Conduct, expressing the views of her committee on earlier drafts of a financial disclosure rule and recommending that a different approach be taken regarding the extent of disclosure. The advisory rules committees carefully considered the views of the Committee on Codes of Conduct in revising the draft financial disclosure rules.

John K. Rabiej

Attachments

CIVIL RULES	APPELLATE RULES	CRIMINAL RULES
Rule 7.1 Disclosure Statement	**Rule 26.1 Disclosure Statement**	**Rule 12.4. Disclosure Statement**
(a) Who Must File.	**(a) Who Must File.**	**(a) Who Must File.**
(1) Nongovernmental Corporate Party. A nongovernmental corporate party to an action or proceeding in a district court must file two copies of a statement that:	**(1) Nongovernmental corporate party.** Any nongovernmental corporate party to a proceeding in a court of appeals must file a statement that:	**(1) Nongovernmental corporate party.** Any nongovernmental corporate party to a proceeding in a district court must file a statement that:
(A) identifies any parent corporation and any publicly held corporation that owns 10% or more of its stock or states that there is no such corporation, and	**(A)** identifies any parent corporation and any publicly held corporation that owns 10% or more of its stock or states that there is no such corporation, and	**(A)** identifies any parent corporation and any publicly held corporation that owns 10% or more of its stock or states that there is no such corporation, and
(B) discloses any additional information that may be required by the Judicial Conference of the United States.	**(B)** discloses any additional information that may be required by the Judicial Conference of the United States.	**(B)** discloses any additional information that may be required by the Judicial Conference of the United States.
(2) Other Party. Any other party to an action or proceeding in a district court must file two copies of a statement that discloses any information that may be required by the Judicial Conference of the United States.	**(2) Other party.** Any other party to a proceeding in a court of appeals must file a statement that discloses any information that may be required by the Judicial Conference of the United States.	**(2) Organizational Victim.** If an organization is a victim of the alleged criminal activity, the government must file a statement identifying the victim. If the organizational victim is a corporation, the statement must also disclose the information required by Rule 12.4(a)(1).
(b) Time for Filing; Supplemental Filing. A party must: **(1)** file the Rule 7.1(a) statement upon its first appearance, pleading, petition, motion, response, or other request addressed to the court, and	**(b) Time for Filing: Supplemental Filing.** A party must file the Rule 26.1(a) statement with the principal brief or upon filing a motion, response, petition, or answer in the court of appeals, whichever occurs first, unless a local rule requires earlier filing. Even if the statement has already been filed, the party's principal brief must include the statement before the table of contents.	**(b) Time for Filing; Supplemental Filing.** A party must: **(1)** file the Rule 12.4(a) statement upon its first appearance, pleading, petition, motion, response, or other request addressed to the court, and
(2) promptly file a supplemental statement upon any change in the information that the statement requires.	A party must supplement its statement whenever the information that must be disclosed under Rule 26.1(a) changes.	**(2)** promptly file a supplemental statement upon any change in the information that the statement requires.

(c) Form Delivered to Judge. The clerk must deliver a copy of the Rule 7.1(a) statement to each judge acting in the action or proceeding.	**(c) Number of Copies.** If the Rule 26.1(a) statement is filed before the principal brief, or if a supplemental statement is filed, the party must file an original and 3 copies unless the court requires a different number by local rule or by order in a particular case.	

III-C-1

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

FROM: **Professor Dave Schlueter, Reporter**

RE: **Grand Jury Reform—Information Item**

DATE: **September 26, 2000**

Attached are materials concerning proposed reforms to the grand jury system.

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

August 17, 2000

MEMORANDUM TO JUDGES W. EUGENE DAVIS AND DAVID D. DOWD AND PROFESSOR DAVID A. SCHLUETER

SUBJECT: *Grand Jury*

For your information, I have attached copies of statements from three law professors and two Department of Justice officials on proposed reform of the grand jury system. The statement of James K. Robinson, Assistant Attorney General and former member of the Evidence Rules Committee, is particularly comprehensive.

John K. Rabiej

Attachments

cc: Honorable Anthony J. Scirica
Honorable Paul L. Friedman
Professor Daniel R. Coquillette
Peter G. McCabe, Secretary

SUBCOMMITTEE ON THE CONSTITUTION

Committee on the Judiciary

U.S. House of Representatives

Oversight Hearing on "Constitutional Rights and the Grand Jury"

Thursday, July 27, 2000

10:00 a.m.; 2237 Rayburn House Office Building

TENTATIVE WITNESS LIST

James K. Robinson, Assistant Attorney General, Criminal Division, U.S. Department of Justice

Loretta Lynch, United States Attorney for the Eastern District of New York, U.S. Department of Justice

Sara Sun Beale, Professor of Law, Duke University School of Law

Peter J. Henning, Associate Professor of Law and Director of Graduate Studies, Wayne State University Law School

Andrew D. Leipold, Professor of Law, University of Illinois College of Law

Statement of James K. Robinson

Assistant Attorney General

Criminal Division

and

Loretta E. Lynch

United States Attorney

Eastern District of New York

Before the

Subcommittee on the Constitution

Committee on the Judiciary

U.S. House of Representatives

July 27, 2000

Mr. Chairman and members of the Subcommittee, thank you for the opportunity to appear before you today. The Department of Justice is pleased to participate in this hearing on the grand jury. Our federal grand jury system is older than our nation. As a core institution adopted in this nation's earliest days, the grand jury has been the primary instrument used to investigate and charge federal crimes for over two hundred years. Because it is fundamental to our federal criminal justice system, we can and should carefully and regularly examine the grand jury system to make sure that it functions both fairly and effectively.

We would like to share with you today what we believe are the basic elements and goals of our grand jury system, provide you with an overview of how the system is working, and explain the safeguards that the Department of Justice and the courts have put in place to protect individual interests along with the public's interest in bringing criminal offenders to justice. In addition, we are aware that the criminal defense bar has proposed to change the way the federal grand jury functions. It is the Department's view that many of these proposals would eviscerate the effectiveness of the grand jury and impede its vital work. Once you have examined these proposals in detail, we believe that you will conclude, as we have, that it would be detrimental to our system of justice to change a system that so well serves the public interest.

I. Basic Elements and Goals of the Federal Grand Jury System

The grand jury was brought to this country with the English common law. When our nation ratified the Bill of Rights, the grand jury was given a central position in the new government as the sole means by which the United States may initiate felony charges. The United States grand jury, like its English progenitor, is a body of ordinary citizens that serves to protect the innocent and indict those towards whom evidence leads. It has four defining characteristics.

First, the federal grand jury conducts its work in secret. As early as the 17th century, jurors could not be required to divulge to anyone, including the courts, the evidence upon which they had acted. The Supreme Court of the United States and the lower courts have articulated specific reasons for this secrecy. In particular, it prevents those who may be indicted from absconding, ensures that the grand jury is not restrained in its deliberations, and prevents persons subject to indictment or their associates from importuning the grand jurors. The secrecy also prevents subornation of perjury or tampering with the witnesses who may testify before the grand jury and later appear at the trial of those indicted by it,

encourages free and untrammeled disclosures by persons who have information with respect to the commission of crimes, and protects the innocent accused who is exonerated from disclosure of the fact that he has been under investigation, and from the expense of standing trial where there was no probability of guilt. See, e.g., U.S. v. Proctor & Gamble Co., 356 U.S. 677 (1958).

Second, the grand jury is vested with broad powers. Traditionally, the grand jury has been accorded wide latitude to inquire into violations of criminal law. It can subpoena witnesses and documentary evidence, take testimony under oath, and compel testimony by providing immunity. The Supreme Court has repeatedly stated that the grand jury's investigative power must be broad if its public responsibility is adequately to be discharged, and thus the Court has insisted that the grand jury remain free to pursue its investigations unhindered by external influence or supervision. See, e.g., Branzburg v. Hayes, 408 U.S. 665, 700 (1972).

Third, the grand jury is independent from other branches of government. Although it is grounded in the Bill of Rights, it has been described as belonging to no one branch of the institutional government. The grand jury is separate from the executive branch and thus the authority of the prosecutor to seek an indictment is coterminous with the authority of the grand jury to entertain the prosecutor's charges. In our criminal justice system, the power of the prosecutor is derived from, and dependent on, the power given to him by the grand jury. There is no judge or other judicial officer present during the grand jury proceedings. Although judicial review is available where there have been claims of abuse or irregularity, review of the substance of the proceedings is disfavored by the courts. As such, the Supreme Court has held that for a court to review a grand jury indictment on the ground that there was insufficient evidence "would run counter to the whole history of the grand jury institution." Costello v. U.S., 350 U.S. 359, 364 (1956).

Fourth, the grand jury is non-adversarial. Three years prior to the ratification of the Fifth Amendment, an early United States court explained that it is not the grand jury's function "to enquire ... upon what foundation [the charge] may be denied," or to try the suspect's defenses, but instead to examine "upon what foundation [the charge] is made" by the prosecutor. U.S. v. Williams, 504 U.S. 36, 52 (1992), citing Respublica v. Shaffer, 1 U.S. (1 Dall.) 236 (O.T. Phila. 1788). In the words of the modern Supreme Court, "it is axiomatic that the grand jury sits not to determine guilt or innocence, but to assess whether there is adequate basis for bringing a criminal charge." Williams, 504 U.S. at 51.

II. The Functioning of the Modern Day Federal Grand Jury

Today's grand jury continues to implement the fundamental governmental role of securing the safety of the person and property of the citizen. Branzburg v. Hayes, 408 U.S. 665, 700 (1972).

The matters that come before our modern-day federal grand jury are generally the product of substantial investigation and assessment. Before a matter is presented to a grand jury, it undergoes a thorough screening process in our United States Attorneys' offices. Generally, a matter begins when an investigative agency, such as the Federal Bureau of Investigation or the Drug Enforcement Administration, makes an initial determination as to whether a matter should be referred to the United States Attorney's office. Once a referral is made, the United States Attorney's office decides whether it merits further investigation and review. If there is insufficient evidence, or some other defect in the case, the matter may be immediately declined. If the matter has sufficient merit, the United States Attorney's office may seek additional information from the investigating agency or submit it for further review within the office by other prosecutors or supervisors. Ultimately, the United States Attorney's office must decide whether to proceed to the grand jury. The United States Attorneys' Manual (USAM) states that a prosecutor is to present a case to the grand jury for indictment only if he or she "believes that the person's conduct constitutes a Federal offense and that the admissible evidence will probably be sufficient to obtain and sustain a conviction." USAM 9-27.220. If this high standard is satisfied, the United States Attorney's office may submit the indictment to a grand jury for decision.

Because of this thorough review, and the high standard controlling submission of matters to the grand jury, prosecutors refer only meritorious matters to the grand jury. On an annual basis, a significant percentage of all matters referred to United States Attorneys' offices are declined, and are never

presented to a grand jury. Cases in which there is insufficient evidence, no compelling federal interest, or other fundamental flaws are routinely screened out. Because of the exhaustive analysis undertaken by federal prosecutors, approximately 99% of the cases referred to the grand jury result in indictments, and 90% of these cases ultimately result in conviction of the defendant. Of this remaining 10%, less than 2% represent acquittals.

Those matters that ultimately come before grand juries are often complex, detailed, and fact-intensive. They are brought to protect the citizens of the United States from narcotics trafficking, white-collar and organized crime, environmental degradation, terrorism and civil rights abuses, among other crimes. Each year, there are anywhere from 850 to 1360 federal grand juries convened to hear approximately 25,000 matters.

Although the volume of cases that is presented to federal grand juries is high, the number of cases of alleged prosecutorial overreaching is extremely small. While federal grand juries across the nation hear tens of thousands of matters each year, problems have been cited in a minuscule number of cases. A recent report by the National Association of Criminal Defense Lawyers (NACDL) cited 12 cases of alleged prosecutorial abuse in the federal system over the course of the last 19 years. From 1993 to 1999 there were 179,193 criminal matters heard by federal grand juries. In that same time period, the NACDL cites four instances of alleged abuse. Notwithstanding our good record, the Department of Justice takes very seriously any allegations of prosecutorial overreaching and does not tolerate such behavior. We must be careful, however, not to make drastic changes based on such scant evidence of problems.

The complex nature of the matters charged, and the fact that all felony charges must be brought via a grand jury indictment, make the federal grand jury system unique, and distinguish the system from the many different systems that have been put in place at the state level. The Fifth Amendment grand jury right is inapplicable to the states. Unlike other parts of the Bill of Rights, the right to a grand jury has never been applied to the states through the Fourteenth Amendment. Hurtado v. California, 110 U.S. 516 (1884). Moreover, most states do not require – either through their state constitutions or by statute -- the use of a grand jury for felony cases. Of those states that do require the use of the grand jury, many utilize it only for certain types of crimes. Consequently, states utilize the grand jury in comparatively few cases. By contrast, federal prosecutors must use the grand jury in every felony case, unless the defendant has waived grand jury indictment. Thus, the state experience is not a reliable harbinger for the federal system. For this reason, in 1999 the United States Judicial Conference declined to rely on states' experiences with grand jury reform when the Conference studied, and ultimately rejected, proposed reforms to the federal system.

In short, our federal grand jury system is a sound institution, serving the multitude of interests that the public, individuals, the federal government, and our courts have in investigating serious violations of federal law and bringing offenders to justice.

III. Safeguards Built Into Federal Grand Jury System

The Department of Justice and the federal courts have taken steps to ensure that our policies and practices before federal grand juries appropriately balance the rights of the individual and fairness to the accused with the need to protect our citizens against grave dangers.

First, federal prosecutors generally undergo training on grand jury practice. In the last seven years, the Department has sponsored more than two programs each year for federal prosecutors that focus on practice before the grand jury. Additionally, there are numerous annual trainings for federal prosecutors that include instruction on grand jury policies and procedures. Also, since 1961, the Department has provided federal prosecutors with the Grand Jury Practice Manual, which provides detailed, additional guidance specific to federal grand jury practice. This practical handbook on grand jury practice has recently been revised and will be distributed to federal prosecutors nationwide.

Second, the USAM directs prosecutors to protect the rights of subjects and targets during grand jury proceedings. The USAM sets forth the policies and procedures relevant to the work of federal prosecutors. It requires prosecutors to accord to all grand jury witnesses certain warnings and procedural

benefits that surpass in significant respects those mandated by law. Moreover, the USAM regulates the behavior of prosecutors by enumerating over two hundred actions – including the charging of certain offenses – that cannot be undertaken without prior permission from the Department of Justice.

Third, any individual who believes that a prosecutor has acted inappropriately in a grand jury context has a range of options to address overreaching. A witness can seek to quash a subpoena or obtain a protective order, suppress grand jury testimony at trial, expunge prejudicial language from an indictment, or obtain disciplinary action against a prosecutor. In cases where the defendant alleges sufficiently egregious conduct, the court may dismiss the indictment either on due process grounds or as an exercise of its supervisory powers.

In order to substantiate a claim of prosecutorial abuse, a defendant can petition the court for a copy of the grand jury transcript. Rule 6 of the Federal Rules of Criminal Procedure mandates the recording of all matters occurring before the grand jury (other than its deliberations or voting), including the examination of all witnesses and all remarks by the prosecutors. When such a petition is made, the court may review the transcript in camera and, if allegations of abuse are substantiated, may issue to the defendant a copy of relevant parts of the transcript. In addition, regardless of whether any prosecutorial impropriety is alleged, defendants receive the transcripts of testimony by any witnesses who testify at trial. Defendants also receive information about any exculpatory evidence that was revealed during the grand jury proceedings. Although it is typically defendants who petition the court for copies of transcripts, the law provides that any witness can, upon a showing of particularized need, receive a transcript of the grand jury proceeding. These safeguards ensure that the courts can ferret out incidents of prosecutorial overreaching. Our confidence that existing safeguards provide adequate protection in the grand jury setting was echoed last year by the Judicial Conference of the United States when it relied on the existence of such safeguards in its most recent rejection of proposed grand jury reforms.

IV. Assessing the Need for Reforms to Our Federal Grand Jury System

Our grand jury system has changed very little over the last two hundred years because it works: it protects our citizens from crime and it protects the rights of the accused. There have, nonetheless, been intermittent calls for reform of the grand jury system. Most recently, the NACDL has announced its support for legislation to dramatically overhaul the operations of our federal grand jury system. The NACDL proposal is broken down into ten individual recommendations. We would like to address individually the proposals that have been made to alter the grand jury system and the specific problems with each proposal.

Proposal 1: Allow counsel to accompany and advise his or her client inside the grand jury room.

It has long been the prevailing practice that counsel may not accompany the witness inside the grand jury room. The proposal to allow defense counsel to be permitted inside the grand jury room has been considered – and rejected -- by previous Congresses. Proponents of this change argue that counsel is necessary to protect the witness's rights and to deter prosecutorial abuse. As we stated earlier, the grand jury is not a part of the adversarial criminal justice process. It is solely a screening tool to determine whether there is an adequate basis for bringing a criminal charge. We believe that allowing witness counsel to accompany a witness to a grand jury proceeding, would, as a practical matter, destroy the effectiveness of our federal grand jury system.

First, the presence of an attorney in the grand jury room would interfere with the basic function of the grand jury – to thoroughly investigate allegations of violations of federal criminal law. The entire purpose of calling witnesses before the grand jury is to elicit whatever pertinent facts the witness knows. It is essential that witnesses provide truthful, full, unfettered and unsuggested testimony. If counsel were present, the witness might simply look to him or her for guidance on how to respond. A witness may be more likely to repeat the words his attorney whispered to him or her, rather than provide truthful and exhaustive testimony in his or her own words.

Second, the presence of counsel for the witness has the potential to change the federal grand jury from a

body that investigates and charges federal crimes into one that determines guilt or innocence -- and the process from an informal back and forth discussion to an adversarial proceeding. It is not the role of witness counsel to assist the grand jury in its search for truth. Rather, counsel has the responsibility to zealously represent his or her client and protect interests that are often inconsistent with the role of the grand jury. In particular, to the extent that a complete and truthful answer would arguably prejudice the witness in any way, counsel for the witness would not want his or her client to answer. Counsel would likely object to questions he or she regards as irrelevant, overbroad, or technically defective – objections that have historically had no place in grand jury investigations. With counsel present, these proceedings would devolve to arguments about evidentiary issues and other procedural concerns that have no place in the grand jury. Grand jurors themselves regularly pose questions to witnesses. These questions would undoubtedly fail to comport with technical requirements of guilt-determining proceedings; repeated objections by counsel would both disrupt the proceedings and chill grand jurors from making inquiries.

Some counsel might go further than representing a client and attempt to disrupt the proceeding itself. If counsel were present in the grand jury room without the presence of a judge, there would be the potential for some counsel to make frivolous objections, confer with their clients in stage whispers, refer to prejudicial material and otherwise act to impede the proceedings. We doubt that the restrictions on counsel proposed by the NACDL would prevent this disruptive behavior. Even with strict rules, counsel could still communicate through his or her client and disrupt the proceedings. At the same time, we are also deeply skeptical that adequate remedies exist to control disruptive counsel. Some have suggested that the offending counsel could be excluded from the grand jury room. We believe -- and the Judicial Conference has stated -- that courts would rightly be extremely reluctant to interfere in the attorney/client relationship by ordering that a witness's counsel be removed. In addition, there may be a substantial constitutional difficulty with ordering a witness to obtain other counsel against his wishes. The Judicial Conference has also voiced its concern that attorneys would not abide by the rules. In its 1999 report, the Conference adopted the following comment by a group of Second Circuit judges: "[e]xperience in criminal trials demonstrates that many lawyers simply would not adhere to the idealistic conception that they would limit themselves to advising their clients in sotto voce."

Third, the problems associated with the presence of counsel in the grand jury would result in repeated court intervention – and thus in significant delays and use of court resources. Every disagreement between a prosecutor and a witness' counsel would require an appearance before a judge who could control counsel only through the court's contempt powers. This would spawn protracted -- and costly -- litigation and lengthy delays. The grand jury must be free to act expeditiously to investigate crimes.

Delays that may be acceptable in other contexts are uniquely damaging in the grand jury system. Although limited extensions can be obtained with court approval, grand jury proceedings are limited to eighteen months. In our many complex cases, such as organized crime, terrorism and white collar crime, the grand jury needs its full tenure to adequately conduct its investigative and charging functions. The inevitable inclination of witnesses to consult their attorneys before every question would render the proceedings sluggish. Coupled with the breaks to litigate disruptions by counsel, these delays would detract from the time allotted to the grand jury to complete its work.

Fourth, the admission of counsel into the grand jury would place in jeopardy the secrecy that is so key to the effectiveness of the grand jury. Counsel, privy to the secret testimony presented in the grand jury room, could use this information to tailor the later testimony of other witnesses and thwart the investigation. Counsel could also discern the direction of the investigation and prepare later witnesses accordingly. This would certainly compromise the ability of the grand jury to elicit truthful, untainted testimony. It would also create an additional source for the release of secret information to the public. Like witnesses, counsel are not required to keep grand jury information confidential under Rule 6(e). Nothing would prevent counsel from sharing this information with the subjects, targets, prospective witnesses or the press. Counsel could use their access to make misleading comments that could influence future witnesses or trial jurors. Furthermore, having counsel in the grand jury room further complicates the investigation of grand jury leaks because it expands the universe of potential sources. Dissemination of such sensitive information at the grand jury stage would make the already difficult job of securing testimony from recalcitrant or reluctant witnesses more difficult and, in some cases, impossible. It could also encourage suspects to flee prior to an indictment.

Fifth, the presence of counsel in the grand jury room would make it difficult for a witness to testify candidly about his or her employer, business, union, organization or syndicate whose activities are under investigation. In many of our cases, these witnesses are represented by a "company lawyer." Individual witnesses who possess relevant information are often willing to cooperate in the investigation and provide testimony against their employers. However, this cooperation may be premised on the condition that their cooperation not become known -- at least until trial -- to the employer, fellow union members, or others who may cause them harm. If the attorney were present in the grand jury room, the witness would actually be unable to cooperate for fear of reprisal. The witness would not be able to decline the presence of counsel without tipping off the organization or syndicate to his cooperation. Furthermore, the witness could not realistically cooperate outside of the grand jury setting because the failure to be called in front of the grand jury would itself be noticeable. In these cases, permitting counsel in the grand jury room would have the ironic effect of paralyzing those witnesses willing to cooperate and chilling candid testimony.

Similar problems arise in cases of multiple representation – where one attorney, or a group of closely associated counsel, represent more than one grand jury witness. This is particularly common in investigations of organized criminal enterprises, business frauds, antitrust violations and other white collar offenses. Multiple representation creates the opportunity to thwart a legitimate investigation by obtaining valuable information from one client that can be used to advise other clients on how to tailor their responses in light of earlier testimony. This type of planning and fine-tuning of testimony can seriously mislead the grand jury and wholly undermine its work. In order to do tremendous damage to the grand jury's investigation, all counsel need to do is sit quietly during the proceeding and then use the information outside of the grand jury room.

Proponents of change have asserted that states that permit witness counsel in the grand jury room have not experienced these anticipated difficulties. Assuming for the sake of discussion that such assertions are true, as we stated earlier, the state experience is not a reliable predictor for federal proceedings. Most state prosecutors are not required to proceed through the grand jury and therefore states use grand juries infrequently. Also, there is a substantial difference in the nature of crimes prosecuted in the state and federal systems. While there are some states that regularly prosecute complex crimes, as a general matter, most state crimes do not necessitate the exhaustive use of the grand jury's investigative powers that federal cases require. Typically, the state caseload is dominated by cases that utilize government witnesses such as police officers. Because these witnesses work with the government, they will be unlikely to bring attorneys into the grand jury room or do anything to compromise the government's case. In contrast, the federal caseload includes organized crime, white collar crime, narcotics cases, environmental crimes, civil rights cases, and other complex matters in which the grand jury must sift through considerable evidence, hear from numerous witnesses – many of whom are hostile to the government's case -- and determine who to charge. The types of dangers enumerated above are significantly more likely to occur in these cases.

Finally, we should note that there is no discernible problem of unfairness or prosecutorial misconduct to rectify through the presence of counsel in the grand jury room. Today, every grand jury witness is free to consult with his or her counsel during grand jury proceedings. It is long-standing grand jury practice to permit the witness to step outside of the grand jury room to consult with counsel for any reason and at any time. Moreover, federal prosecutors routinely instruct grand jurors not to be prejudiced against a witness who exercises the right to consult with counsel. In addition, grand jury proceedings are recorded and judicial review of alleged prosecutorial misconduct is available. It is not necessary to have counsel monitor the proceedings in order to secure this information.

In short, the presence of counsel in the federal grand jury would certainly interfere with our ability to effectively charge and prosecute serious federal crimes and our ability to protect the public from dangerous felons. It would be a dangerous step for Congress to take and one that the Department opposes, as it has under both Democratic and Republican administrations for more than 20 years. We would stress that similar proposals were opposed by Attorneys General Bell, Civiletti, Levi, Smith, and Meese, and are today opposed by Attorney General Reno.

Proposal 2: Requirement that federal prosecutors disclose exculpatory evidence to the grand jury.

Proponents of grand jury change advocate that federal prosecutors be required to disclose any exculpatory evidence to the grand jury.

The Supreme Court addressed this issue in U.S. v. Williams, 514 U.S. 36 (1992), and held that prosecutors are not required to present exculpatory evidence to the grand jury. In so holding, the Court stated that requiring the "prosecutor to present exculpatory as well as inculpatory evidence would alter the grand jury's historical role, transforming it from an accusatory to an adjudicatory body." Id. at 51. Moreover, it would be contrary to Department policy and practice for a federal prosecutor to bring a case before the grand jury where substantial exculpatory evidence exists, particularly in light of the mandate that federal prosecutors only bring before the grand jury charges that they "reasonably expect to prove beyond a reasonable doubt through legally sufficient evidence at trial." USAM 9-27.300. In any event, the Department has responded to concerns about exculpatory evidence by carving out a category of evidence that is provided to the grand jury. Specifically, the USAM requires a federal prosecutor who is personally aware of substantial evidence that directly negates the guilt of a subject of the investigation, to present or otherwise disclose such evidence to the grand jury before seeking an indictment. USAM 9-11.233.

The legislative codification of this policy is undesirable. As a legal matter, the question of what constitutes exculpatory evidence is difficult to determine at this stage of the proceedings when not all of the evidence has been presented. Codification would permit defendants to challenge indictments by claiming that exculpatory evidence was not presented to the grand jury. This would create a whole new class of costly and time-consuming litigation on such difficult and fact-intensive issues as whether evidence is "exculpatory"and whether evidence was "adequately" disclosed. Moreover, judicial review of these issues is extremely problematic. Since the question of whether evidence is, in fact, exculpatory depends on the rest of the evidence in the case, the reviewing court would have to assess all of the evidence presented to the grand jury. Such a rule would also draw courts to review the quality and sufficiency of grand jury evidence -- a practice that is now prohibited. See Costello v. U.S, 350 U.S. 359. By contrast, our current policy and practice allow for the disclosure of directly exculpatory evidence to the grand jury without creating these serious problems. They also reflect that the appropriate venue for evaluation of this evidence is the trial -- not the grand jury.

Proposal 3: Apply the exclusionary rule to grand jury proceedings.

In order to function effectively, the grand jury needs to have the benefit of exhaustive evidence and has therefore not traditionally been bound by the evidentiary rules that control trial proceedings. In U.S. v. Calandra, 414 U.S. 338 (1974), the Supreme Court held that the exclusionary rule, which in a trial context prohibits the use of certain evidence obtained in violation of the Fourth Amendment, is inapplicable to grand jury proceedings. In so holding, the Court voiced its belief "that allowing a grand jury witness to invoke the exclusionary rule would unduly interfere with the effective and expeditious discharge of the grand jury's duties." Id. at 350.

Nonetheless, to ensure fairness to the accused, the Department has carved out a category of inadmissible evidence that federal prosecutors should not present to the grand jury. The USAM states that a prosecutor should not present to the grand jury for use against a person whose constitutional rights clearly have been violated evidence which the prosecutor personally knows was obtained as a direct result of the constitutional violation. This USAM provision, which is found at 9-11.231, reflects the Department's commitment to fairness, and exceeds what is required by law.

The Department has concerns about any legislative codification of this proposal. A prosecutor cannot know with certainty at the grand jury stage of the proceedings what evidence will be admissible at trial. Indeed, questions about admissibility are often complex and fact-intensive, and must be resolved by the court. Also, the question of admissibility may depend on later developments in the case which are not known this early in the proceeding. This proposal is likely to create a new class of litigation on this set of issues and would, in the words of the Supreme Court, would make the "grand jury a pawn in a

technical game instead of respecting it as a great historic institution of lay inquiry into criminal wrongdoing." U.S. v Johnson, 319 U.S. 503, 512 (1943). The USAM is a more flexible mechanism for dealing with this type of evidence and we believe it has successfully struck the delicate balance necessary in this area.

Proposal 4: Grant targets and subjects the right to testify and submit evidence to the grand jury.

In accordance with the broad power of the grand jury, it is solely within the province of the grand jury to determine what evidence it hears. Within this limitation, however, the Department of Justice already has put in place a policy to afford targets and subjects an opportunity to testify before a grand jury. The USAM states that reasonable requests by a subject or target to testify before the grand jury should ordinarily be given favorable consideration, as long as the witness waives the privilege against self-incrimination. USAM 9-11.152. Additionally, the USAM encourages prosecutors to notify targets within a reasonable time before seeking an indictment to afford the target an opportunity to testify. USAM 9-11.153.

The Department opposes, however, the codification of an absolute right to testify or submit evidence to the grand jury and believes that such a provision would impede criminal law enforcement. The proposal that prosecutors notify targets and subjects of their right to testify would require prosecutors to inform all potential suspects that they are being investigated for violation of a federal crime. Because of the danger that a subject or target will flee, destroy evidence, or tamper with witnesses, it is not always prudent for a prosecutor to alert a subject or target that he is the subject of a grand jury investigation. Prosecutors must make difficult decisions about whether this information can safely be conveyed and the USAM provides for this discretion. Moreover, such a codification would be impossible to administer. Since the determination of who is a subject or target is often itself a product of the grand jury's investigation, prosecutors cannot always predict who will likely be a target or subject when presenting a case to the grand jury. These determinations may not be made until late in the proceedings.

The Department opposes any requirement that subjects and targets be permitted to submit written information or evidence to the grand jury. Written statements by targets or subjects are of little legitimate value to the grand jury since they are fundamentally self-serving, do not allow the jury to weigh the witness' credibility, are not made under oath, are not subject to cross-examination, and do not require the witness to waive the right against self-incrimination. There would be no guarantee that the submitted evidence would have any relevance to the grand jury investigation. This proposal would permit subjects and targets to put before the grand jury irrelevant information designed to garner sympathy or otherwise improperly influence the grand jury. A subject or target should not, as a matter of right, be permitted to provide information untested by grand jury questioning.

Proposal 5: Provide witnesses with a transcript of their grand jury testimony.

The Department of Justice strenuously opposes any requirement that would jeopardize grand jury secrecy. Grand jury secrecy is the hallmark of effective grand jury investigations. If this secrecy is compromised, the grand jury would lose its ability to effectively and aggressively investigate cases. The automatic dissemination of grand jury transcripts would entirely subvert the Rule 6(e) secrecy rules. Nothing would prohibit the sharing of grand jury transcripts with other witnesses, subjects, targets, or the media. The dissemination of this information would undoubtedly lead to the manufacturing and fine-tuning of later testimony, witness intimidation, evidence tampering, and flight of targets. Dissemination could also undermine the "shield" function served by the grand jury by harming the reputation of targets who are ultimately not charged with any crime.

Adequate mechanisms already exist for witnesses and defendants to obtain copies of their transcripts. As a matter of right, defendants automatically receive transcripts of testimony by any witness who testifies at trial, and any exculpatory evidence that was revealed at the grand jury proceeding. Any witness can make a motion to obtain a transcript to substantiate a claim of prosecutorial misconduct. Additionally, any witness can receive transcripts of any or all parts of the grand jury proceeding on a showing to the court of particularized need. These provisions provide appropriate access to grand jury transcripts

without fully compromising the need for secrecy.

Proposal 6: Prohibit the naming of unindicted co-conspirators.

The Department of Justice, through the USAM, strongly disfavors the naming of unindicted co-conspirators in federal indictments. USAM 9-11.130. However, the Department has concerns about any proposal that would prohibit prosecutors from naming one or more unindicted co-conspirator in the limited instances when it is necessary to do so. In certain cases, naming an unindicted co-conspirator facilitates the admission of vital evidence at trial. Many federal cases involve sophisticated, organized criminal machines and complex conspiracies that are extremely difficult to infiltrate. In order to best protect our communities, federal prosecutors need to have in their arsenal those tools which can best further the work of federal law enforcement.

Proposal 7: Require prosecutors to give all non-immunized subjects or targets a Miranda warning.

On numerous occasions, the Supreme Court has determined that Miranda warnings are not constitutionally required for grand jury witnesses and that defendants cannot seek dismissal of indictments for failure to provide these warnings. See, e.g., U.S. v. Mandujano, 425 U.S. 564 (1976). The Court has recognized that, unlike custodial interrogations, grand juries do not present the potential for abuse that Miranda is meant to address. U.S. v. Mara, 410 U.S. 19, 46 (1973). The Court therefore asserted that to extend the Miranda concept to the grand jury "is an extravagant expansion never remotely contemplated by this Court in Miranda." Mandujano at 580. Nevertheless, it has been a long-standing practice of federal prosecutors to provide Miranda-type warnings to subjects and targets in grand jury practice. USAM 9-11.151 directs prosecutors to routinely attach an "Advice of Rights" form, which recites the Miranda warnings, to all subpoenas that are given to targets or subjects. These warnings are routinely given on the record in the grand jury itself by the prosecutor. Where appropriate, the USAM also indicates that targets should receive an "Advice of Status" letter which advises them that they are under investigation. The Department believes it is appropriate to provide these warnings in the interests of fairness. However, we also believe that codification of this proposal would give defendants a dangerous tool to delay the proceedings and hinder the grand jury's work. It would be unproductive to codify this warning requirement, when existing practice works effectively.

Proposal 8: Require 72 hours' notice for witness grand jury appearances.

Federal prosecutors routinely provide witnesses with at least 72 hours' notice – and generally much more -- prior to a required appearance before the grand jury, except in those rare instances where an immediate response is justified. Moreover, federal prosecutors must seek the prior approval of their United States Attorney before using issuing a forthwith subpoena. Even in those rare cases where such subpoenas are used, a witness can seek to quash a subpoena that provides for less than 72 hours' notice. There are legitimate reasons, however, for the use of subpoenas giving less than 72 hours' notice and the Department would strongly oppose any proposal that prohibits federal prosecutors from using them. Shorter notice may be necessary if there is a risk that the witness will flee or destroy evidence, or if there is reason to believe that violent or terrorist activity is imminent. In some cases, a prosecutor may need to prevent witnesses from coordinating their testimony before appearing before the grand jury. Furthermore, it may also be necessary to recall a witness on short notice. Even a codification that contemplates exceptions will lead to unnecessary – and potentially risky – delays while the parties litigate the invocation of the exceptions. Grand jury investigations are fluid proceedings and -- like all investigations of criminal activity -- are time-sensitive. Where shorter notice is necessary to advance the grand jury's work, prevent the destruction of evidence, or preclude flight, it should not be compromised.

Proposal 9: Require meaningful and on the record jury instructions.

Grand jurors receive extensive guidance on their roles and responsibilities. At the inception of every investigation, a judge provides instructions to the grand jurors on the function of the grand jury and their roles as jurors. Unless the grand jury has previously been instructed, at the conclusion of the evidence the prosecutor typically reviews the elements of each offense and instructs the jurors regarding the legal

framework for their evaluation of whether probable cause exists to return an indictment on each individual account. All of these instructions are given on the record. The USAM specifically directs federal prosecutors to advise the grand jurors on the law and to comport themselves in a way that is scrupulously fair. USAM 9-11.010. If a target of the grand jury investigation wishes to challenge the jury instructions, and can show adequate evidence of impropriety, he or she can apply to the court for a transcript and judicial review.

The Department opposes any provision which would attempt to unnecessarily insert the court into the grand jury process. Codification of a proposal specifying the nature of grand jury instructions would certainly lead to extensive litigation. Courts would be forced to conduct mini-trials to determine, for example, whether the instructions given were in fact "meaningful." Past attempts to expand the court's supervisory role over the grand jury have been repeatedly rejected by the Supreme Court as counter to the grand jury's independent role. See e.g., U.S. v. Williams, 504 U.S. 36 (1992).

Proposal 10: Prohibit the calling of witnesses who intend to invoke the right against self-incrimination.

USAM 9-11.154 states that witnesses should ordinarily be excused from testifying if they intend to invoke the Fifth Amendment privilege against self-incrimination. Moreover, federal prosecutors generally instruct the grand jury not to be prejudiced against a witness who invokes the privilege against self-incrimination. The Department opposes, however, the codification of this proposal because there are numerous legitimate reasons for the grand jury to seek the appearance of such a witness. The grand jury has the absolute right to seek non-incriminating information from the witness that does not infringe on the privilege. Even witnesses who invoke their privilege can be compelled by the court to provide non-incriminating information that advances the grand jury's investigation. Witnesses cannot use the Fifth Amendment shield merely to avoid answering questions that might discomfort or embarrass them. The grand jury also has the right to test the witness' invocation of the privilege to ensure that the decision was not coerced. In certain circumstances, there may also be some value in having the witness invoke the Fifth Amendment on the record, giving the witness an opportunity to change his mind and cooperate with the investigation. It is also appropriate to compel the witness' appearance if the prosecution is prepared to immunize his or her testimony. For these reasons, it is inappropriate to create a blanket exclusion for these witnesses.

Overall, we have serious concerns about each of these ten proposals, notwithstanding the fact that some of them are substantively similar to current Department of Justice policy. The USAM effectively guides the work of prosecutors and federal grand jury practice. It fosters the flexibility that is so vital in a fluid system, and can be changed to reflect new court decisions. Its provisions reflect the delicate balance that our criminal justice system represents and circumscribes the conduct of prosecutors while enabling them to effectively fight crime. The USAM also provides a framework for addressing prosecutorial error short of the costly and time-consuming litigation that legal codifications of these provisions is likely to create. Federal prosecutors comply with these provisions and understand that there are ramifications for failing to do so.

V. Summary

Our federal criminal justice system is a model for criminal justice systems around the world. Today's grand jury is the effective sword and shield that it has been for hundreds of years. It is not a court of law. It is, and should remain, an investigative body of ordinary citizens tasked with the critical job of investigating complex and sensitive matters and deciding who should be prosecuted. It would be wrong today to try to turn this important investigative body into an adversarial tribunal and dangerous to leave our communities unprotected by unduly hindering federal law enforcement.

The Department of Justice is not alone in its concern about these proposals. The Judicial Conference of the United States, which speaks on behalf of the federal judges who are responsible for administering the grand jury system, has repeatedly rejected attempts to substantially depart from those practices which make our grand jury such an effective tool. In a report issued in 1975, and in another report issued in 1999, the Judicial Conference voiced its belief that the claimed misconduct of government attorneys is

not so prevalent as to justify changes in practice. It also stated that current law, coupled with Department practice, contains more than adequate safeguards. We join the Judicial Conference in opposing reforms that would impair our ability to protect our communities.

We are fortunate in this country that over the past decade, crime has dropped each year and is now at its lowest level in a quarter of a century. But we cannot become complacent. We cannot weaken those very systems that protect our nation from dangerous criminals. Keep in mind that we are dealing with people who threaten our national security, offend our civil rights, traffic in narcotics and sell drugs to our children, run organized crime syndicates, and pollute and hurt our environment. Often, the federal criminal justice system is the last line of defense for vulnerable communities and thus it needs to be as strong as possible. We must not erode those institutions that have served us for hundreds of years. There are many aspects of our justice system that badly need attention and we would urge you to focus on those areas that would truly benefit from legislative reform.

Mr. Chairman and Members of the Subcommittee, that completes our prepared testimony. We appreciate the opportunity to appear before you and will be pleased to attempt to respond to your questions at this time.

TESTIMONY OF

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BEFORE THE SUBCOMMITTEE ON THE CONSTITUTION

COMMITTEE ON THE JUDICIARY

UNITED STATES HOUSE OF REPRESENTATIVES

CONSTITUTIONAL RIGHTS AND THE GRAND JURY

JULY 27, 2000

Thank you, Mr. Chairman, for inviting me to testify regarding constitutional rights and the grand jury. I would like to focus on the history of the federal grand jury and general perspectives on proposals to alter the procedures under which federal grand juries operate.

The history of the grand jury

The English origins of the grand jury

The modern federal grand jury is the direct descendant of an English institution whose history can be traced for 900 years. The accusing or presenting jury–the ancestor of both the modern grand jury and the trial jury–was formally made a part of English procedure at the Assize of Clarendon in 1166. Although the grand jury has been praised as an important safeguard of individual liberty, it originated as a prosecutorial tool designed to increase criminal prosecutions, enhance the crown's authority, and indirectly to raise revenues when property owned by persons convicted of crimes was forfeited to the state. The local presenting jury was summoned and required, under oath, to report each person who was accused or reputed to have committed a crime. Beginning in the 13th century the presenting jurors were fined for misconduct or errors, including the failure to indict or confusing the details of any crime. This practice, which has been compared to a "grim spelling bee," ensured that criminal conduct was disclosed and further augmented the crown's coffers.

The separation of the trial and grand jury functions occurred in the middle of the 14th century, and by the end of the century the "grande inquest," which closely resembled the modern grand jury, had appeared. Although it could still prefer charges based upon its own knowledge of the crime, the grand jury, like the trial jury, began to hear witnesses during this period. The practice also developed of allowing third persons, including servants of the king, to draft charges that the judge would transmit to the grand jury.

Not until the end of the 17th century did the grand jury develop its reputation as a body that not only accused the guilty but also shielded the innocent from unfounded charges. A sense of the grand jury's independence gradually developed. In 1642 Lord Coke interpreted the provision in the Magna Charta that provided no man could be taken or imprisoned but by "the law of the land" to guarantee that no man

could be "restrained of liberty, by petition, or suggestion to the king, or his council, unless it be by indictment or presentment of good, and lawful men." Although there was no legal impediment to the practice of fining grand jurors for their refusal to indict, the imposition of such fines in 1667 raised a storm of protests. The Lord Chief Justice was summoned to the House of Commons, which resolved that fines and imprisonments of grand jurors were illegal, though the House of Lords did not concur. Grand juries in London blocked the king's attempts to prosecute Protestants Stephen Colledge and the Earl of Shaftesbury for treason. Both grand juries were under considerable pressure to indict. In the Colledge case the presiding judge required the jury to explain its failure to indict, and the foreman of the grand jury was subsequently questioned by the privy council and imprisoned in the Tower. The judge in the Shaftesbury case gave instructions very favorable to the crown, and told the jury they would be criminals if they did not indict. He also granted the prosecution's request that the grand jury hear witnesses in public, rather than in private as was the custom. Although Shaftesbury was eventually driven into exile and Colledge was indicted by a grand jury outside of London and ultimately executed, the London grand juries' refusal to indict in these cases was seen as a demonstration that the grand jury was a safeguard of English liberty.

The grand jury was seen as a protection against unfounded or malicious charges, since no one could be formally charged and held for trial unless a jury of his peers agreed that there was a sufficient case against him. For example, a book originally published in 1680 stated that it was the function of the grand jury:

> To preserve the Innocent from the Disgrace and Hazards which ill Men may design to bring them to, out of Malice, or though Subornation, or other sinister Ends; for so tender is the Law, of the Reputation and Live of a Man, that it will not suffer the one to be sullied... and the other indangered by a Trial, until first the Matter and Evidence against him have been scann'd, examined, and found by a Grand Jury, upon their Oaths, against him.

By the late 1700s the procedures of the English grand jury closely resembled those of modern federal grand juries. The grand jurors generally heard testimony and deliberated in private. Witnesses appeared before the grand jury without counsel, and as a lay body the grand jury operated informally, without attempting to follow the rules of evidence. An indictment issued if a majority of the grand jurors concurred.

The American grand jury

The English colonies adopted the system of instituting criminal charges by the grand jury's accusation, though colonial grand juries also served other needs in the new settlements. During the Revolutionary period grand juries played a role in the colonists's opposition to British rule. Grand jury charges and reports were used for patriotic propaganda, and grand juries refused to indict colonists for crimes involving resistance to British authority. For example, three successive grand juries in New York refused to indict John Peter Zenger for libel, and Massachusetts grand juries refused to indict the leaders of the Stamp Act rebellion for any offense. On the other hand, the Boston grand jury actively pursued accusations against the British soldiers who were quartered in town, indicting them for conduct such as breaking and entering private homes and waylaying private citizens. Thus royal prosecutors disliked taking cases to local grand juries, preferring to initiate charges by a prosecutor's information.

When the new federal and state governments were constituted, the grand jury was adopted in each jurisdiction. The founders of these new governments were influenced not only by the role played by the grand juries during the Revolutionary period, but also by the most widely read English authorities, who portrayed the grand jury as one of the principal safeguards of personal liberty in the English legal system. At the federal level, the original constitution proposed to the states contained no provision regarding the grand jury. Amendments drafted in Massachusetts (by John Hancock), New Hampshire and New York proposed guaranteeing indictment by grand jury. The amendments proposed by James Madison included this guarantee, which was reworded and adopted as part of the Fifth Amendment. The grand jury clause of the Fifth Amendment provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger.

As the Supreme Court has repeatedly stated, the federal grand jury "was intended to operate substantially like its English progenitor."

The most remarkable feature of the English grand jury and its American descendants is a dual function, which has been compared to a shield and a sword. The sword function–the offensive prosecutorial function–developed first. Functioning as a prosecutorial tool, the investigative grand jury discovers and attacks criminal conduct. The grand juries that refused to indict Stephen Colledge, the Earl of Shaftesbury, John Peter Zenger, and the participants in the Stamp Act rebellion, performed the defensive or shield function, standing as a protective bulwark, or shield, between the prosecution and the accused. This is also referred to as the grand jury's screening function. While it was the grand jury's screening function that led to its inclusion in the Fifth Amendment, the new federal grand juries (and those provided for in the state constitutions) retained their dual nature.

State grand jury practice

By the middle of the 19th Century, there was considerable debate at the state level regarding the value and appropriate function of the grand jury. Critics charged that the grand jury was an expensive and cumbersome relic that had outlived its usefulness, and there was also concern that the grand jury's inquisitorial procedures posed a threat to individual liberty.

Although no state has abolished the grand jury, reformers drafted state constitutional provisions permitting the initiation of criminal cases by information. In *Hurtado v. California*, decided in 1884, the United States Supreme Court upheld a state conviction initiated by information, holding that neither the Fifth Amendment nor the Due Process clause of the Fourteenth Amendment required the states to afford the right to grand jury review before trial. Today, only about one third of the states require a grand jury indictment to initiate every serious criminal charge (and a few additional states require an indictment to initiate charges that could result in a capital sentence or life imprisonment). However, all states have preserved the investigative function of the grand jury, and in most states that permit prosecutions to be initiated by information the prosecutor has the option of initiating the case through the grand jury.

In recent years the focus in many states has been on the adoption of procedural reforms intended to provide greater protection for witnesses and targets of grand jury probes, as well as reforms intended to strengthen the grand jury's defensive or screening function. Probably the most significant procedural reform has been the enactment in about one third of the states of provisions that permit witnesses to bring counsel with them into the grand jury room. A few states have adopted provisions requiring that witnesses be advised of their rights before they testify, or advised of the subject of the grand jury's investigation. Some states afford the accused the right to testify or present evidence before the grand jury. A number of states regulate the evidence received by the grand jury, requiring the grand jury to observe some or all of the rules of evidence, and requiring the prosecution to make the grand jury aware of exculpatory evidence. In order to prevent the grand jury from being used for harassment, several states have imposed limits on the number of times the prosecution may seek an indictment against an individual for a particular offense if a previous grand jury has voted not to indict that person. Grand jury procedure in these states diverges from the procedure in the federal courts, which more closely follow the procedures of the English and colonial grand juries, and the original federal grand juries that were modeled upon them.

Perspectives on proposals to alter grand jury procedures

Various groups have proposed revamping the procedures under which federal grand juries operate in order to adopt the reforms already in place in a number of states. Two of the more prominent examples are the Model Grand Jury Act proposed in 1982 by the American Bar Association and the Bill of Rights proposed this year by the National Association of Criminal Defense Lawyers' Commission to Reform

the Grand Jury. Publicity surrounding the Whitewater grand jury convened by Independent Counsel Kenneth Starr has also focused public attention on the procedures followed in grand jury proceedings, and the potential for abuse.

In considering proposals to amend the procedures under which federal grand juries operate, I would urge the Committee to keep the following points in mind:

1. Fundamental changes in the legal system have occurred since the development of the English, colonial, and early federal grand juries, and it is entirely appropriate to assess whether these developments warrant changes in grand jury procedures.

Many of the reform proposals are premised on the insight that the contemporary prosecutor has unprecedented access to, and ability to influence, the grand jury. It is important to note that this change in the prosecutor's role is only one aspect of a more comprehensive change in the criminal justice process, which has become highly professionalized, formal, and adversarial.

By way of illustration, consider the changes in the trial process. For example, in the mid 1700s the records of the Old Bailey reveal that a single judge conducted 16 trials before two juries in less than three days. Of 171 criminal trials in the Old Bailey during that period, the participation of counsel can be documented in only 12 cases, and the records reveal only 2 cases in which counsel for both the prosecution and the defense appeared. It was generally understood that the witnesses could present their testimony without the aid of counsel, subject to cross-examination by the trial judge and by the defendant. Although counsel, if available, could cross-examine witnesses, counsel were not permitted to address the jury. The defendant was not permitted to give sworn testimony, but he or she could make an unsworn statement and cross examine witnesses. At this time, the relative informality of the trial process was on a par with the relative informality of the grand jury. Morever, given the dispatch with which trials occurred, there was no great incentive to create a system of plea bargaining, and virtually all cases went to trial.

In contrast, today's trial is much more formal, adversarial, and professionalized. The prosecution is uniformly represented by counsel, and the defendant is entitled to appointed counsel in all serious cases if he or she cannot afford to employ counsel. The rules of evidence as well as constitutional rules of exclusion are followed. On the other hand, only a small fraction of cases go to trial. More than 90% of federal criminal cases are resolved by a guilty plea entered to obtain sentencing concessions, and this percentage has been increasing under the Sentencing Guidelines.

Many of these changes appear to provide support for proposals to revamp grand jury procedure. Whereas counsel for both the prosecution and the defense played almost no role at the time the traditional grand jury procedures developed, they now play a central role in criminal proceedings. The prosecutor orchestrates the grand jury proceedings, and many observers believe that this has endangered the grand jury's independence and its ability to serve as a real check on the prosecution, and that it places unrepresented witnesses at an unfair disadvantage. Similarly, the formalization of the trial process raises the question whether the informality of the grand jury process remains appropriate, or whether the grand jury should also, to the extent possible, conform to the rules of evidence and observe the constitutional exclusionary rules. Finally, the phenomenal increase in the number of cases resolved by guilty plea means that in more than 93% of the cases the prosecution's evidence will not be reviewed after an indictment issues.

Although these fundamental changes in the criminal justice system support a reappraisal of grand jury procedures, some additional points should be kept in mind.

First, the investigative function of the grand jury, especially in the federal system, is more crucial now than it was at the time of the drafting of the Fifth Amendment, largely because of changes in the nature of the federal caseload. The principal charges tried in the Old Bailey in the mid 1700s–when the grand jury's traditional procedures were established--were common law offenses: homicide, burglary, robbery, various forms of theft, and receiving stolen goods. The proof in these cases was simple and easily presented. It typically consisted of the testimony of the victim, bystanders, co-felons who confessed, or

pawn brokers who received stolen goods from the accused. In these cases, the grand jury was serving mainly its screening function. In contrast, the contemporary federal caseload includes white collar offenses, consensual crimes (such as drug and gambling offenses, money laundering, and bribery), and organizational crimes that often sweep over both state and national boundaries. These crimes are difficult to detect and prove, and the procedures and investigative authority of the federal grand jury--its authority to subpoena witnesses to testify and produce evidence and to immunize witnesses while operating in secrecy–are critical. Given the nature of the federal caseload, the investigative grand jury plays an especially important role in federal practice.

Second, experience in the states is not necessarily a perfect predictor of the impact procedural changes will have in the federal system. As a general matter, the crimes prosecuted in the state courts correspond much more closely to the common law offenses than do the federal cases. State dockets focus heavily on crimes of violence, property offenses, and other crimes that depend less critically upon the resources of an investigative grand jury. Moreover, at present the state prosecutors have the option in many situations of referring a case to federal officials, and they frequently do so when state procedures are deemed too onerous, or the state procedures do not provide needed investigative tools. In this sense, the availability of the federal grand jury currently serves as an escape valve for the states. For example, federal officials frequently use the unfettered power of the investigative grand jury to delve into cases involving organized criminality, where state law enforcement efforts have sometimes proven ineffective.

Thus the propriety of reforms should be judged in the context of both the changes in the criminal justice system that may call for greater protections to witnesses and targets, and the enhanced need for an effective investigative tool to root out modern criminality. Let me give just one illustration, the proposal to allow counsel to accompany a witness into the grand jury room. Proponents of allowing counsel to accompany a witness point out that an unrepresented witness is at a disadvantage when being questioned by the prosecutor, and may inadvertently waive her rights. (Moreover, allowing counsel within the grand jury room may even improve the efficiency of the proceedings, because the witness will not have to leave the grand jury room to consult with counsel). Nonetheless, this proposal is not unproblematic, at least in one important class of cases in the federal system, those involving organized criminality. Here, the concern is that allowing the counsel to accompany each witness will provide the targets of the investigation with much greater and more precise information about the course of the grand jury's investigation and the information available to the government, as a result of joint defense agreements. To be sure, the witness could relay information to counsel outside of the grand jury room, but that information would not be as complete as would be available if counsel had been present. Providing the targets with more precise and complete information at this stage could allow them to thwart the investigation and might endanger witnesses. Moreover, in these circumstances a witness may not be as cooperative or forthcoming as he might in counsel's absence. In addressing the proposal to permit counsel to accompany witnesses inside the grand jury room, consideration should be given to this issue to determine how frequently such a situation might occur, how seriously it might impair certain types of investigation, and whether any additional changes (such as changes in the standards or procedures for disqualification of counsel) might be warranted.

2. The fundamental challenge in developing procedures to enhance the grand jury's screening function is to adapt these procedures to the preliminary stage at which the grand jury operates, and to its unique inquisitorial character. The adversarial trial is the most refined screening device developed in the United States legal system. Grand jury procedures cannot reasonably replicate all aspects of trial procedure, both because the grand jury is intended to be a preliminary screening device serving a different function than the trial, and because the secret inquisitorial character of the grand jury is its defining characteristic. If the grand jury operated in open court under the supervision of the trial judge, and it allowed the defense to participate fully in an adversarial proceeding, it would no longer in any real sense be a grand jury. It would at that point more closely resemble the trial, or the preliminary hearing, or some hybrid of the two. On the other hand, as noted above, it is no longer the case that most or all of the cases presented to the grand jury will be presented at trial, and receive full adversarial testing. This change may warrant some greater degree of scrutiny at the grand jury stage (or the addition of a requirement for a preliminary examination).

This principle provides a basis for examining some of the reforms that have been proposed, including

the requirement that the grand jury observe the rules of evidence and the exclusionary rule, the requirement that the grand jury be presented with exculpatory evidence, and the requirement that the accused be permitted to testify before the grand jury or designate evidence to be presented to the grand jury.

Testimony Before the House Judiciary Committee

Subcommittee on the Constitution

Andrew D. Leipold

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July 27, 2000

Constitutional Rights and the Grand Jury

I. Background

Few parts of the criminal justice system have been as routinely criticized, or have withstood the criticism better, than the grand jury. Although the 5th Amendment to the Constitution requires that all serious criminal charges be subjected to grand jury review, modern commentators are nearly unanimous in concluding that the institution does not protect suspects from weak or unfounded accusations. Rather than imposing a significant check on the government's charging decisions, the belief is that grand jurors invariably approve any indictment the prosecutor puts before them. As one cliche has it, "If you gave grand jurors a napkin, they'd sign it."

Grand juries are also responsible for investigating crimes, and this function has also come under frequent attack. Here the claim is that the institution - and by extension the prosecutors who fully control the investigations - is *too* effective. The grand jury's power to gather evidence is nearly unrestrained, and critics allege that this authority is used with distressing frequency to harass witnesses as well as suspects.

Although these criticisms have been made for over a century,(1) the courts and Congress have been reluctant to regulate grand jury practice. Federal courts routinely turn away efforts to compel prosecutors to follow certain practices or to present certain kinds of evidence.(2) Congress also has been hesitant to intervene. Although it has passed laws regarding jury selection and secrecy, there are relatively few statutory constraints on the nature of the information the jurors should consider, or on the scope, subject matter, or procedures to be followed in an investigation.(3)

The most serious reform effort in modern times came in the 1970s on the heels of the alleged grand jury abuses by President Nixon's Justice Department. During this period Congress considered numerous changes, including at least four bills to amend the Fifth Amendment to abolish the grand jury requirement.(4) In the course of Congressional hearings there was a great deal of testimony on the grand jury's shortcomings, but ultimately only marginal changes were made. This combination of pointed criticism and small alterations is characteristic of the grand jury debate; as a result, the grand jury continues to operate today much as it did at the end of the 19th century.

This lack of oversight means that the primary protection against grand jury abuse is the good judgment of the United States Attorney's offices. To a large degree this confidence seems justified. Despite the apparent lack of screening, prosecutors still obtain convictions in roughly 85% of the cases where an indictment is returned, suggesting (without proving) that most of the cases presented for review are meritorious.(5) And while there are persistent complaints that prosecutors use the investigative powers in overbroad and intrusive ways, it is hard to evaluate these complaints. Those being investigated have an incentive to exaggerate the burdens, and the secrecy of the proceedings makes it hard to assess the concerns.

Of course, even if the incidences of abuse are low, the harm caused by overreaching when it does occur is great; the power to accuse someone of a crime and the power to investigate every aspect of a person's life are too serious to be complacent. Continued monitoring of grand jury behavior is essential, and the numerous reforms that have been suggested over the years are worthy of careful and continued study.

The point of these comments today, however, is to urge caution. Identifying problems with the institution is relatively easy; finding workable solutions is far more difficult. As noted below, many of the core problems raised by current practice are directly related to the grand jury's unusual features - its secrecy, its *ex parte* nature, its uniquely broad jurisdiction - making it hard to fix the perceived problems without fundamentally altering the nature of the institution. Any dramatic change in the structure or the process, particularly given the resource constraints that routinely plague the justice system, should occur only after sustained study, and should perhaps be made as part of a comprehensive review of pretrial practice, rather than piecemeal.

Set forth in the next section are three specific concerns about current reform efforts, concerns that may help give context to this important debate.

II. Evaluating Reform Proposals

Attempts to change grand jury practice typically fall into one of two categories. In the first are proposals to better control the evidence presented at the hearings. Common recommendations in this category are: (a) that prosecutors be required to present to the grand jury evidence that the government knows will exonerate the suspect; (b) that prosecutors be prohibited from presenting evidence that a court has already ruled was illegally obtained; (c) that subject and targets be permitted to testify before the grand jury on request. (Neither the Constitution nor the Rules of Criminal Procedure prevent or require these practices, although the U.S. Attorney's Manual is consistent with each.(6)) A second type of reform seeks to change the procedures a prosecutor must follow. Typical proposals in this group are a requirement that witnesses be given *Miranda*-like warnings before they testify, and most dramatically, a rule

that would allow witnesses to bring lawyers with them into the grand jury room.(7)

Those who engage in grand jury practice are better positioned to speak to the wisdom of specific changes. But there are three threshold suggestions offered below that may be worth considering, points that could provide a useful backdrop for the discussion.

A. Assess the Impact of Reform Proposals on Grand Jury Secrecy

One problem with many of the reform is that to a greater or lesser extent they would undermine the secrecy of the grand jury room. By tradition and by rule,(8) grand jury proceedings are closed to the public, the press, defense counsel, and suspects; the only people permitted in the room are jurors, the prosecutors, a court reporter, a translator, and the witness under examination. Except for the witness, each of the participants is forbidden on pain of contempt from disclosing matters that occur before the grand jury. In general, this prohibition continues even after the indictment is filed.

The Supreme Court has identified several reasons for this veil of secrecy: (1) prevent the escape of those who are under investigation; (2) protect the grand jurors from being pressured by the suspect or his friends; (3) prevent potential witnesses from being tampered with; (4) encourage witnesses to testify freely; and (5) protect the innocent suspect from having his reputation harmed if no indictment is returned.(9) In short, secrecy is thought to be an important feature that allows grand juries to search for the truth, vindicate the innocent, and uncover crimes without pressure from suspects or the public.

Each of the proposals noted above (and many others) would test our commitment to institutional secrecy. Any proposal that tries to dictate what type of evidence must be presented to the jurors -- evidence favorable to the accused, for example -- would require someone other than the prosecutor to review grand jury material to ensure compliance. The two choices for reviewer are the court and defense counsel, neither of which is an appealing alternative. Courts have steadfastly resisted efforts to involve them in the substance of the grand jury's work, in large part because of the delay and resource commitment this would entail.(10) The other choice for monitoring compliance with a new rule is defense counsel, and here the ability to maintain secrecy would be at its lowest. The only way that suspects would have a meaningful chance to raise a potential rule violation would be to have access to the transcript, but this obviously would undermine many of the interests in secrecy the Court has identified. (Thus, for example, grand jury witnesses might be less forthcoming if they knew that after the indictment was returned the defense would have access to their testimony.)

It is worth noting that this problem already arises with efforts to enforce existing rules. Today a suspect who believes that the prosecutor has violated a grand jury rule can seek access to the transcript, but typically a court will require a preliminary showing of the violation before ordering disclosure. Suspects are thus in the difficult position of being unable to claim a violation without knowing what occurred in the grand jury room, but cannot discover what occurred without first claiming a violation. Reforms that fail to address the tension between the government's interest in secrecy and the suspect's need for evidence to support a claim will simply compound the problem.

Even proposals that would not require direct disclosure of grand jury material would have implications for secrecy. One of the benefits of a closed proceeding is that a suspect can be investigated quietly, without tipping the government's hand. Notifying a target or subject of the investigation could easily undermine this interest, as would permitting a witness to bring a lawyer into the grand jury room. Some lawyers -- those who represent both a corporate target and corporate employees who are called as witnesses, for example -- could learn a great deal from being in the room during the questioning, information that could be passed on to other targets or subjects.

The point is *not* that these proposals are a bad idea, nor is it that secrecy should be our highest value. The point instead is that any proposal designed to curtail prosecutorial overreaching will have consequences for grand jury secrecy and the interests it protects, simply because enforcing these rules would often require revealing the substance of the proceedings to some other party. In considering the costs and benefits of any reform, this is a cost that needs to be weighed explicitly in the balance.

B. Recognize the Limits of the Institution

Some of the concerns about grand juries may be the product of unrealistic expectations. Reform proposals often seem based on the assumption that if grand juries were just given more evidence, or if prosecutors had a bit less influence over the proceedings, the jurors then would be able to effectively screen the government's charging decisions. This belief is probably unfounded. In my view, the basic structure of the grand jury makes it inevitable that the jurors will be unable to make a reasoned decision about the prosecutor's case.(11)

The barriers to a grand jury's ability to screen cases are not obvious because its task seems so simple. Jurors listen to the government's case and then are asked a single question: whether there is probable cause to believe that the suspect committed a specified crime. The problem is that this is a question grand jurors are not qualified to answer. Whether probable cause exists is ultimately a legal determination about the sufficiency of the evidence -- has the prosecutor put forth enough information to get above the legal threshold established by the probable cause standard? In submitting a case to the grand jury, we are asking non-lawyers with no experience in weighing evidence to decide whether a legal test is satisfied, and to do so after the only lawyer in the room, the prosecutor, has concluded that it has been. Because jurors lack any expertise in making this assessment, it becomes not only predictable but also logical that they will return a true bill in nearly every case, not because they are a rubber stamp but because they have no benchmark against which to evaluate the evidence, and thus no basis for rejecting the government's recommendation to indict.

The point can be made more easily by comparing the role of grand jurors to that of trial jurors. It might be argued that trial jurors make a similar "sufficiency of the evidence" decision when they decide whether the prosecution has proved its case beyond a reasonable doubt. But in fact, a grand jury's determination of probable cause is qualitatively different than a trial jury's verdict, and these differences are crucial to the ability (or inability) of the two panels to perform their respective functions.

One justification for having lay-citizens serve on trial juries is that we believe non-lawyers are at least as good as judges at weighing the facts and deciding which of the competing versions of the case is correct. Indeed, the adversary system is based on the idea of presenting two "biased" versions of the same event and letting a neutral decision maker decide where the truth lies. Jurors are well-suited for this task: weighing credibility and spotting logical flaws in testimony do not require any special skill, and thus conclusions of lay jurors will usually lead to an accurate finding of whether the defendant committed the crime.

Contrast this with the grand jury's role. Unlike a trial, which is designed to *present* conflicting facts to the jury, a grand jury hearing is structured to *avoid* conflicting facts. The grand jurors are presented with a single version of the events surrounding the crime (the prosecutor's), and asked to make a legal judgment about the quantum of evidence. In virtually every other context such decisions are left to judges. Summary judgment and judgments as a matter law in civil cases, as well as judgments of acquittal in criminal actions take the ultimate decision away from the jury and give it to the judge when the facts are not contested and a legal finding is required. The grand jury moves in the opposite direction: the legal decision is taken from the court and given to a jury,(12) but limits the jurors to a version of the events that has not been subject to cross-examination or other adversary testing.

Requiring prosecutors to disclose to the grand jury evidence that is favorable to the accused, or restricting the evidence the jury can consider to that which would be admissible at trial, or letting the target testify on request might sharpen the quality of the evidence presented, but the baseline problem would remain. As every lawyer knows, it is not just the facts but also an *advocate's presentation* of them that helps juries make decisions. As long as grand jury proceedings remain *ex parte* -- and no realistic reform proposal has ever suggested otherwise -- it will continue to be the rare case when grand jurors will be able to make an informed decision to reject the prosecutor's recommendation to indict. The result is that prosecutors as a group will continue to feel relatively unconstrained in their charging decisions.

In short, expecting grand jurors to screen out unfounded charges in an *ex parte* proceeding may be expecting too much. Dramatic changes designed to

make the process more adversarial can surely be made, but the costs of such a change would be quite high. Grand jury proceedings would start to resemble a "mini-trial" on the merits (in which case they would closely mimic preliminary examinations), with all the attendant resource demands. Just as importantly, a more adversarial process would take us quite far from the historical understanding of what a grand jury should do. This type of fundamental change should be made, if at all, as part of an overall reevaluation of the institution, not as a consequence of incremental reform.

C. Focus on the Investigative Powers Rather than the Screening Function

Many of the common reform proposals focus on the grand jury's ability to screen cases This orientation is mildly surprising, since the grand jury feature that causes the most popular discontent is the investigative powers. There are frequently expressed concerns that unwary witnesses, ignorant of the subject about which they will be questioned and forced to testify without the guiding hand of counsel, are at times induced to incriminate themselves in crimes.(13) More generally, the grand jury's broad authority to subpoena witnesses, compel testimony, and demand the production of documents and records can be burdensome on witnesses, subjects, and targets alike.

Judicial recognition of the federal grand jury's enormous investigative powers is long-standing and deeply rooted. The power to force witnesses to appear and testify were firmly established at the time the 5th Amendment was ratified,(14) and numerous statutes and rules since that time have confirmed this authority. The breadth of the investigative power is equally well-settled: the grand jury is entitled to "every man's evidence," and the power to search for crime is virtually unconstrained:

The function of the grand jury is to inquire into all information that might possibly bear on its investigation until it has identified an offense or has satisfied itself that none has occurred. As a necessary consequence of its investigatory function, the grand jury paints with a broad brush. . . . [I]ts operation generally is unrestrained by the technical procedural and evidentiary rules governing the conduct of criminal trials.(15)

The reason there are so few limits on this power is that the grand jury plays such an important role in the federal government's crime-control efforts. Grand jury investigations have been remarkably successful in uncovering organized crime, white collar offenses, and official corruption. The power to subpoena and immunize witnesses means that the government can compel the production of evidence that would otherwise be unavailable;(16) in the absence of this authority, law enforcement officials must depend on a cooperative citizenry for information and search warrants to gather physical evidence, neither which has been a satisfactory way to investigate large, complex criminal schemes.(17)

The success of grand juries in uncovering crime makes it politically difficult to limit the investigative powers, but there are other, more subtle barriers to reform. One problem is finding an appropriate remedy. Many of those who feel aggrieved by grand jury investigations are not themselves the target of the investigation and thus are never charged, making the usual remedy - quashing the indictment - ineffective. The recipient of an overreaching subpoena may go to court to resist compliance, but this route is time-consuming and expensive, often making acquiescence the path of least pain. And even when the burden of an overreaching investigation falls on a criminal suspect, quashing the indictment often seems like a disproportionate response.

A second, and related, problem is that the standards for quashing a subpoena are government-friendly. A target or witness who wants to complain that the prosecutor is seeking irrelevant information, for example, must first convince a court that there is "no reasonable possibility that the category of materials the Government seeks will produce information relevant to the general subject of the grand jury's investigation."(18) Given that no one outside the grand jury room has access to the precise knowledge of what is being investigated, the success rate of these motions is predictably low.(19)

Despite these problems, some changes can and probably should be made. Basic rules of fair treatment for witnesses - sufficient advance notice of subpoenas, warnings to witnesses about the dangers of self incrimination,(20) and perhaps an easier standard for showing the unreasonableness of a subpoena(21) - could relieve some of the burdens without interfering with legitimate law enforcement efforts. In addition, rules that require prosecutors to act in an ethical and honorable manner may simply duplicate current Department of Justice standards, but to the extent the rules give teeth to the requirements they are probably desirable. These are admittedly small steps, but on balance, the risks of interfering with the very effective investigative function are high enough to justify caution about proposals for more sweeping change.

III. Conclusion

To summarize: We should begin by recognizing that the unusual nature of the grand jury - its secrecy, its ex parte procedures, its enormous investigatory authority - make it hard to reform without fundamentally altering the nature of the institution. And while fundamental change may be the best way reach some of the goals we seek, centuries of practice, resource constraints, and a strong societal interest in uncovering crime will make dramatic change difficult to achieve. To the extent large-scale reform is contemplated, the interrelated nature of the pre-trial process suggests a system-wide review, rather than one that focuses only on the grand jury.

The core suggestion of these remarks is that any discussion of specific reforms be preceded by a full consideration of the role secrecy plays in grand jury proceedings. Nearly all reforms will touch on this subject in one way or the other, making it critical to know how far our commitment to secrecy extends. Beyond that, smaller, more measured changes -- perhaps by promulgating rules that confirm the prosecutorial responsibilities already recognized by the Department of Justice -- would probably best take account of the grand jury's limited ability to carry out its screening function while still preserving its ability to carry out its investigative tasks.

1.

0 *See, e.g.*, 1 Sara Sun Beale, et al., Grand Jury Law and Practice at 1-21 to 1-22 (2d ed. 1997) ("By the middle of the 19th century . . . . [c]ritics charged that the grand jury was an expensive and cumbersome relic that had outlived its usefulness. There was also concern that the grand jury's inquisitorial procedures posed a threat to individual liberty.").

2.

0 The leading Supreme Court cases on this point are United States v. Williams, 504 U.S. 36 (1992) (court supervisory power may not be used to compel prosecutors to reveal exculpatory evidence to grand jury); United States v. R. Enterprises, 498 U.S 292 (1991) (setting high standard for challenging grand jury subpoena on relevance grounds); United States v. Calandra, 414 U.S. 338 (1974) (use of illegally obtained evidence in grand jury not grounds for witnesses to refuse to answer questions based on that evidence); Costello v. United States, 350 U.S. 359 (1956) (rejecting challenges to indictment based on sufficiency of the evidence).

3.

0 *See* Jury Selection and Service Act, 28 U.S.C. § 1861 *et. seq.*; Fed. R. Crim. P. 6. Congress has limited the use of evidence that was the product of illegal electronic surveillance. *See* 18 U.S.C. § 2515; Gelbard v. United States, 408 U.S. 41 (1972).

4. 0 The proposals to amend the Fifth Amendment were introduced in 1977 as House Joint Resolutions 59 through 62. *See* Hearings before the Subcommittee on Immigration, Citizenship, and International Law on H.R. 94, 95th Cong., 1st Sess., at 995-1003 (1977). For a comparison of the various statutory proposals to change the grand jury, *see id.* at 1006-08, 1140-48; *see also* the proposed Grand Jury Reform Act of 1978, *reprinted in* Appendix to

Hearings before the Subcommittee on Administrative Practice and Procedure of the Committee on the Judiciary on S. 3405, 95th Cong., 2d Sess., at 1-64 (1978).

5.

0 Convictions alone do not confirm the correctness of indictments. It has been alleged that prosecutors at times persuade grand juries to *over*charge defendants in hopes of inducing a guilty plea to some lesser (and perhaps more appropriate) charge. The opaque nature of plea bargains makes it hard to know how often this occurs.

6.

0 *See* U.S. Attorney's Manual § 9-11.233 ("It is the policy of the Department of Justice . . . that when a prosecutor conducting a grand jury inquiry is personally aware of substantial evidence that directly negates the guilt of a subject of the investigation, the prosecutor must present or otherwise disclose such evidence to the grand jury before seeking an indictment against such a person. While a failure to follow the Department's policy should not result in dismissal of an indictment, appellate courts may refer violations of the policy to the Office of Professional Responsibility for review."); *id.* § 9-11.231 ("A prosecutor should not present to the grand jury for use against a person whose constitutional rights clearly have been violated evidence which the prosecutor personally knows was obtained as a direct result of the constitutional violation."); *id.* § 9-11.152 (reasonable requests to testify by subjects and targets normally should be honored).

7.

0 These recommendations and others have recently been advanced by the National Association of Criminal Defense Lawyers in a report found at http://www.criminaljustice.org. Many of these recommendations are similar to standards previously set forth by the American Bar Association. *See* ABA Standards for Criminal Justice § 3-3.6 (3d ed. 1993).

8.

0 *See* Fed. R. Crim. P. 6(e).

9.

0 *See* United States v. Procter & Gamble, 356 U.S. 677, 681 n.6 (1958).

10.

0 *See* Costello v. United States, 350 U.S. 359, 363 (1956) ("If indictments were to be held open to challenge on the ground that there was inadequate or incompetent evidence before the grand jury, the resulting delay would be great indeed. . . . This is not required by the Fifth Amendment.").

11.

0 A more detailed version of this argument and citations to its sources are set forth in Leipold, *Why Grand Juries Do Not (And Cannot) Protect the Accused*, 80 Cornell L. Rev. 260 (1995).

12. 0 A case may be presented to a magistrate at a preliminary examination to determine if there is probable cause to bind the case over for trial. Fed. R. Crim. P. 5.1. But if the grand jury returns an indictment before the preliminary examination, the hearing is mooted. *Id.*, Rule 5(c).

13.

0 For a discussion of these and related topics see Peter J. Henning, *Prosecutorial Misconduct in Grand Jury Investigations*, 51 S.C. L. Rev. 1 (1999).

14.

0 *See* Blair v. United States, 250 U.S. 273, 279-81 (1919).

15.

0 United States v. R. Enterprises, 498 U.S. 292, 297-98 (1991) (internal quote marks and citations omitted).

16. 0 A grand jury may compel the testimony of witnesses who would not otherwise be required to cooperate with police. Although the witness may not be forced to testify in violation of the privilege against self incrimination, that privilege can be overcome by a grant of immunity. *See* 18 U.S.C. §§ 6002, 6003.

17. 0 Commentators have identified several other advantages of grand juries over police investigative work, including the benefits of citizen participation and the benefits of secret proceedings. *See* 3 Wayne R. LaFave et al., Criminal Procedure § 8.3 (2d ed. 1999).

18.

0 U.S. v. R. Enterprises, 498 U.S. at 301.

19.

0 *Id.* at 300 ("[W]e recognize that a party to whom a grand jury subpoena is issued faces a difficult situation. . . . . A party who desires to challenge a grand jury subpoena . . . may have no conception of the Government's purpose in seeking production of the requested information. Indeed, the party will often not know whether he or she is a primary target of the investigation or merely a peripheral witness. Absent even minimal information, the subpoena recipient is likely to find it exceedingly difficult to persuade a court that 'compliance would be unreasonable.'").

20.

0 There apparently is no constitutional requirement that a non-target witness be warned about the dangers of self-incrimination; the rule on targets who testify is less clear. It is the policy of the Department of Justice to advise witnesses of their right against self-incrimination before they testify if they are the target or subject of the investigation. *See* U.S. Attorney's Manual §9-11.151.

21.

0 By way of example, one court of appeals has used its supervisory power to place a preliminary burden on the government to justify a challenged subpoena. The prosecutor must file a so-called "*Schofield* affidavit" that sets forth the relevance of the subpoenaed items to the investigation. *See* In re Grand Jury Proceedings (Doe), 103 F.3d 1140, 1144-45 (3d Cir. 1997) (en banc).

Testimony of Professor Peter J. Henning, Wayne State University Law School

Subcommittee on the Constitution, Committee on the Judiciary

Hearing on Constitutional Rights and the Grand Jury

Thursday, July 27, 2000

Chairman Hyde, Representative Canady, and Members of the Subcommittee:

I appreciate the opportunity to testify before the Subcommittee on the Constitution at this hearing on Constitutional Rights and the Grand Jury. I am an Associate Professor of Law at Wayne State University Law School in Detroit, Michigan. Prior to joining the faculty at Wayne State, I was a Trial Attorney in the Fraud Section of the Criminal Division in the United States Department of Justice. I made numerous appearances before federal grand juries in connection with investigations of bank fraud, mail and wire fraud, and money laundering.

The Investigatory Function of the Federal Grand Jury

A grand jury is made up of 23 citizens chosen at random from the community. They have no special training in the law, and no resources to pursue a case on their own. While the grand jury's roots are traceable to twelfth-century England, it is a body whose role in the legal system is not entirely clear because it combines two almost antithetical functions: it investigates criminal activity (the investigatory function) and then the same group must weigh objectively the evidence to decide whether there is probable cause a person committed the crime (the accusatory function). The Constitution's sole reference to the grand jury is the Fifth Amendment guarantee that no one may be charged with a capital or "otherwise infamous" offense except by a grand jury indictment.

The importance of the grand jury is not its role in deciding whether to indict a defendant, despite the fact that the Fifth Amendment specifically identifies that act as a protected right of a defendant. Indeed, the ability of the grand jurors to exercise their independent judgment regarding whether to indict a defendant has been questioned. Some commentators bemoan the grand jury's lack of real autonomy from the controlling hand of the prosecutor, assailing it as a "lapdog," "rubberstamp," and a "total captive of the prosecutor." These criticisms focus on the grand jury's accusatory role, that it simply follows a prosecutor's lead in mindlessly handing up indictments. Professor Leipold's excellent article, *Why Grand Juries Do Not (and Cannot) Protect the Accused*, 80 CORNELL L. REV. 260 (1995), explains very clearly why grand juries are not an effective means to screen cases from prosecution. Therefore, it is the investigatory function, unmentioned in the Constitution, that is the grand jury's more important role in the criminal justice system.

In American history, grand juries have occasionally served as watchdogs of governmental misconduct, and even more rarely thwarted prosecutorial overzealousness by refusing to indict. The accusatory function declined in importance during the nineteenth century when a number of states authorized prosecutors to file complaints directly with the court to initiate a criminal prosecution. In *Hurtado v. California*, 110 U.S. 516 (1884), the Supreme Court held that states need not charge capital crimes by a grand jury indictment, and this federal right is one of only two criminal protections in the Bill of Rights not applicable to the states.

The development of a large body of professional prosecutors in the twentieth century has enhanced the grand jury's investigatory role. Federal criminal prosecutors do not have independent authority to compel the production of documents or the appearance of witnesses, so they must work under the auspices of the grand jury. As the Department of Justice made economic and organizational crimes--such as money laundering, fraud, and RICO--a priority over the past thirty years, the significance of the grand jury in federal law enforcement increased because its broad authority to compel the production of evidence and the testimony of witnesses is unmatched. While the accusatory function may be largely an anachronism, the grand jury today plays an integral part in the investigation of criminal conduct,

especially white collar crimes.

The key to the grand jury's investigatory power is the authority to issue subpoenas that require the recipient to turn over evidence and appear before the grand jury to testify, on pain of criminal contempt if there is no basis for a refusal to comply. The label "grand jury investigation" is a misnomer because the grand jurors themselves have little to do with the investigatory process of issuing subpoenas, reviewing records, and interviewing witnesses. The prosecutors in the United States Attorney's Office and the investigative agencies--primarily the Federal Bureau of Investigation--control the scope and pace of the investigation. Prosecutors routinely issue subpoenas, usually without informing the grand jurors; a grand jury subpoena can be issued without the jurors even being aware that an investigation exists. In most United States Attorney's Offices, there is a set of blank subpoenas that prosecutors, legal assistants, and support staff can fill out at any time, often upon the request of an investigative agent without further inquiry. In my experience, many subpoenas for records employ boilerplate language describing the documents or material sought, and little thought is given to the breadth of the subpoena--at least not until a recipient objects. In complex white collar crime investigations involving a large number of documents, the vast majority of the records subpoenaed are never shown to the grand jury, only those that the prosecutor deems relevant to the investigation. It is common for prospective grand jury witnesses to meet with prosecutors for an interview before the grand jury session. While there is nothing wrong with any of these procedures, the prosecutor's control of the process means that the grand jury's role is mainly that of an observer and not a participant, even though technically it is the grand jury that has the authority to compel the production of evidence and appearance of witnesses.

While the recipient of a subpoena can challenge it in court, the threshold for enforcement of a grand jury subpoena is quite low. In *United States v. R. Enterprises*, the Supreme Court held that under Rule 17(c) of the Federal Rules of Criminal Procedure a subpoena is enforceable "unless the district court determines that there is no reasonable possibility that the category of materials the Government seeks will produce information relevant to the general subject matter of the grand jury's investigation." 498 U.S. 292, 301 (1991). The investigative powers exercised by prosecutors under the auspices of the grand jury are subject to little external constraint because the Supreme Court has acknowledged that a grand jury is "free to pursue its investigations unhindered by external influence or supervision so long as it does not trench upon the legitimate rights of any witness called before it." *United States v. Dionisio*, 410 U.S. 1, 17-18 (1973). The grand jurors often are only "along for the ride" in investigations that fall largely outside the control of the judiciary, even though the courts are responsible for calling the grand jury into existence and charged with enforcing its demands for information.

Constitutional Regulation of the Grand Jury

The Constitution provides a panoply of rights to individuals before they are charged with a crime. The Fourth Amendment prohibits unreasonable searches and seizures, and under *Miranda* and its progeny custodial interrogations must be preceded by a litany of warnings to inform suspects that they may cut-off all questioning. Through the remedy of the exclusionary rule, the Supreme Court has fashioned a potent means of enforcing these constitutional restrictions on the investigation of criminal conduct that is aimed at deterring the police from violating an individual's constitutional rights. Given that the grand jury is an investigatory body, one might think that the same protections would be afforded in that proceeding. While witnesses retain their Fifth Amendment privilege against self-incrimination, the Supreme Court has rejected all efforts to extend to grand jury proceedings the constitutional protections that are available in other police investigations. Among the Court's decisions in this area are:

- *United States v. Dionisio*: a grand jury subpoena is not a "seizure" subject to the reasonableness requirement of the Fourth Amendment.

- *United States v. Calandra*: evidence subject to the exclusionary rule as the product of an unlawful search in violation of the Fourth Amendment may be used by a grand jury to determine probable cause.

- *United States v. Mandujano*: a witness subpoenaed to testify before the grand jury need not be provided with a *Miranda*-type warning regarding the right to silence.

- *United States v. Washington*: a witness appearing before a grand jury need not be warned that he is a "target" of the investigation.

- *United States v. Doe (Doe II)*: an order directing a witness to sign a waiver of confidentiality for foreign bank records was not compelled testimony in violation of the witness' Fifth Amendment privilege against self-incrimination.

With almost no protection available in grand jury investigations through the specific protections of the Fourth and Fifth Amendments, defendants sought dismissal of indictments by alleging that prosecutorial misconduct tainted the grand jury process. The Supreme Court, however, rejected all efforts to use claims of prosecutorial misconduct in the grand jury as a means to review any aspect of the grand jury's decision to indict, including the conduct of the prosecutor. The linchpin for understanding how the Court has limited judicial review of the prosecutor's conduct in grand jury is its decision in *Costello v. United States*, 350 U.S. 359 (1956).

Costello involved the prosecution of an organized crime figure for tax evasion through what is known as the "net worth" method, which requires the government to produce a large body of evidence showing a disparity between the income declared on the tax return and the amount of the defendant's expenditures. While the government produced over 140 witnesses at trial, the grand jury only heard the testimony of three investigators who summarized the case against the defendant. The defendant alleged a violation of his Fifth Amendment right on the ground that the grand jury relied solely on inadmissible hearsay. The Supreme Court rejected that argument, holding that an "indictment returned by a legally constituted and unbiased grand jury . . . if valid on its face, is enough to call for a trial of the charge on the merits." 350 U.S. at 363. In *Costello*, the Court refused to inject what it viewed as unnecessary formality into a process otherwise "unfettered by technical rules."

Costello precludes a court from inquiring into the substance of the government's evidence used to secure an indictment, and by implication prohibits a court from examining how that evidence came before a grand jury. Simply put, once a grand jury indicts a defendant, the Supreme Court bars any challenge to the process if that would involve scrutinizing the contents or basis of a facially valid indictment. Judicial review of the adequacy of the evidence supporting an indictment would necessarily include examination of the process by which the prosecutor gathered and presented the evidence. The Court saw no benefit in permitting defendants to challenge the prosecutor's conduct when that would entail reviewing the sufficiency of the evidence or adequacy of its presentation to the grand jury, especially when the trial will resolve the fundamental issue of guilt and the indictment is only a probable cause determination.

In light of *Costello*'s prohibition on judicial review of facially valid indictments, it is impossible to fashion a remedy for prosecutorial misconduct in a grand jury investigation if that claim would require a court to take into account the impact of the violation on the grand jury decision to indict. A court cannot inquire about the weight of the evidence the grand jurors considered, or how the investigation proceeded apart from the misconduct. A grand jury may consider a wide variety of evidence, and the probable cause standard for deciding whether to hand up an indictment is quite low so measuring the impact of a violation would be difficult. The only remedy available, therefore, would be dismissal of the indictment without any inquiry into the effect of the misconduct on the grand jury, *i.e.* a prophylactic rule. Yet, if the grand jury has sufficient evidence to indict but a court precludes the government from prosecuting the defendant, there is a substantial cost in the failure to vindicate society's right to seek redress for criminal conduct. Lower courts refer sometimes to the need to deter future prosecutorial misconduct by ordering dismissal, but the impact of the remedy is felt by society and at best only indirectly by the prosecutor.

Dismissal is quite different from applying the exclusionary rule, which only eliminates evidence flowing directly from the constitutional violation. While suppression of evidence may preclude further prosecution, often the government has other evidence to prove its case. Fashioning a remedy for prosecutorial misconduct short of outright dismissal, such as ordering the government to reindict the

defendant before a new grand jury, would be ineffectual. A prophylactic rule requiring dismissal of the indictment and preclusion of further proceedings against the defendant is a very high price to pay for misconduct whose impact on the grand jury process may have been minimal. The harm suffered by a defendant from prosecutorial misconduct may have little to do with the decision to indict, yet with no realistic remedy short of dismissal a court would either have to ignore the misconduct or levy a severe penalty on the government and society.

The Supreme Court has avoided imposing any constitutional limitations on prosecutors in the conduct of grand jury investigations because there is no way to provide a remedy tailored to address the harm, if any, from the violation. The effect of a prophylactic rule would exceed the benefits it would provide. This is especially so because the probable cause standard is so low that it is often unlikely that a constitutional violation would have much effect on the grand jury, and any harm from the misconduct can be addressed at trial. The lack of an appropriate remedy has led the Court to reject efforts by lower courts to create rules governing the prosecutor's conduct of grand jury investigations through the application of the judiciary's inherent supervisory power. While judges have authority over the conduct of the prosecutor in the courtroom, the Court has precluded use of the supervisory power to control the manner in which the grand jury investigation proceeds and the type of evidence the prosecutor can--or must--present to secure an indictment.

The effect of the Court's prohibition on the creation of rules limiting prosecutorial control of grand jury investigations is demonstrated by its decision in *United States v. Williams*, 504 U.S. 36 (1992). The Court rejected the Tenth Circuit's rule, issued under its supervisory power, requiring prosecutors to present exculpatory evidence to a grand jury or risk dismissal of the indictment. The Court held that because the grand jury is not required to listen to any evidence, the judiciary could not prescribe rules regarding what evidence the prosecutor must present to it. While the result certainly sounds incongruous--prosecutors are free to ignore exculpatory evidence and present only what they want the grand jury to hear--it is consistent with the approach set forth in *Costello*. The Court will not permit any inquiry into the substance of the grand jury's decision, thereby protecting the conduct of prosecutors in gathering evidence and presenting it to the grand jury even if that results in perceived unfairness in the proceeding.

Reforming Prosecutorial Control of the Investigation:

Would a Grand Jury Really Indict a Ham Sandwich?

A picaresque description of prosecutorial domination of the grand jury is that any decent prosecutor could secure the indictment of a ham sandwich. The Supreme Court's refusal to constrain the conduct of grand jury investigations through constitutional or judicial rules reinforces the view that the grand jury is subject to prosecutorial manipulation. *Williams*' stark rejection of a seemingly fair rule for conducting grand jury investigations heightens the perception of prosecutorial domination because even evidence of purported innocence need not be brought before the grand jury.

Assertions that prosecutors in fact misuse the process can be overblown, and generally are not supported by empirical data showing widespread abuse of authority. Defendants often assert claims of prosecutorial misconduct in grand jury investigations for tactical reasons, to gain discovery of the government's case or to distract the prosecutors. The fact that prosecutors can--and even sometimes do--misapply their authority does not necessarily mean that the grand jury system is flawed.

The Supreme Court's decisions on the conduct of the grand jury make it clear that there are no constitutional constraints on the investigatory process comparable to the limitations imposed under the Fourth and Fifth Amendments in police investigations. Similarly, lower courts cannot prescribe such rules on their own authority. Direct challenges to prosecutorial misconduct in a pending criminal proceeding are virtually impossible to raise because there are no grounds for asserting a claim that a court can hear. Redress can only be sought in a separate proceeding, apart from the prosecution in which the alleged misconduct took place. Congress--not the courts--can provide the means to address the issue of prosecutorial conduct of grand jury investigations, if it chooses.

Some proposals to reform the grand jury process focus on enhancing the independence of the grand jury in its determination whether to hand up an indictment. Suggestions for reform include allowing witnesses to bring counsel into the grand jury during their testimony and to require prosecutors to present exculpatory evidence, overturning the effect of *Williams*. The accusatory function, however, is much less important than the exercise of the grand jury's investigatory power through the prosecutor. I am not aware of evidence that prosecutors, with any regularity, seek to indict individuals who are clearly not guilty of a criminal offense, so changes targeted at the grand jury's accusatory function are unlikely to be of much importance in protecting innocent individuals.

The question is whether there is a need for additional rules proscribing the prosecutor's control of grand jury investigations. Reform proposals that seek to formalize the grand jury's decision-making process miss the real issue of providing a means for redressing prosecutorial misconduct when it occurs during the investigation. Most misconduct transpires outside the actual presence of the grand jury, so changing what occurs in the grand jury room is unlikely to have much effect on any problems arising in an investigation. The principal areas where prosecutors have acted improperly in the investigative stage, and which Congress may wish to consider, are:

- *Rule 6(e) violations*: The leaking of information about a current investigation to the media by any prosecutorial authority is reprehensible. Rule 6(e)(2) of the Federal Rules of Criminal Procedure prohibits disclosing "matters occurring before the grand jury," but the Rule has been narrowly interpreted by some courts so that prosecutors can disclose many details of an investigation without violating the secrecy requirement. Congress can address this issue by clarifying the scope of the grand jury secrecy rule.

- *Attorney-Client Privilege*: In the past decade, a number of lawyers have been called as witnesses in investigations of their clients and seen the execution of search warrants at their offices that seek information related to their clients. There are significant questions regarding the scope of the attorney-client privilege when a lawyer is called before a grand jury to testify about a client. Some districts require judicial approval of subpoenas to lawyers if the information sought relates to a client, and that may be a worthwhile area for Congress to explore. For law office searches, the Department of Justice guidelines on the subject may not give adequate protection to privileged information in files seized pursuant to a warrant, and procedures for neutral determination of privilege issues should be considered.

- *Improper Investigative Tactics and Biased Decisions*: The Hyde Amendment (18 U.S.C. § 3006A) is a significant step in permitting vindicated defendants to seek a form of redress for prosecutorial misconduct in the institution or prosecution of criminal charges. The adjudication of a claim for attorney's fees under the statute requires judicial scrutiny of the prosecutor's tactics, including pre-indictment actions in the investigation, to determine if the government's position was "vexatious, frivolous, or in bad faith." That is the type of judicial review prohibited under the Supreme Court's decisions if a defendant raised it as a ground to dismiss an indictment. The statute is not clear, however, regarding when one is a "prevailing party" who can seek attorney's fees. For example, can a subpoena recipient who successfully quashes a subpoena seek attorney's fees as a prevailing party, or is the statute limited to those charged with crimes? Congress may wish to consider whether to extend explicitly the attorney's fee provision to pre-indictment proceedings, such as Rule 17(c) motions to quash subpoenas or Rule 41(e) motions for return of property improperly seized.

Conclusion

I appreciate this opportunity to provide a brief overview of my understanding of the relationship of the grand jury to the Constitution, and analysis of why the Supreme Court has taken such a hands-off approach to the conduct of prosecutors in leading grand jury investigations. I will be happy to answer

any questions the Members of the Subcommittee on the Constitution may have.

In accordance with House Rule XI, clause 2(g)(4), I hereby certify that I have received no Government grants, contracts or subcontracts in this or in the two preceding fiscal years.

Subcommittee on the Constitution, Committee on the Judiciary

Hearing on Constitutional Rights and the Grand Jury

Testimony of Professor Peter J. Henning, Wayne State University Law School

Thursday, July 27, 2000

Summary of Prepared Testimony

- The importance of the grand jury is not its role in deciding whether to indict a defendant, despite the fact that the Fifth Amendment specifically identifies that act as a constitutional right of a defendant. It is the investigatory function, unmentioned in the Constitution, that gives the grand jury a key role in the judicial system.
- The label "grand jury investigation" is a misnomer because the grand jurors themselves have little if anything to do with the investigatory process. Prosecutors in the United States Attorneys Office and the investigative agencies--primarily the Federal Bureau of Investigation--control the scope and pace of the investigation.

- The key to the grand jury's investigatory power is the authority to issue subpoenas to compel the production of evidence and the appearance of witnesses. While witnesses appearing before the grand jury retain their Fifth Amendment privilege against self-incrimination, the Supreme Court has rejected all efforts to extend to grand jury proceedings the familiar constitutional protections of the Fourth and Fifth Amendments that are available in other police investigations.
- The Supreme Court consistently rejected efforts to allow claims of prosecutorial misconduct in the grand jury to be raised in the criminal prosecution in which the alleged misconduct occurred. In *Costello v. United States*, the Supreme Court prohibited any judicial review of facially valid indictments, so it is impossible to fashion a remedy for prosecutorial misconduct in grand jury investigations if, before granting a remedy, courts must take into account the impact of the violation on the grand jury decision to indict.
- The Supreme Court's refusal to constrain the prosecutor's conduct of grand jury investigations through constitutional or judicial rules reinforces the view that the grand jury is subject to prosecutorial manipulation. Assertions that prosecutors in fact abuse the process are often overblown, however, or at least are not supported by any empirical data showing widespread misuse of authority. Defendants often assert claims of prosecutorial misconduct in grand jury investigations for tactical reasons, to gain discovery of the government's case or to distract the prosecutors. Proposals to reform the grand jury that seek to formalize the decision-making process miss the real issue of providing a means for redressing prosecutorial misconduct when it occurs during the investigation. Congress should focus on investigatory issues related to improper disclosures during investigations, attorney-client privilege issues, and the right to seek attorney's fees when the government's position is in bad faith.

III-C-2

LEONIDAS RALPH MECHAM
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ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS

WASHINGTON, D.C. 20544

JOHN K. RABIEJ
Chief
Rules Committee Support Office

September 28, 2000

MEMORANDUM TO CRIMINAL RULES COMMITTEE

SUBJECT: *Methamphetamine Legislation*

On June 27, 2000, Judge Scirica, chair of the Standing Rules Committee, wrote a letter to Chairman Henry Hyde expressing concern about a provision in the Senate-passed Methamphetamine Anti-Proliferation Act of 1999, which would amend Criminal Rule 41(d) to eliminate the requirement to notify a person whose "intangible" property had been searched and seized. The House Judiciary Committee was commencing consideration of the bill. At about the same time, we learned of efforts to attach the Methamphetamine bill to bankruptcy reform legislation.

On September 22, the Senate by unanimous consent approved the Children's Health Act of 2000 (H.R. 4365). Title 36 of the Act contains the Methamphetamine Anti-Proliferation Act of 2000. Although it contains many provisions opposed by the judiciary, e.g. certain mandatory-minimum classifications, it does not contain the provision amending Rule 41(d).

A copy of Judge Scirica's letter and the relevant excerpts of legislation are attached.

John K. Rabiej

Attachments

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

ANTHONY J. SCIRICA
CHAIR

PETER G. McCABE
SECRETARY

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W. EUGENE DAVIS
CRIMINAL RULES

MILTON I. SHADUR
EVIDENCE RULES

June 27, 2000

Honorable Henry J. Hyde
Chairman, Committee on the Judiciary
United States House of Representatives
Room 2138, Rayburn House Office Building
Washington, D.C. 20515

Dear Chairman Hyde:

I write on behalf of the Judicial Conference's Committee on Rules of Practice and Procedure (Standing Committee) to express concern regarding § 301(b) of the Methamphetamine Anti-Proliferation Act of 1999 (S. 486). The bill was approved by the United States Senate on November 19, 1999, and referred to your committee on January 27, 2000.

Rule 41(d) of the Federal Rules of Criminal Procedure requires the government to promptly notify a person whose premises have been searched and property seized. Section 301(b) of the Act would amend Rule 41(d) by limiting its reach explicitly to instances when tangible property has been seized. As a result, a person whose intangible property was seized, e.g., officers photographing premises or taking a sample of a substance, would no longer be entitled under the revised rule to receive notice of the executed search warrant.

The Judicial Conference has a longstanding position opposing direct amendment of the Federal Rules of Practice and Procedure outside the Rules Enabling Act rulemaking process. 28 U.S.C. §§ 2071-2077. For this reason, I urge you and your colleagues to decline to support § 301(b) of S. 486.

There is another reason to defer action. During the past 12 months the Advisory Committee on Criminal Rules has been considering at the request of the Department of Justice proposed amendments to Rule 41(d) that would address the same subject covered by § 301(b). At its June 7-8 meeting, the Standing Committee approved the advisory committee's recommendation to publish for comment in August 2000 proposed amendments to Rule 41(d) that would regulate and establish procedures for such covert observations, including in particular appropriate notice provisions. For this additional reason, further action on § 301(b) of the Act might be better deferred to allow the Rules Enabling Act rulemaking process to proceed.

The advisory committee recognized the authority of a law enforcement officer to seek a warrant for the purpose of covertly observing—on a noncontinuous basis—a person or property so long as the person is later provided notice of the search warrant. Federal law enforcement officers have obtained warrants, based on probable cause, to make a covert search—not for the purpose of seizing property but instead to observe and record information. *See United States v. Villegas*, 899 F.2d 1334, 1336 (2d Cir. 1990), *citing Dalia v. United States*, 441 U.S. 238 (1979) and *Katz v. United States*, 389 U.S. 347 (1967).

The advisory committee was particularly concerned, however, that adequate notice provisions be included in any proposed rule amendment regulating covert observations. The committee found compelling the opinion in *United States v. Freitas*, 800 F.2d 1451 (9th Cir. 1986), *citing United States v. New York Telephone Co.*, 434 U.S. 159, 169 (1977), in which the court held that a warrant for a covert search was invalid because it failed to provide any notice to the person whose premises were being covertly observed in violation of the Fourth Amendment. Under the amendments to Rule 41(b) proposed by the advisory committee, the government must provide notice to the person whose property was covertly observed within 7 days of execution. The time for providing the notice may be extended for good cause for a reasonable time, on one or more occasions. I have enclosed a copy of the proposed amendments along with the Committee Note explaining its purpose.

The Standing Committee expects that the public comments stage will provide helpful insights into the proposed rule amendments, which involve cutting-edge issues and particularly complicated areas of the law.. The public comment stage will also provide an opportunity to those persons and organizations who have an important interest in the proposed rule changes to respond to them. At the end of the rulemaking process, this added scrutiny by the public, rules committees, Judicial Conference, and Supreme Court will provide Congress with a much better record on which to base its decision.

The elimination of § 301(b) will not frustrate the purpose of the Methamphetamine Anti-Proliferation Act. But its deletion would further the policies of the longstanding Rules Enabling Act rulemaking process that has been established by agreement of Congress and the courts. I look forward to continuing this dialogue with you on this important matter.

Sincerely,

Anthony J. Scirica
United States Court of Appeals

Enclosure

cc: Members of the House Judiciary Committee

I

106TH CONGRESS
1ST SESSION

H. R. 2987

To provide for the punishment of methamphetamine laboratory operators, provide additional resources to combat methamphetamine production, trafficking, and abuse in the United States, and for other purposes.

IN THE HOUSE OF REPRESENTATIVES

SEPTEMBER 30, 1999

Mr. CANNON (for himself, Mr. HUTCHINSON, Mr. ROGAN, Mr. MCCOLLUM, Mr. SESSIONS, Mr. PICKERING, Ms. LOFGREN, Mr. BERMAN, Mr. CANADY of Florida, Mr. GIBBONS, Mr. CALVERT, Mr. GALLEGLY, and Mr. SALMON) introduced the following bill; which was referred to the Committee on the Judiciary, and in addition to the Committee on Commerce, for a period to be subsequently determined by the Speaker, in each case for consideration of such provisions as fall within the jurisdiction of the committee concerned

---

A BILL

To provide for the punishment of methamphetamine laboratory operators, provide additional resources to combat methamphetamine production, trafficking, and abuse in the United States, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "Methamphetamine Anti-Proliferation Act of 1999".

information pertaining to, in whole or in part, the manufacture or use of a controlled substance, knowing that such person intends to use the teaching, demonstration, or information for, or in furtherance of, an activity that constitutes a Federal crime.

"(b) PENALTY.—Any person who violates subsection (a) shall be fined under this title, imprisoned not more than 10 years, or both.".

(b) CLERICAL AMENDMENT.—The table of chapters at the beginning of part I of title 18, United States Code, is amended by inserting after the item relating to chapter 21 the following new item:

"22. Controlled Substances ..... 421".

SEC. 6. NOTICE; CLARIFICATION.

(a) NOTICE OF ISSUANCE.—Section 3103a of title 18, United States Code, is amended by adding at the end the following new sentence: "With respect to any issuance under this section or any other provision of law (including section 3117 and any rule), any notice required, or that may be required, to be given may be delayed pursuant to the standards, terms, and conditions set forth in section 2705, unless otherwise expressly provided by statute.".

Refers to Rule 41(d)

(b) CLARIFICATION.—(1) Section 2(e) of Public Law 95–78 (91 Stat. 320) is amended by adding at the end the following:

"Subdivision (d) of such rule, as in effect on this date, is amended by inserting 'tangible' before 'property' each place it occurs.".

(2) The amendment made by paragraph (1) shall take effect on the date of the enactment of this Act.

SEC. 7. TRAINING FOR DRUG ENFORCEMENT ADMINISTRATION AND STATE AND LOCAL LAW ENFORCEMENT PERSONNEL RELATING TO CLANDESTINE LABORATORIES.

(a) IN GENERAL.—

(1) REQUIREMENT.—The Administrator of the Drug Enforcement Administration shall carry out the programs described in subsection (b) with respect to the law enforcement personnel of States and localities determined by the Administrator to have significant levels of methamphetamine-related or amphetamine-related crime or projected by the Administrator to have the potential for such levels of crime in the future.

(2) DURATION.—The duration of any program under that subsection may not exceed 3 years.

(b) COVERED PROGRAMS.—The programs described in this subsection are as follows:

(1) ADVANCED MOBILE CLANDESTINE LABORATORY TRAINING TEAMS.—A program of advanced

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H.R.4365

Children's Health Act of 2000 (Engrossed Senate Amendment)

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H.R.4365

Children's Health Act of 2000 (Engrossed Senate Amendment)

TITLE XXXVI--METHAMPHETAMINE AND OTHER CONTROLLED SUBSTANCES

SEC. 3601. SHORT TITLE.

This title may be cited as the `Methamphetamine Anti-Proliferation Act of 2000'.

Subtitle A--Methamphetamine Production, Trafficking, and Abuse

PART I--CRIMINAL PENALTIES

SEC. 3611. ENHANCED PUNISHMENT OF AMPHETAMINE LABORATORY OPERATORS.

(a) AMENDMENT TO FEDERAL SENTENCING GUIDELINES- Pursuant to its authority under section 994(p) of title 28, United States Code, the United States Sentencing Commission shall amend the Federal sentencing guidelines in accordance with this section with respect to any offense relating to the manufacture, importation, exportation, or trafficking in amphetamine (including an attempt or conspiracy to do any of the foregoing) in violation of--

(1) the Controlled Substances Act (21 U.S.C. 801 et seq.);

(2) the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.); or

(3) the Maritime Drug Law Enforcement Act (46 U.S.C. App. 1901 et seq.).

(b) GENERAL REQUIREMENT- In carrying out this section, the United States Sentencing Commission shall, with respect to each offense described in subsection (a) relating to amphetamine--

(1) review and amend its guidelines to provide for increased penalties such that those penalties are comparable to the base offense level for methamphetamine; and

(2) take any other action the Commission considers necessary to carry out this subsection.

III-D

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

September 27, 2000

MEMORANDUM TO CRIMINAL RULES COMMITTEE

SUBJECT: *Local Rules Governing Electronic Filing*

For your information, I am attaching draft charts summarizing the key features of local rules governing electronic case filings in civil cases of four district courts. Professor Daniel Capra, reporter to the Advisory Committee on Evidence Rules, prepared the preliminary charts as part of a project to share the experience of these electronic-case-filings courts with all other courts.

John K. Rabiej

Attachments

Topics/Issues	DISTRICT COURTS
	NORTHERN DISTRICT OF OHIO **(www.ohnd.uscourts.gov)**
Source of ECF Procedures	Local Civil Rules (Jan. 1, 1992; rev'd Jan. 1, 2000) Gen. Order No. 97-38, (Oct. 6, 1997) Gen. Order No. 2000-48, (Aug. 8, 2000) Electronic Filing Policies and Procedures Manual (Feb. 2, 1998) Electronic Case Files (ECF) User Manual (rev'd Sept. 17, 1999)
Cases Accepted for Electronic Filing	"The determination as to whether documents will be filed electronically will be made at the initial Case Management Conference or at any other time if stipulated by the parties and approved by the presiding judicial officer." (Gen. Order No. 97-38, ¶ 5) "Electronic filing may be beneficial for a wide variety of cases. Cases best suited for electronic filing may include those in which: Parties filing or requiring service are reasonably identifiable; Parties filing or requiring service have or can acquire access to a computer, the world wide web and, where necessary, a scanner; and The number and/or size of documents that are likely to be scanned before they are electronically filed is not unreasonable. While scanned documents can be electronically filed, numerous or voluminous documents that need to be imaged may be cumbersome to create, transmit or retrieve. Computerized textual documents, however, may be nearly unlimited in size, subject to Local Rules or Orders regarding page limitations." (Pol. & Proc. Manual, ¶ 5) "Beginning July 1, 2001, all new civil cases filed in the United States District Court for the Northern District of Ohio will be placed in the Case Management/Electronic Case Filing CM/ECF system." (http://www.ohnd.uscourts.gov/Electronic_Filing/electronic_filing.html) "[A]bsent a showing of good cause, all documents, notices and orders in all social security reviews filed in this district on or after January 1, 2001 shall be filed and noticed electronically, rather than on paper, except as noted below." (General Order No. 2000-48 ¶ 1)
Voluntary or Mandatory Participation	"In the early stages of the electronic filing program, the Court will seek the cooperation of the attorneys and their clients in volunteering to participate in the program." (Gen. Order No. 97-38, ¶ 1) "[A]bsent a showing of good cause, the Court hereby orders that all social security cases filed on or after January 1, 2001 be electronically filed." (General Order No. 2000-48 ¶ 11)

Outside Users (Eligibility and Registration, passwords, etc.)	**"To utilize the electronic filing system, attorneys must have a completed Attorney Registration Form on file with the Clerk of Court." (Gen. Order No. 97-38, ¶ 8)** **"A party seeking to file documents electronically must submit a completed Electronic Filing System Registration form (Appendix B) prior to being assigned a user identification name and password that will serve as that party's signature for Fed. R. Civ. P. 11 purposes. Additionally, attorneys seeking to file electronically must be admitted to practice in the U.S. District Court for the Northern District of Ohio. . . Once registration is completed, the party will receive notification by U.S. mail as to his/her user identification name and password. Once registration is completed, the party will receive notification by U.S. mail as to his/her user identification name and password. Parties agree to protect the security of their passwords and immediately notify the clerk of court if they learn that their password has been compromised. Parties may be subject to sanctions for failure to comply with this provision." (Pol. & Proc. Manual, ¶ 12 & App. B)**
Filing/Service of Initial Case Papers	**"The filing of the initial papers, issuance and service of the summons, . . . will be accomplished in the traditional manner on paper (not electronically)." (Gen. Order No. 97-38, ¶ 4)** **"Complaints shall be filed, fees paid, and summons issued and served in the traditional manner on paper rather than electronically. Parties who participate in electronic filing may be required to provide electronic copies of such documents for later entry into the electronic system." (Pol. & Proc. Manual, ¶ 7)** **"Parties will provide to the Clerk of Court electronic copies of all previous paper filings." (Gen. Order No. 97-38, ¶ 6.b)**
FEES	**"[P]ayment of initial filing fees will be accomplished in the traditional manner on paper (not electronically)." (Gen. Order No. 97-38, ¶ 4)**

Filing of Other Papers/ Receipt from Court	**"Unless otherwise ordered by the presiding judicial officer, all subsequent papers will be filed electronically except for papers filed under seal pursuant to LR 5.2 and trial exhibits lodged with the Court pursuant to LR 39.1;" (Gen. Order No. 97-38, ¶ 6.a)** **"Parties will provide to the Clerk of Court electronic copies of all previous paper filings." (Gen. Order No. 97-38, ¶ 6.b)** **"The parties are encouraged to take advantage of electronic servicing and noticing, including notices from the Court, consenting to all service and other notices by electronic means." (Gen. Order No. 97-38, ¶ 6.c)** **"The filing of discovery depositions, interrogatories, requests for production of ducuments, requests for admissions, and answers and responses thereto shall be governed by the Case Management Plan defined in Local Rule 16.1(b)(4), and the determination of whether such materials shall be filed electronically or manually will be made by the judicial officer after consulting with the parties." (Pol. & Proc. Manual, ¶ 20)** **"Electronic transmission of a document consistent with the procedures adopted by the Court shall, upon the complete receipt of the same by the clerk of the court, constitute filing of the document for all purposes of the Federal Rules of Civil Procedure and the Local Rules of this Court, and shall constitute entry of that document onto the docket maintained by the Clerk pursuant to Fed. R. Civ. P. 58 and 79.** **A receipt acknowledging that the document has been filed will immediately appear on the filer's screen. Parties can also verify the filing of documents by inspecting the Court's electronic docket sheet. The Court may, upon the motion of a party or upon its own motion, strike any inappropriately filed document.** **Documents filed electronically must be submitted in the Adobe Acrobat PDF format. Filing documents electronically does not alter any filing deadlines. All electronic transmissions of documents must be completed (i.e., received completely by the Clerk's Office) prior to midnight in order to be considered timely filed that day. Although parties can file documents electronically 24 hours a day, attorneys and parties are strongly encouraged to file all documents during normal working hours of the Clerk's Office (8:00 a.m. to 4:45 p.m.) when assistance is available." (Pol. & Proc. Manual, ¶ 9)**
Filing of Court Orders and Judgments	**"When submitting a motion or application electronically, the proposed order must be submitted on paper to the judge's chambers either prior to or at the time of a hearing or before the date and time of presentment. The order should reference the motion, application or notice of presentment number obtained when the document was filed electronically. A disk containing the proposed order in a WordPerfect compatible format should be submitted to chambers together with the paper copy of the proposed order. Write directly on a label on the disk, the case number and the document number of the motion or application to which the order on the disk relates." (ECF User Manual, p. 31)**

Attachments, Exhibits, Other Difficult-to-Handle Items	**"Unless otherwise ordered by the presiding judicial officer, all subsequent papers will be filed electronically except for papers filed under seal pursuant to LR 5.2 and trial exhibits lodged with the Court pursuant to LR 39.1;" (Gen. Order No. 97-38, ¶ 6.a)** **"Exhibits 'lodged' with the clerk of court pursuant to LR 39.1 will not be filed electronically. Such documents will not be placed into the electronic filing system unless and until they are admitted as part of the official public record. The party submitting the 'lodged' exhibits may be required to resubmit the documents in electronic format once they are admitted into the public record." (Pol. & Proc. Manual, ¶ 19)** **"Parties otherwise participating in the electronic filing system may be excused from filing a particular component electronically under certain limited circumstances, such as when the component cannot be reduced to an electronic format or exceeds [1.5 megabytes]. Such component shall not be filed electronically, but instead shall be manually filed with the clerk of the court and served upon the parties in accordance with the applicable Federal Rules of Civil Procedure and the Local Rules for filing and service of non-electronic documents. Parties making a manual filing of a component shall file electronically a Notice of Manual Filing setting forth the reason(s) why the component cannot be filed electronically. A party may seek to have a component excluded from electronic filing pursuant to Fed. R. Civ. P. 26(c). A model form is provided as Appendix C." (Pol. & Proc. Manual, ¶ 15)**
Sealed Documents	**"Unless otherwise ordered by the presiding judicial officer, all subsequent papers will be filed electronically except for papers filed under seal pursuant to LR 5.2 and trial exhibits lodged with the Court pursuant to LR 39.1;" (Gen. Order No. 97-38, ¶ 6.a)**
Status of Papers Filed Electron-ically	**"Pursuant to Fed. R. Civ. P. 5(e), the Clerk's Office will accept papers filed, signed or verified by electronic means that are consistent with technical standards, if any, that the Judicial Conference of the United States establishes, if ordered by the Court. A paper filed by electronic means in compliance with this Rule constitutes a written paper for the purposes of applying these Rules and the Federal Rules of Civil Procedure." (Local Civil Rule 5.1(b))** **"Electronic transmission of a document consistent with the procedures adopted by the Court shall, upon the complete receipt of the same by the clerk of the court, constitute filing of the document for all purposes of the Federal Rules of Civil Procedure and the Local Rules of this Court, and shall constitute entry of that document onto the docket maintained by the Clerk pursuant to Fed. R. Civ. P. 58 and 79.** **A receipt acknowledging that the document has been filed will immediately appear on the filer's screen. Parties can also verify the filing of documents by inspecting the Court's electronic docket sheet. The Court may, upon the motion of a party or upon its own motion, strike any inappropriately filed document. . . .** **Filing documents electronically does not alter any filing deadlines. All electronic transmissions of documents must be completed (i.e., received completely by the Clerk's Office) prior to midnight in order to be considered timely filed that day. Although parties can file documents electronically 24 hours a day, attorneys and parties are strongly encouraged to file all documents during normal working hours of the Clerk's Office (8:00 a.m. to 4:45 p.m.) when assistance is available." (Pol. & Proc. Manual, ¶ 9)**

Retention of Documents in Paper Form	**"Originals of documents requiring scanning to be filed electronically must be retained by the filing party and made available, upon request, to the Court and other parties for a period of one year following the expiration of all time periods for appeals." (Pol. & Proc. Manual, ¶ 16)**
Signature	**"The user identification number and the user password required to submit documents over the system shall serve as the attorney's signature on all electronic documents filed with the Court, and will also serve as a signature for purposes of Fed. R. Civ. P. 11 and for all other purposes under the Federal Rules of Civil Procedure and the Local Rules of this Court." (Gen. Order 97-38, ¶ 7)** **"The party identification name and password shall constitute the party's signature for Fed. R. Civ. P. 11 puposes pursuant to General order 97-38. All documents filed electronically shall include a signature block in compliance with LR 10.1 and include the typewritten anem, address, telephone number and the attorney's Ohio Bar Registration Number, if applicable.** **In addition, the name of the password registrant under whose password the document is submitted should be preceded by a "s/" and typed in the space where the signature would otherwise appear.** **S/ [Name of Password Registrant]** **Name of Password Registrant** **Address** **City, State, Zip Code** **(xxx) xxx-xxxx [telephone number]** **[attorney bar number, if applicable]** **Documents requiring signatures of more than one party shall be filed either by submitting a scanned document containing all necessary signatures; by representing the consent of the other parties on the document; or by filing the document identifying the parties whose signatures are required and by the submission of a notice of endorsement by the other parties no later than three business days after filing." (Pol. & Proc. Manual, ¶ 17)**
Service of Papers Filed Electron-ically	**"The parties are encouraged to take advantage of electronic servicing and noticing, including notices from the Court, consenting to all service and other notices by electronic means." (Gen. Order No. 97-38, ¶ 6.c)** **"By participating in the electronic filing process, the parties consent to the electronic service of all documents, and shall make available electronic mail addresses for service. Upon filing of a document by a party, an e-mail message will be automatically generated by the electronic filing system and sent via electronic mail to the e-mail address of all parties in the case. In addition to receiving e-mail notifications of filing activity, the parties are strongly encouraged to sign on to the electronic filing system at regular intervals to check the docket in their case.** **A certificate of service must be included with all documents filed electronically. Such certificate shall indicate that service was accomplished pursuant to the Court's electronic filing procedures. The party effectuates service on all parties by filing electronically. Service by electronic mail does not constitute service by mail pursuant to Fed. R. Civ. P. 6(e)." (Pol. & Proc. Manual, ¶ 13)**
Notice of Court Orders and Judgments	**"The parties are encouraged to take advantage of electronic servicing and noticing, including notices from the Court, consenting to all service and other notices by electronic means." (Gen. Order No. 97-38, ¶ 6.c)**

Docket Entries	**"Electronic transmission of a document consistent with the procedures adopted by the Court shall, upon the complete receipt of the same by the clerk of the court, constitute filing of the document for all purposes of the Federal Rules of Civil Procedure and the Local Rules of this Court, and shall constitute entry of that document onto the docket maintained by the Clerk pursuant to Fed. R. Civ. P. 58 and 79." (Pol. & Proc. Manual, ¶ 9)** **"Upon the filing of a document, a docket entry will be created using the information provided by the filing party. The clerk of court will, where necessary and appropriate, modify the docket entry description to comply with quality control standards." (Pol. & Proc. Manual, ¶ 10)**
Technical Failures	**"If a party is unable to file electronically and, as a result, may miss a filing deadline, the party must contact the Help Desk to inform the clerk or court of the difficulty. If a party misses a filing deadline due to an inability to file electronically, the party may submit the untimely filed document, accompanied by a declaration stating that the reason(s) for missing the deadline. The document and declaration must be filed no later than 12:00 noon of the first day on which the Court is open for business following the original filing deadline." (Pol. & Proc. Manual, ¶ 11)**
Public Access	**"You may view the Public Case Information, which will allow you to view docket sheets whether or not you have a login and password." (ECF User Manual p. 10)**
Other Special Provisions for Electronic Filing	**"Documents to be filed electronically are to be reasonably broken into their separate component parts. By way of example, most filings include a foundation document *(e.g.,* motion) and other supporting items *(e.*g., memorandum and exhibits). The foundation document as well as the supporting items will each be deemed a separate component of the filing, and each component shall be uploaded separately in the filing process. Any component having an electronic file size that exceeds 1.5 megabytes shall not be filed electronically. Where an individual component is not included in the electronic filing, the filer shall electronically file the prescribed Notice of Manual Filing in place of that component." (Pol. & Proc. Manual, ¶ 14)** **"Electronically filed documents must meet the requirements of Fed. R. Civ. P. 10 (Form of Pleadings), LR 10.1 (General Format of Papers Presented for Filing), and LR 10.2 (Designation of District Judge and/or Magistrate Judge) as if they had been submitted on paper. Documents filed electronically are also subject to any page limitations set forth by Court order or by LR 7.1(g) (Length of Memoranda)." (Pol. & Proc. Manual, ¶ 8)**
Record on Appeal	

TOPICS/ ISSUES	DISTRICT COURTS WESTERN DISTRICT OF MISSOURI (ecf.mowd.uscourts.gov)
Source of ECF Procedures	• Court En Banc Order (Electronic Filing Procedures), dated Nov. 5, 1998. • ECF Administrative Procedures Manual, dated November 18,1997, updated September, 1999.
Cases Accepted for Electronic Filing	• "The Court shall select those cases to be designated for ECF and shall notify the parties." (Court En Banc Order ¶ 1) • "Beginning October 1, 1999 all cases shall be assigned to the Electronic Filing System." (ECF Admin. Proc. Manual ¶ I.A.)
Voluntary or Mandatory Participation	• "Beginning October 1, 1999 all cases shall be assigned to the Electronic Filing System." (ECF Admin. Proc. Manual ¶ I.A.) • "Except as expressly provided for in ¶ III.A., below, all documents required to be filed with the Court in connection with a case assigned to the System shall be electronically filed on the System." (ECF Admin. Proc. Manual ¶ II.A.) [paragraph III.A. provides for conventional filing of transcripts, documents to be filed under seal, and "exhibits to filed documents, such as leases, notes and the like, which are not available in electronic form"] • "Except as expressly provided in paragraph 6a below, or as ordered by the Court, all motions, pleadings, legal memoranda or other documents required to be filed with the Court shall be electronically filed." (Court En Banc Order ¶ 3.a) [paragraph 6a provides for conventional filing of complaints, attachments to a motion or pleading which are not available in an electronic format, and documents to be filed under seal]
Outside Users (Eligibility and Registration, Passwords, etc.)	• "Each attorney in good standing in this Court shall be entitled to one ECF system login and password . . ." (Court En Banc Order ¶ 2; ECF Admin. Proc. Manual ¶ I.B.)) • "Each attorney registering for the System will receive an internet e-mail message after their password has been assigned. This is to assure that the attorney's internet e-mail address has been entered correctly in the CM/ECF system. The password information will then either be mailed to the attorney by regular, first-class mail; or the attorney may arrange to pick up their password at the Office of the Clerk. (ECF Admin. Proc. Manual ¶I.C.3) • Attorneys may find it desirable to change their court assigned passwords periodically. This can be done by contacting the Office of the Clerk, Systems Department. In the event that the attorney believes that the security of an existing password has been compromised and that a threat to the System exists, the attorney shall give immediate notice by telephonic means to the Clerk of Court, Chief Deputy Clerk or Systems Department Manager and confirm by facsimile in order to prevent access to the System by use of that password." (ECF Admin. Proc. Manual ¶I.C.3)

Filing/Service of Initial Case Papers	• **"The following documents shall only be filed conventionally and not electronically unless specifically authorized by the Court.** **(1) Complaints. . . ." (Court En Banc Order ¶ 6.a..(1))** • **"If you file your complaint before 2:00 p.m., present the Clerk's office with a Civil Cover Sheet (JS-44c) and that portion of the complaint which lists the case party information . . . " (ECF Admin. Proc. Manual ¶ II.B.1) OR "You may present us with a Civil Cover Sheet . . . and your complaint in adobe.pdf format on a disk. This is an option always available to you, BUT IS MANDATORY AFTER 2:00 P.M." (ECF Admin. Proc. Manual ¶ II.B.2)**
Fees	• **"For filings that require a fee, application for authorization of credit card payment may be made with the financial officer of the Office of the Clerk." (ECF Admin. Proc. Manual ¶ II.E; Court En Banc Order ¶ 3.e)**
Filing of Other Papers/Receipt from Court	• **"Except as expressly provided for in paragraph III.A., below, all documents required to be filed with the Court in connection with a case assigned to the System shall be electronically filed on the System." (ECF Admin. Proc. Manual ¶ II.A.) [paragraph III.A. provides for conventional filing of transcripts, documents to be filed under seal, and "exhibits to filed documents, such as leases, notes and the like, which are not available in electronic form"]** • **"Except as expressly provided in paragraph 6a below, or as ordered by the Court, all motions, pleadings, legal memoranda or other documents required to be filed with the Court shall be electronically filed." (Court En Banc Order ¶ 3.a) [paragraph 6a provides for conventional filing of complaints, attachments to a motion or pleading which are not available in an electronic format, and documents to be filed under seal]** • **"If you bring us paper you will be asked to scan your document onto a disk." (ECF Admin. Proc. Manual ¶ IV.B)** • **"The electronic filing of a pleading or other document in accordance with these procedures shall constitute filing of the document for all purposes under the Federal Rules of Civil Procedure and the Local Rules of this Court and shall constitute entry of that pleading or other document on the docket kept by the Clerk under FRCP 79(a)." (Court En Banc Order 3.b)**
Filing of Court Orders and Judgments	• **"All orders, decrees, judgments, and proceedings of the Court will be entered in accordance with these procedures and shall constitute entry of the order, decree, judgment or proceeding on the docket kept by the Clerk under FRCP 79(a)." (Court En Banc Order ¶ 3.c)** • **"All signed orders shall be filed electronically by either the presiding judge in the case or the office of the Clerk." (ECF Admin. Proc. Manual ¶ II.F)** • **"[A]ll proposed orders must be e-mailed to the courtroom deputy for the presiding judge in your case IN WORDPERFECT FORMAT . . . Please attach your proposed order to an internet e-mail sent to the appropriate courtroom deputy as listed . . ." (ECF Admin. Proc. Manual ¶ II.F)**

Attachments, Exhibits, Other Difficult-to-Handle Items	• **"The following documents shall be filed conventionally and not electronically unless specifically authorized by the Court:** **1. Transcripts;** **2. Document(s) to be filed under seal . . .** **3. Exhibits to filed documents, such as leases, notes and the like, which are not available in electronic form. However exhibits to filed documents can be electronically imaged and filed using Portable Document Format (PDF). Whenever possible, the attorney should extract and file electronically the relevant portions of conventionally produced documents." (ECF Admin. Proc. Manual ¶ III.A.1-3)** • **"The following documents shall only be filed conventionally . . . unless specifically authorized by the Court. . . .** **(1) Complaints.** **(2) Attachments to a motion or pleading which are not available in an electronic format. The filer should also file and extract electronically any part of the attachment which the filer has in an electronic format. . . .** **(4) Transcripts.** **(5) Records from state court proceedings. . . .** **(6) Proposed Orders." (Court En Banc Order ¶ 6.a.(1), (5), and (6))**
Sealed Documents	• **"Documents to be filed under seal. . . . shall only be filed conventionally and not electronically unless specifically authorized by the Court. . . . However, the motion to file documents under seal shall be filed electronically unless prohibited by law." (Court En Banc Order ¶ 6.a.(3))** • **"The Order of the Court authorizing the filing of documents under seal shall be filed electronically by the assigned judge unless prohibited by law. A paper copy of the Order shall be attached to the documents under seal and be delivered to the Office of the Clerk. . . ." (Court En Banc Order ¶ 6.a.(3)(a))**
Status of Papers Filed Electronically	• **"The electronic filing of a pleading or other document in accordance with these procedures shall constitute filing of the document for all purposes under the Federal Rules of Civil Procedure and the Local Rules of this Court and shall constitute entry of that pleading or other document on the docket kept by the Clerk under FRCP 79(a)." (Court En Banc Order ¶ 3.b)**
Retention of Documents in Paper Form	• **"Any pleading, affidavit or other document containing original signatures shall indicate on the electronically filed document a signature, e.g., 's/Jane Doe'. The originally executed copy must be maintained by the filer for two (2) years after final resolution of the action, including final disposition of all appeals." (Court En Banc Order ¶ 4.b)**

Signatures	• **"Use of the attorney's password/login to electronically file a pleading, affidavit or other document constitutes the attorney's signature for all purposes." (Court En Banc Order ¶ 4.a)"** • **"Any pleading, affidavit or other document containing original signatures shall indicate on the electronically filed document a signature, e.g., 's/Jane Doe'." (Court En Banc Order ¶ 4.b)** • **"Documents which must contain original signatures or which require either verification or an unsworn declaration under any rule or [statute], shall be filed electronically with originally executed copies maintained by the filer. The pleading or other document electronically filed shall indicate a signature, e.g., 's/Jane Doe'." (ECF Admin. Proc. Manual ¶ II.D.1)** • **"In the case of a stipulation or other document to be signed by two or more persons, the following procedure should be used:** **(a) The filing party or attorney shall initially confirm that the content of the document is acceptable to all persons required to sign the document and shall obtain the physical signatures of all parties on the document.** **(b) The filing party or attorney then shall file the document electronically, indicating the signatories, e.g., 's/Jane Doe,' 's/John Doe,' etc.** **(c) The filing party or attorney shall retain the hardcopy of the document containing the original signatures . . .** **(d) No later than the first business day after the document has been electronically filed, each person required to sign the document shall file a Notice of Endorsement of the document. The document shall be deemed fully executed upon the filing of all Notices of Endorsement that are due." (ECF Admin. Proc. Manual ¶ 2.D.2.(a)—(d))**

Service Procedures	• **"Each person, including the Office of the Clerk, electronically filing a pleading, order, decree, judgment or other document shall, on the same day, serve a 'Notice of Electronic Filing' on parties entitled to service under the Federal Rules of Civil Procedure and the Local Rules. The 'Notice . . .' shall be served by hand, facsimile, e-mail or by first-class mail postage prepaid. In addition, paper copy of the electronically filed pleading or other document shall be (i) delivered to the . . . judge assigned to the case, together with a copy of the 'Notice . . .' until the judge assigned to the case orders otherwise, and (ii) served on those parties not designated to receive or not able to receive electronic notice. If such service of a paper copy is to be made, it shall be made pursuant to the Federal Rules of Civil Procedure and the Local Rules." (Court En Banc Order ¶ 5.a)** • **"Participants in the ECF pilot project agree to receive notice and service as provided herein." (Court En Banc Order ¶ 5.b)** • **Pleadings or other documents which are not filed electronically shall be served in accordance with the Federal Rules of Civil Procedure and the Local Rules except as otherwise provided by Order of the Court." (Court En Banc Order ¶ 5.c)** • **"The electronic Case File system will generate a 'Notice of Electronic Filing' when any document is filed. The filing party is obligated to serve this 'Notice . . .' upon all other parties at that time. This service can be accomplished by e-mail. In addition, a paper copy of the electronically filed pleading or other document shall be (I) sent to the chambers of the presiding judge in the case, together with a copy of the " Notice . . .' unless and until the judge assigned to the case orders otherwise, and (II) served on those parties not designated or able to receive electronic notice, but nevertheless entitled to notice of said pleading or other document in accordance with the Federal Rules of Civil Procedure and the Local Rules of the Western District of Missouri except as otherwise provided by order of the Court. If such service of a paper copy is to be made, it shall be made pursuant to the Federal Rules of Civil Procedure and the Local Rules of the Western District of Missouri." (ECF Admin. Proc. Manual ¶ II.C.1)** • **"[F]or paper documents of documents filed on 3.5 inch floppy disk, the filing party shall not be required to serve any pleading or other documents (other than the 'Notice . . .' generated by the System) on any party entitled to electronic notice." (ECF Admin. Proc. Manual ¶ II.C.2)** • **"Pleadings or other documents which are filed conventionally or on 3.5 inch floppy disk rather than electronically shall be served in the manner provided for in, and those parties entitled to notice in accordance with, the Federal Rules of Civil Procedure and the Local Rules of the Western District of Missouri except as otherwise provided by order of the Court." (ECF Admin. Proc. Manual ¶ III.B)**
Notice of Court Orders and Judgments	• **"All signed orders shall be filed electronically by either the presiding judge in the case or the office of the Clerk." (ECF Admin. Proc. Manual ¶ II.F)** • **SEE "Service Procedures" SECTION ABOVE.**

Docket Entries	• **"The electronic filing of a pleading or other document in accordance with these procedures shall constitute filing of the document for all purposes under the Federal Rules of Civil Procedure and the Local Rules of this Court and shall constitute entry of that pleading or other document on the docket kept by the Clerk under FRCP 79(a)." (Court En Banc Order 3.b)** • **"All orders, decrees, judgments, and proceedings of the Court will be entered in accordance with these procedures and shall constitute entry of the order, decree, judgment or proceeding on the docket kept by the Clerk under FRCP 79(a)." (Court En Banc Order ¶ 3.c)** • **"The person electronically filing a pleading or other document must title the document using one of the categories contained in the ECF Procedures Manual . . ." (Court En Banc Order ¶ 3.e; ECF Admin. Proc. Manual ¶ II.G)** • **"All documents which form part of a pleading and which are being filed at the same time and by the same party may be electronically filed together under one docket number, e.g., the motion and a supporting affidavit, with the exception of suggestions in support. Suggestions in support should be electronically filed separately and shown as a related document to the motion." (ECF Admin. Proc. Manual ¶ II.A.2)**
Technical Failures	• **"The Clerk shall deem the W.D.M.O. Public Web site to be subject to a technical failure on a given day if the Site is unable to accept filings continuously or intermittently over the course of any period of time greater than one hour after 12:00 noon that day, in which case filings due that day which were not filed due solely to such technical failures shall become due the next business day. Such delayed filings shall be rejected unless accompanied by a declaration or affidavit attesting to the filing person's failed attempts to file electronically at least two times after 12:00 p.m. separated by at least one hour on each day of delay due to such technical failure." (ECF Admin. Proc. Manual ¶ V)**
Public Access	• **"Any person or organization other than those referred to in paragraph I.B.1. may access the System at the Court's Internet site at http://ecf.mowd.uscourts.gov. Such access to the System through the Internet site will allow retrieval of the docket sheet and documents on a time delayed basis. Unless a user has a Password, access to the System will be on a 'read only' basis." (ECF Admin. Proc. Manual ¶ IV.A.) [paragraph I.B.1. refers to attorneys with passwords]**
Record on Appeal	

Topics/Issues	DISTRICT COURTS
	eastern district of new york **(www.nyed.uscourts.gov)**
Source of ECF Procedures	• **Admin. Order 97-12 (Oct. 23, 1997)** • **Admin. Order 99-2 (June 9, 1999)** • **User's Manual for ECF [Electronic Case Filing] (Jan. 4, 1999)**
Cases Accepted for Electronic Filing	• **"The Clerk shall maintain and post on the E.D.N.Y. Public Web Site a list of the Judges of this Court who permit use of EFP [Electronic Filing Procedures] in actions assigned to them ('Participating Judicial Officers'). A magistrate judge assigned to an action in which the assigned judge is a Participating Judicial Officer shall be deemed a Participating Judicial Officer for the purposes of that Action. Upon the filing of the complaint in any action in which the Judge initially assigned is a Participating Judicial Officer, the Clerk shall provide the plaintiff(s)with a copy of a Notice Regarding Availability of Electronic Filing in a form approved by the Chief Judge. Such Notice shall be served upon the defendant(s) in the action together with the summons and complaint." (Admin. Order 97-12 ¶ 2(a))** • **"In any action subject to EFP, upon application of any party or sua sponte, the assigned Judge may terminate or modify application of EFP to the action." (Admin. Order 97-12 ¶ 2(d))**
Voluntary or Mandatory Participation	• **"At the initial scheduling conference in the action, if the assigned judicial officer consents to use of EFP, and if all parties appearing also consent to use of EFP, then the parties shall sign at the initial conference a Joint Consent to EFP satisfying the requirements of paragraph 3; otherwise the assigned judicial officer shall note on the initial Scheduling Order that the action shall not be subject to EFP." (Admin. Order 97-12 ¶ 2(a))**

Outside Users (Eligibility and Registration)	• "Any attorney admitted to the Bar of this Court may register as a Filing User of the E.D.N.Y. Public Web Site. Registration shall be by paper on a form prescribed by the Clerk which shall require identification of the action as well as the name, address, telephone number and Internet e-mail address of the attorney, together with a declaration that the attorney is admitted to the Bar of this Court." (Admin. Order 97-12 ¶ 12(a)) • "Any party to a pending civil action who is not represented by an attorney may register as a Filing User of the E.D.N.Y. Public Web Site solely for purposes of the action. Registration shall be by paper on a form prescribed by the Clerk which shall require identification of the action as well as the name, address, telephone number and Internet e-mail address of the party. If, during the course of the action, the party retains an attorney who appears on the party's behalf, the appearing attorney shall advise the Clerk to terminate the party's registration as a Filing User upon the attorney's appearance." (Admin. Order 97-12 ¶ 12(b)) • "The filing of a Consent to EFP constitutes consent to service of all papers as provided herein as a full, adequate and timely substitute for service pursuant to Federal Rules of Civil Procedure." (Admin. Order 97-12 ¶ 6(c))
Filing/ Service of Initial Case Papers	• "Nothing in the EFP shall affect the manner of filing and service of complaints (including third-party complaints) and the issuance and service of summonses, which in all civil actions shall continue to be filed, issued and served in paper form and in conformance with the Federal Rules of Civil Procedure and the Local Rules of this Court." (Admin. Order 97-12 ¶ 1) • "Within ten days after an action becomes subject to EFP, each party shall refile electronically . . . every paper in the action that the party previously filed." (Admin. Order 97-12 ¶ 2(c))
Fees	

Filing of Other Papers/ Receipt from Court	• "Notwithstanding the provisions of Local Civil Rule 5.1(a), in any action subject to EFP, the assigned Judge may enter an order authorizing the filing of discovery requests, discovery responses, discovery materials or other matter subject to Local Civil Rule 5.1(a), but only to the degree and upon terms and conditions to which all of the parties (or non-parties producing such materials) have previously agreed in a stipulation submitted to the Court. In the absence of such an order, no party shall file any such materials except in the form of excerpts, quotations, or selected exhibits from such materials as part of motion papers, pleading or other filings with the Court which must refer to such excerpts, quotations, etc." (Admin. Order 97-12 ¶ 11) • "ORDERED that a standing protective order is hereby entered limited to prohibiting the electronic filing of the administrative hearing transcripts and the litigants' briefs in Social Security cases, and it is further ORDERED that any material not filed electronically pursuant to this Order shall be filed with the Clerk and served as if the action were not subject to the Electronic Filing Procedures." (Admin. Order 99-2) • "In any case designated as subject to EFP, all papers required to be filed with the Clerk shall be filed electronically on the E.D.N.Y. Public Web Site pursuant to EFP, except as expressly provided herein." (Admin. Order 97-12 ¶ 4(a)) • "Electronic transmission of a paper to the E.D.N.Y. Public Web Site consistent with EFP, together with the receipt of a Notice of Electronic Filing from the Court in the form shown in the Users' Manual, shall constitute filing of the paper for all purposes of the Federal Rules of Civil Procedure and the Local Rules of this Court, and shall constitute entry of that paper on the docket kept by the Clerk pursuant to Rules 58 and 79 of the Federal Rules of Civil Procedure. Only upon receipt of such Notice of Electronic Filing from the Court will the paper be deemed filed and entered." (Admin. Order 97-12 ¶ 4(c)) • "When a paper has been filed electronically, the official paper of record is the electronic recording of the paper as stored by the Court, and the filing party shall be bound by the paper as filed. Except in the case of papers first filed in paper form and subsequently submitted electronically, a paper filed electronically shall be deemed filed at the date and time stated on the Notice of Electronic Filing from the Court." (Admin. Order 97-12 ¶ 4(d))
Filing of Court Orders and Judgments	• "In any case designated as subject to EFP, all papers required to be filed with the Clerk shall be filed electronically on the E.D.N.Y. Public Web Site pursuant to EFP, except as expressly provided herein." (Admin. Order 97-12 ¶ 4(a)) • "A Filing User filing any paper electronically that requires a judicial officer's signature shall also promptly deliver such document in paper form to the judicial officer by U.S. mail or other means." (Admin. Order 97-12 ¶ 4(h))
Attachments, Exhibits, Other Difficult-to-Handle Items	• "Papers or sets of papers that are too bulky to permit electronic filing conveniently via the Filing User's Internet connection may be filed by bringing EFP-compliant copies on electronic media approved by the Clerk and filed electronically by the Filing User using a high-bandwidth Internet connection and equipment to be provided by the Clerk in the Clerk's Office . . ." (Admin. Order 97-12 ¶ 4(g))

Sealed Documents	• **"Nothing in the EFP shall be interpreted to permit material prohibited by order from filing except under seal to be filed by any means except under physical seal." (Admin. Order 97-12 ¶ 4(i))**
Status of Papers Filed Electron-ically	• **"Electronic transmission of a paper to the E.D.N.Y. Public Web Site consistent with EFP, together with the receipt of a Notice of Electronic Filing from the Court in the form shown in the Users' Manual, shall constitute filing of the paper for all purposes of the Federal Rules of Civil Procedure and the Local Rules of this Court, and shall constitute entry of that paper on the docket kept by the Clerk pursuant to Rules 58 and 79 of the Federal Rules of Civil Procedure. Only upon receipt of such Notice of Electronic Filing from the Court will the paper be deemed filed and entered." (Admin. Order 97-12 ¶ 4(c))** • **"When a paper has been filed electronically, the official paper of record is the electronic recording of the paper as stored by the Court, and the filing party shall be bound by the paper as filed. Except in the case of papers first filed in paper form and subsequently submitted electronically, a paper filed electronically shall be deemed filed at the date and time stated on the Notice of Electronic Filing from the Court." (Admin. Order 97-12 ¶ 4(d))** • **"Individual rules of a Participating Judicial Officer requiring delivery of courtesy copies of any paper filed shall remain in force until rescinded by the Participating Judicial Officer, but the provisions of any such rule requiring equivalent service of the paper upon all parties shall be satisfied by compliance with the electronic filing and service provisions of the EFP." (Admin. Order 97-12 ¶ 4(j))**
Retention of Documents in Paper Form	• **"Any Filing User filing a paper electronically shall make and keep copies of the paper in both paper and electronic form for subsequent production to the Court if so ordered or for inspection upon request by a party until one year after final resolution of the action (including appeal, if any) in the case of the copy in paper form, and until ten years after final resolution of the action (including appeal, if any) in the case of the copy in electronic form." (Admin. Order 97-12 ¶ 4(f))**

Signature	• "A paper filed with the Court electronically shall be deemed to be signed by a person (the 'Signatory') when the paper identifies the person as a Signatory and the filing complies with either subparagraph (a), (b) or (c). When the paper is filed with the Court in accordance with any of these methods, the filing shall bind the Signatory as if the paper (or the paper to which the filing refers, in the case of a Notice of Endorsement filed pursuant to subparagraph (c)) were physically signed and filed, and shall function as the Signatory's signature, whether for purposes of Rule 11 of the Federal Rules of Civil Procedure, to attest to the truthfulness of an affidavit or declaration, or for any other purpose. (a) In the case of a Signatory who is a Filing User (as that term is defined in paragraph 12), such paper shall be deemed signed, regardless of the existence of a physical signature on the paper, provided that such paper is filed using the User ID and Password of the Signatory. The page on which the physical signature would appear if filed in paper form must be filed electronically, but need not be filed in an optically scanned format displaying the signature of the Signatory. (b) In the case of a Signatory who is not a Filing User, or who is a Filing User but whose User ID and Password will not be utilized in the electronic filing of the paper, such paper shall be deemed signed and filed when the paper is physically signed by the Signatory, the paper is filed electronically, and the signature page is filed in optically scanned form pursuant to and consistent with the EFP. The Filing User who files such paper shall retain the executed original of the paper as the copy in paper form required pursuant to paragraph 4(f). (c) In the case of a paper that has already been filed electronically with the Court, the paper shall be deemed signed and filed by the Signatory when a Notice of Endorsement of the paper is signed and filed by the Signatory pursuant to either subparagraph (a) or (b). Such Notice must provide the title, electronic docket number, and date and time filed of the paper being so signed. (d) In the case of a stipulation or other paper to be signed by two or more persons, the paper may be filed and signatures may be provided in a single electronic filing in which all signatures are authorized either (i) pursuant to subparagraph (b) alone, or (ii) pursuant to subparagraph (a) in the case of one Signatory who is a Filing User and pursuant to subparagraph (b) in the case of all other Signatories. (e) In the case of a stipulation or other paper to be filed and signed by two or more persons, the paper may be filed and signatures may be provided in two or more electronic filings as follows: One Filing User shall initially confirm that the content of the paper is acceptable to all persons due to sign the paper and shall obtain the physical signatures on the paper of the Signatories who do not intend independently to transmit their signatures electronically to the Court. Such Filing User shall then file the paper and submit all such signatures electronically in a single electronic filing in which the signatures are authorized by subparagraphs (a) or both. The paper shall also list all persons whose signatures are due to be transmitted independently to the Court. Not later than the first business day after such filing, all other persons due to sign the paper shall file one or more Notices of Endorsement of the paper pursuant to subparagraph (c). The paper shall be deemed fully executed upon the filing of all Notices of Endorsement that are due." (Admin. Order 97-12 ¶¶ 5(a)-(e))

Service of Papers Filed Electron-ically	• "An attorney or unrepresented party filing a paper pursuant to EFP shall, within one hour following filing, send by e-mail a Notice of Filing of the paper to all E-Mail Addresses of Record. Such Notice shall provide, at a minimum, the electronic docket number and the title of the paper filed, and shall provide the date and time filed, as set forth in the Notice of Electronic Filing received from the Court. Such e-mail transmission(s) shall constitute service on the attorney or unrepresented party or other persons who have consented to EFP. Proof of such service shall be filed with the Court pursuant to the EFP, but such proof of service need not itself be served." (Admin. Order 97-12 ¶ 6(a)) • "Upon the filing of a third-party complaint pursuant to paragraph 1 in an action which is subject to EFP, the third-party plaintiff(s) shall serve notice that the action is subject to EFP upon the third-party defendant together with the third-party complaint. Concurrent with the filing of the third-party answer or other papers responsive to the third-party complaint, the third-party defendant shall either (i) file a Consent to EFP for purposes of the action, or (ii) move for exemption from EFP pursuant to subparagraph 2(d)." (Admin. Order 97-12 ¶ 7(a)) • "In an action subject to EFP, when service of a paper other than a third-party complaint is required to be made upon a person who has not filed a Consent to EFP, a paper copy of the document shall be served on the person as otherwise required by the Federal Rules of Civil Procedure or the Local Rules of this Court. If the person so served is permitted or required to respond to the paper, such time to respond shall be computed without regard to the EFP. Such person may file a Consent to EFP conforming to the requirements of paragraph 3 and thereby become subject to the EFP for the purposes of the action." (Admin. Order 97-12 ¶ 7(b)) • "A Filing User filing any paper electronically that requires a judicial officer's signature shall also promptly deliver such document in paper form to the judicial officer by U.S. mail or other means." (Admin. Order 97-12 ¶ 4(h)) • "Individual rules of a Participating Judicial Officer requiring delivery of courtesy copies of any paper filed shall remain in force until rescinded by the Participating Judicial Officer, but the provisions of any such rule requiring equivalent service of the paper upon all parties shall be satisfied by compliance with the electronic filing and service provisions of the EFP." (Admin. Order 97-12 ¶ 4(j))
Notice of Court Orders and Judgments	• "The Clerk shall file electronically all orders, decrees, judgments, and proceedings of the Court in accordance with the EFP, which shall constitute entry of the order, decree, judgment or proceeding on the docket kept by the Clerk pursuant to Rules 58 and 79 of the Federal Rules of Civil Procedure. Immediately upon the entry of an order or judgment in an action subject to EFP, the Clerk shall transmit by e-mail to the E-Mail Addresses of Record a notice of the entry of the order or judgment and shall make a note in the docket of the transmission. Transmission of the notice of entry shall constitute notice as required by Rule 77(d) of the Federal Rules of Civil Procedure. When notice of the order or judgment is due to be provided to a person who has not consented to EFP, the Clerk shall give such notice in paper form pursuant to the Federal Rules of Civil Procedure." (Admin. Order 97-12 ¶ 9)

Docket Entries	• "Electronic transmission of a paper to the E.D.N.Y. Public Web Site consistent with EFP, together with the receipt of a Notice of Electronic Filing from the Court in the form shown in the Users' Manual, shall constitute filing of the paper for all purposes of the Federal Rules of Civil Procedure and the Local Rules of this Court, and shall constitute entry of that paper on the docket kept by the Clerk pursuant to Rules 58 and 79 of the Federal Rules of Civil Procedure. Only upon receipt of such Notice of Electronic Filing from the Court will the paper be Deemed filed and entered." (Admin. Order 97-12 ¶ 4(c)) • "The E.D.N.Y. Public Web Site shall denote in a separate electronic document for each action subject to EFP the filing of any paper by or on behalf of a party and the entry of any order or judgment by the Court, regardless of whether such paper was filed electronically. The record of those filings and entries for each case shall be consistent with Rule 79(a) of the Federal Rules of Civil Procedure and shall constitute the docket for purposes of that Rule. The Clerk shall make such technical accommodations as may be necessary to permit the Court's existing PACER system to access electronic dockets for actions subject to EFP." (Admin. Order 97-12 ¶ 8)
Technical Failures	• "The Clerk shall deem the E.D.N.Y. Public Web Site to be subject to a technical failure on a given day if the Site is unable to accept filings continuously or intermittently over the course of any period of time greater than one hour after 12:00 noon that day, in which case filings due that day which were not filed due solely to such technical failures shall become due the next business day. Such delayed filings shall be rejected unless accompanied by a declaration or affidavit attesting to the filing person's failed attempts to file electronically at least two times after 12:00 p.m. separated by at least one hour on each day of delay due to such technical failure. The Clerk shall provide notice of all such technical failures on the E.D.N.Y. Public Web Site, and by means of an E.D.N.Y. Public Web Site status line which persons may telephone in order to learn the current status of the Site." (Admin. Order 97-12 ¶ 10(a)) • "If, within 24 hours after filing a paper electronically, the filing party discovers that the version of the paper available for viewing on the E.D.N.Y. Public Web site does not conform to the paper as transmitted upon filing, the filing party may file of right a retransmitted copy of the paper. This provision (and the designation 'Retransmitted') shall not be used for the filing of corrections of typographical errors or other changes or variations from the paper as transmitted upon filing." (Admin. Order 97-12 ¶ 10(c))

Public Access	• **"The Clerk's Office shall provide sufficient equipment and facilities, including high-bandwidth Internet access, to allow for public electronic filing of papers and for public access to all Court records. The use of such facilities and equipment for any purpose other than accessing the E.D.N.Y. Public Web Site is prohibited." (Admin. Order 97-12 ¶ 16(a))** • **Until such time as the United States Court of Appeals for the Second Circuit provides notice to the Chief Judge that public access to the E.D.N.Y. Public Web Site obviates or modifies any need for transmittal of the record on appeal of any action subject to EFP as to which a notice of appeal to that Court of Appeals has been filed, when required, the Clerk shall deliver to the Court of Appeals, at that Court's election, either a complete paper copy of the record on appeal or an electronic reproduction of that record on appeal as such record is reflected in the E.D.N.Y. Public Web Site." (Admin. Order 97-12 ¶ 16(b))** • **"The E.D.N.Y. Public Web Site shall include for each action subject to EFP a current list of the E-Mail Addresses of Record maintained by the Clerk. Each attorney of record and each unrepresented party shall promptly serve notice upon all parties of any change in such person's E-Mail Addresses of Record for the purposes of the action, and shall promptly notify the Clerk of such change, including identifying to the Clerk each action subject to EFP in which such e-mail address must be updated and confirming that such person has received test e-mail messages successfully from all persons who have consented to EFP in each such action." (Admin. Order 97-12 ¶ 3(c))**

Other Special Provisions for Electronic Filing	• "Whenever a person has the right or is required to do some act or take some proceedings within a prescribed period after the service of a notice or other paper upon the person, and such paper is filed and served electronically pursuant to EFP, one day shall be added to the prescribed period. Service pursuant to subparagraph (a) shall not constitute service by mail to which Rule 6(e) of the Federal Rule of Civil Procedure applies. Service shall be deemed complete on the date of e-mail transmission pursuant to subparagraph (a)." (Admin. Order 97-12 ¶ 6(b)) • "Notwithstanding the provisions of Local Civil Rule 5.1(a), in any action subject to EFP, the assigned Judge may enter an order authorizing the filing of discovery requests, discovery responses, discovery materials or other matter subject to Local Civil Rule 5.1(a), but only to the degree and upon terms and conditions to which all of the parties (or non-parties producing such materials) have previously agreed in a stipulation submitted to the Court. In the absence of such an order, no party shall file any such materials except in the form of excerpts, quotations, or selected exhibits from such materials as part of motion papers, pleading or other filings with the Court which must refer to such excerpts, quotations, etc." (Admin. Order 97-12 ¶ 11) • "In connection with discovery or the filing of any material in an action subject to EFP, any person may apply by motion for an order prohibiting the electronic filing in the action of certain specifically-identified materials on the grounds that such materials are subject to copyright or other proprietary rights and that, notwithstanding the existence of such rights and the notice for which subparagraph 13(a) provides, electronic filing in the action is likely to result in substantial prejudice to those proprietary rights." (Admin. Order 97-12 ¶ 14) • "In connection with discovery or the filing of any material in an action subject to EFP, any person may apply by motion for an order prohibiting the electronic filing in the action of certain specifically-identified materials on the grounds that the electronic filing of such materials is subject to privacy interests and that electronic filing in the action is likely to prejudice those privacy interests." (Admin. Order 97-12 ¶ 15)
Record on Appeal	• "Until such time as the United States Court of Appeals for the Second Circuit provides notice to the Chief Judge that public access to the E.D.N.Y. Public Web Site obviates or modifies any need for transmittal of the record on appeal of any action subject to EFP as to which a notice of appeal to that Court of Appeals has been filed, when required, the Clerk shall deliver to the Court of Appeals, at that Court's election, either a complete paper copy of the record on appeal or an electronic reproduction of that record on appeal as such record is reflected in the E.D.N.Y. Public Web Site." (Admin. Order 97-12 ¶ 16(b))

Topics/Issues	DISTRICT AND BANKRUPTCY COURTS
	NEW MEXICO **(www.nmcourt.fed.us)** (USING LOCALLY DEVELOPED ELECTRONIC FILING SYSTEM)
Source of ECF Procedures	Local Civil Rules 5.5, 5.6 (Jan. 1, 1999) Local Bankr. Rules 5005-4, 7005-1 (Oct. 1, 1996) Admin. Order No. 97-26 (Feb. 11, 1997) Admin. Order No. 97-83 (June 9, 1997) Advanced Court Engineering (A.C.E.) Attorney Training Manual ("Training Manual") (Dec. 1999) Miscellaneous Order No. 99-359 (Aug. 18, 1999)
Cases Accepted for Electronic Filing	"[Y]ou may initiate electronic filing in any civil case in the district court. At this time, the District of New Mexico is not accepting criminal cases for electronic filing." (Training Manual p. 29) BANKRUPTCY: "A party may file any paper using electronic transmission in accordance with guidelines when established by the court." (Local Bankr. Rule 5005-4(b))
Voluntary or Mandatory Participation	"There are two ways to initiate electronic filing in a civil case: 1. At the initial scheduling conference; or 2. By manually filing a Motion to Initiate Electronic Filing, after a case is already in progress." (Training Manual p. 29)
Outside Users (Eligibility and Registration, Passwords, etc.)	"In order to obtain the necessary user identification number and user password, an attorney must be admitted to practice in Federal Court and in good standing." (Admin. Order No. 97-26 ¶ 2) "Any attorney seeking access to the Court's electronic filing must meet the minimum requirements set by the Court for participant/users . . ." (Admin. Order No. 97-26 ¶ 3) BANKRUPTCY: "Any log-in name and password required for electronic filing shall be used only by the attorney to whom the log-in name and password are assigned and by such agents, members and employees of that attorney's firm as that attorney shall authorize. The attorney must immediately notify the court upon learning that the security of the log-in has been compromised." (Misc. Order No. 99-359, ¶ 2).
Filing/Service of Initial Case Papers	"At this time, the District Court does not allow cases to be opened electronically. Therefore, all initial complaints must be filed manually at the Federal Court and fees paid at the intake counter. Once a case has been opened, the complaint is then scanned and filed electronically by a court employee so that it is available on-line." (Training Manual p. 29) "[T]he judges in the District of New Mexico will file an order allowing electronic filing in a case. When this order is filed, the case is "activated" and is ready to accept electronically filed pleadings." (Training Manual p. 29)

Fees	"At this time, the District Court does not allow cases to be opened electronically. Therefore, all initial complaints must be filed manually at the Federal Court and fees paid at the intake counter. Once a case has been opened, the complaint is then scanned and filed electronically by a court employee so that it is available on-line." (Training Manual p. 29) "We anticipate having case opening available towards the end of 1999. At that time, the District Court will establish a credit card account policy for attorneys similar to that which is being used by the Bankruptcy Court." (Training Manual p. 29)
Filing of Other Papers/ Receipt from Court	" A printed copy of the Court's ACE electronic file stamp shall serve as the equivalent of the Court's mechanical file stamp." (Admin. Order No. 97-26 ¶ 5) "Electronic submission to the Ace Server of a motion, supporting brief, responsive pleadings, exhibits, affidavits and other documents relating to the motion constitutes filing of these documents with the Court Clerk's Office." (Admin. Order No. 97-26 ¶ 7.A) "Upon electronic filing of any document, a notice of such filing is immediately placed in the electronic mailbox of all attorney/users/participants in the relevant case who have agreed to the use of electronic filing. Arrival in the electronic mailbox shall constitute service of the document on those parties. Additional time for response time, such as the 3 days mailing, will not be given unless otherwise provided by federal or local rules." (Admin. Order No. 97-26 ¶ 7.B) "Filing by Electronic Transmission. A party may file any paper using electronic transmission in accordance with guidelines when established by the Court." (Local Civil Rule 5.5)
Filing of Court Orders and Judgments	" Chambers staff are currently able to file court generated documents (notices, orders, opinion, etc.) electronically through the ACE system . . . After someone in chambers files a document electronically, it is submitted to the ACE automated noticing system. Notices filed before 4:30 are sent out the same day. Notices submitted after 4:30 are filed immediately but are not sent until the next business day. The system faxes notices to parties who have opted to receive their notice via fax, then prints out notices and lables for parties who will receive notice by mail. Parties also have the option of receiving notice electronically. These notices are sent instantly when the document is electronically filed." (Training Manual, p. 32)
Attachments, Exhibits, Other Difficult-to-Handle Items	
Sealed Documents	BANKRUPTCY: "A motion to file a document under seal shall be filed electronically. The order of the Court authorizing the filing of such document under seal shall be filed electronically by the Court. A paper copy of the order shall be attached to the document under seal and the document and the copy of the order shall be delivered to the clerk of the Bankruptcy Court." (Misc. Order No. 99-359 ¶ 8)

Status of Papers Filed Electron-ically	"When filed electronically by the user/participant attorney or Court, the official document of record is the electronic document stored in the Court's data base." (Admin. Order No. 97-26 ¶ 5) BANKRUPTCY: "When a document is filed electronically, the official document of record is the electronic document stored in the court's database. A printed copy of the court's digital file stamp is the equivalent of the court's mechanical file stamp." (Misc. Order No. 99-359 ¶ 3)
Retention of Documents in Paper Form	"The original paper documents requiring verified signatures (such as affidavits) of other than the user/participant must be retained by the attorney/user for retrieval if so ordered by the Court. Such documents may be scanned by scanner and/or by fax machine by the filing attorney and then filed electronically as a separate document." (Admin. Order No. 97-26 ¶ 6)
Signature	BANKRUPTCY: "Use of the log-in name and password required to submit documents electronically constitutes an attorney's signature for purposes of Fed. R. Bankr. P. 9011." (Misc. Order No. 99-359 ¶ 1) BANKRUPTCY: "Documents which require the verified signature of a person other than the electronically filing attorney may be electronically filed, utilizing scanning technology." (Misc. Order No. 99-359 ¶ 6) "The use of identification number and the password required to submit documents over the system shall constitute the attorney's signature under Rule 11 of the Federal Rules of Civil Procedure on all electronic documents filed with the Court." (Admin. Order No. 97-26 ¶ 1) "Court generated documents: Use of an authorized login and password and attachment of a graphical signature block to any orders initiated within chambers or in the Clerk's Office serves as the equivalent of a written signature within this electronic environment." (Admin. Order No. 97-83 ¶ 3)

Service of Papers Filed Electron-ically	"The Clerk or any other person may serve and give notice by electronic transmission, in lieu of service and notice by mail, to any person who has a written request, on file with the Clerk, to receive service and notice by electronic transmission. The request remains effective in all subsequent litigation in this District involving the person who filed the request; however, any person may withdraw his or her request by sending written notice to the Clerk. Service and notice are complete when the sender obtains electronic confirmation of receipt of the transmission." (Local Civil Rule 5.6; Local Bankr. Rule 7005-1) "Electronic transmission to any person who has a written request on file with the Clerk to receive service and notice by electronic transmission on the ACE system is the equivalent of service by U.S. Mail in accordance with Fed. R. Civ. P. 5(b) and 77(d). The filing date is that date on which an electronic document is received on the ACE server." (Admin. Order 97-83 ¶ 2(a)) "Upon electronic filing of any document on the Court's ACE server, a notice of such filing is immediately placed in an electronic mailbox of all attorney/users/participants in the relevant case who have agreed to the use of electronic filing. Arrival in the electronic mailbox shall constitute service of the document on those parties. Such service shall be considered the equivalent of U.S. Mail for purposes of applying the three day mailing rule of Fed. Rule of Civ. P. 6(e)." (Admin. Order No. 97-83 ¶ 2(b)) • "An attorney/user/participant is required to notify the Court of conventional service of non-electronic participants in a case." (Admin. Order No. 97-26 ¶ 7.C) • BANKRUPTCY "Names of attorneys who have agreed to receive service and notice from other attorneys via ACE electronic mailbox or by facsimile transmission shall be listed on the Court's website . . . Service upon and notice to attorneys whose names do not appear on the Court's website listing is to be accomplished by other means." (Misc. Order No. 99-359 ¶ 5)
Notice of Court Orders and Judgments	"Chambers staff are currently able to file court generated documents (notices, orders, opinions, etc.) electronically through the ACE system . . . . After someone in chambers files a document electronically, it is submitted to the ACE automated noticing system. Notices filed before 4:30 are sent out the same day. Notices submitted after 4:30 are filed immediately but are not sent until the next business day. The system faxes notices to parties who have opted to receive their notice via fax, then prints out notices and labels for parties who will receive notice by mail. Parties also have the option of receiving notice electronically. These notices are sent instantly when the document is electronically filed." (Training Manual p. 32) "Court generated documents: Use of an authorized login and password and attachment of a graphical signature block to any orders initiated within chambers or in the Clerk's Office serves as the equivalent of a written signature within this electronic environment." (Admin. Order No. 97-83 ¶ 3)

Docket Entries	"When something is electronically filed, the attorney's proposed entry will appear on the docket sheeet immediately. The document then prints out on a printer in the court house and is docketed manually into our Integrated Case Management System (ICMS). When the case manager dockets the entry in ICMS, it overwrites the attorney's docket entry." (Training Manual p. 15) "There will be times when the wrong document is accidentally filed . . . In these instances, at this time, the court requires the attorney to file a 'Notice of Withdrawal of Incorrectly Filed Document.' The Notice will be linked to the incorrectly filed document which will terminate any Court action triggered by the incorrectly filed document. The docket entry for the incorrectly filed document will remain on the Court's docket, but the notation 'Filed in Error, Filer Notified' will be added. Incorrectly filed documents remain in the record unless removal is ordered by the court." (Training Manual p. 31)
Technical Failures	"If you are unable to electronically file a pleading due to the system being down . . . Fax your completed document and exhibits . . . Your fax machine should confirm transmission. The clerk's office fax machine will indicate the date and time the fax was sent on the document. . . . As soon as you are able to make a connection to the server, submit the same document electronically, then call the clerk's office and let them know that the faxed document is now available on the system. The clerk's office will back date your electronic document to reflect the date and time on the fax transmission." (Training Manual p. 30-31) "If your phone lines are down and you are unable to . . . fax your documents, YOU MUST BRING THEM TO THE CLERK'S OFFICE FOR FILING." (Training Manual p. 30)
Public Access	
Other Special Provisions for Electronic Filing	"Attorney/user/participant in ACE are required to check their electronic mailbox as they would their traditional mailbox." (Admin. Order No. 97-26 ¶ 8) "Attorney/user/participant must maintain a back-up copy of any transmissions made to the Court." (Admin. Order No. 97-26 ¶ 9) BANKRUPTCY: "The clerk's copy submission requirements do not apply to electronically filed documents." (Misc. Order No. 99-359 ¶ 9) BANKRUPTCY: "Any document filed electronically will be electronically file stamped with the actual time and date of filing. However, the 'drop box rule' for the filing of pleadings and other documents, . . . is applicable; that is, any pleadings or other documents filed by a party after the close of business, but before 8:00 a.m. the following business day will be deemed filed at midnight the previous business day. . . . [T]he 'drop box rule' does not apply when an order or notice specifies a time and date by which to file a document." (Misc. Order No. 99-359 ¶ 7) "[T]he judges in the District of New Mexico have agreed to a standard order to waive packet submission requirements imposed by Local Rule 7.3(a)." (Training Manual p. 29)
Record on Appeal	