

REPORT OF THE STANDING COMMITTEE ON  
RULES OF PRACTICE AND PROCEDURE

TO THE CHIEF JUSTICE OF THE UNITED STATES, CHAIRMAN, AND  
MEMBERS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES:

The Standing Committee on Rules of Practice and Procedure met in Washington, D. C. on July 17 and 18, 1978. All members of the Committee were present except the Attorney General, Griffin B. Bell. Mr. Joseph F. Spaniol, Jr., Secretary to the Standing Committee also attended the meeting.

Appellate Rules

The Advisory Committee on the Federal Rules of Appellate Procedure submitted to the Standing Committee proposed amendments to Rules 1, 3, 4, 5, 6, 7, 10, 11, 12, 13, 24, 27, 28, 34, 35, 39, and 40, Federal Rules of Appellate Procedure, together with accompanying Advisory Committee notes, and a recommendation that the proposed amendments be approved by the Standing Committee and submitted to the Conference for its approval and transmission to the Supreme Court. Judge Aldrich, Chairman of the Appellate Rules Committee at the time these proposed amendments were considered, and Professor Jo Desha Lucas, its reporter, attended the meeting and explained the purpose and intent of the proposed amendments. Judge Aldrich stated that the proposed rules had been previously circulated to bench and bar for comment and that the Advisory Committee had fully considered the comments received.

The Standing Committee carefully reviewed each of the proposed amendments submitted by the Advisory Committee and made only technical and clarifying changes thereto. The proposed amendments to the Federal Rules of Appellate Procedure, together with the notes thereto, set out in Appendix A to this report, have been unanimously approved by the Standing Committee. We recommend that they be transmitted to the Supreme Court for consideration and adoption.

#### Criminal Rules

The Advisory Committee on the Federal Rules of Criminal Procedure submitted to the Committee proposed amendments to Rules 6, 7, 9, 11, 17, 18, 32, 35, 40, 41, and 44 of the Federal Rules of Criminal Procedure and proposed new Rules 26.2 and 32.1; Rule 410 of the Federal Rules of Evidence; Rule 10 of the Rules Governing Section 2254 Cases; and Rules 10 and 11 of the Rules Governing Section 2255 Proceedings for the United States District Courts. Professor Wayne LaFave, Reporter to the Criminal Rules Advisory Committee, and Professor Frank Remington, the member of the Standing Committee who acts as our liaison with the Criminal Rules Committee, explained the nature and effect of these proposed amendments.

All of our proposed amendments had been submitted to the bench and bar for comment under date of February 28, 1978 with the request that comments be received no later than May 30, 1978. Approximately 6,000 copies of the proposed amendments were distributed early in March to presidents of bar associations,

deans of law schools, defender organizations, other professional societies, law teachers, federal judges, and other members of the bar. The proposed amendments also appeared in the advance sheets of the Supreme Court Reporter, the Federal Reporter, and the Federal Supplement dated April 24, 1978; and Federal Rules Decisions, Vol. 77, pg. 507, (1978) and thus became available to members of the bar generally.

Although the time allowed for comment on the proposed amendments was 90 days or less, the reporter to the Advisory Committee indicated that the responses thereto were equal in both quantity and quality to the responses commenting on previous proposed amendments to the Federal Rules of Criminal Procedure when a longer period for comment was allowed.

At its meeting on July 6 and 7, 1978, the Advisory Committee was of the view that all conceivable points of view that could be expressed on these proposed amendments were contained in the comments received. Since the proposed amendments were, for the most part, in the nature of corrective amendments to bring the rules into conformity with other changes in law and recent court decisions, the Advisory Committee felt that it was on sound ground in recommending approval of the proposed amendments at this time.

The Standing Committee carefully reviewed each of the proposed amendments and made several changes. After full consideration, the Standing Committee recommends that the proposed amendments, set out in Appendix B, together with the

Committee notes appended thereto, be approved by the Judicial Conference and transmitted to the Supreme Court with a recommendation that they be adopted.

#### Civil Rules

The Advisory Committee on the Federal Rules of Civil Procedure also met in Washington on July 6 to review proposed amendments to various rules of civil procedure which had been submitted to bench and bar for comment on March 31, 1978, with the request that comments be received by July 1, 1978. The Attorney General of the United States and several organizations requested that the time for submitting comments be extended to permit fuller consideration of the proposed changes. Because of the controversial nature of some of the proposed amendments and the short period of time originally allowed for comment, the Advisory Committee on Civil Rules concluded that the date for submitting comments should be extended to November 30, 1978. The Advisory Committee also decided that it should schedule hearings on the proposed changes, one to be held in Washington, D.C. on October 16, 1978, and one in Los Angeles, California, on October 26, 1978. An announcement to this effect has been circulated to bench and bar.

The Advisory Committee plans to meet again early in December to review all comments and suggestions received and to complete its work on the proposed amendments in time for presentation to the Standing Committee in January and to the March 1979 session of the Conference.

Participation of Bench and Bar in the  
Rule-making Process

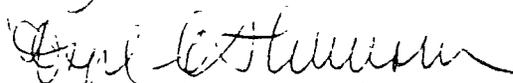
From time to time the Standing Committee has received criticism of the rule-making process because of the length of time required to effect changes. To meet this criticism, the proposed amendments to the Rules of Civil and Criminal Procedure were this year put in circulation for only about 90 days in an effort to speed up the process. As a result, the Committee has now received complaints that the time allowed for comment was too short. Several organizations and individuals requested that the time be extended. As noted above, an extension has been granted to give additional time for comment on the proposed amendments to the civil rules. With respect to the Criminal Rules, however, the Advisory Committee and the Standing Committee agreed that the comments received adequately represented the views of the bench and bar so that those rules might properly go forward.

The Standing Committee considered at some length the need to speed up the rule-making process on the one hand, and on the other, to permit adequate time for the formulation and submission of comment on proposed changes. The Committee believes that it is not possible to adopt a firm schedule applicable to all situations, but that there must be some flexibility based upon the type of amendments being proposed, their urgency, and the practical needs of the Supreme Court, as well as this Conference, for adequate time in which to

review proposed amendments. The scheduling problem is made more difficult because certain organizations, such as the American Bar Association, meet only once or twice each year.

The Standing Committee recognizes that all points of view must be taken into consideration if rules of procedure are to be fairly formulated and are to receive wide-spread approval. We are suggesting to the Advisory Committees that they conduct public hearings on all important proposed amendments to the rules and give further consideration to the appropriate period of time to be allowed for comment.

Respectfully submitted,



Roszel C. Thomsen, Chairman  
Honorable Griffin B. Bell  
Honorable Shirley M. Hufstedler  
Honorable Carl McGowan  
Honorable James S. Holden  
Professor Frank J. Remington  
Professor Bernard J. Ward  
Richard E. Kyle, Esquire  
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July 31, 1978

Proposed Amendments to the

FEDERAL RULES

OF

CRIMINAL PROCEDURE



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15       (12) General Rule of Secrecy. A grand  
16 juror, an interpreter, a stenographer, an  
17 operator of a recording device, a typist  
18 who transcribes recorded testimony, an  
19 attorney for the government, or any person  
20 to whom disclosure is made under paragraph  
21 (23) (A) (ii) of this subdivision shall not  
22 disclose matters occurring before the grand  
23 jury, except as otherwise provided for in  
24 these rules. No obligation of secrecy may  
25 be imposed on any person except in accord-  
26 ance with this rule. A knowing violation  
27 of rule 6 may be punished as a contempt of  
28 court.

29       (23) Exceptions.

30       (A) Disclosure otherwise prohibited  
31 by this rule of matters occurring before  
32 the grand jury, other than its delibera-  
33 tions and the vote of any grand juror,  
34 may be made to--

35       (i) an attorney for the government  
36 for use in the performance of such  
37 attorney's duty; and

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38           (ii) such government personnel as are  
39           deemed necessary by an attorney for the  
40           government to assist an attorney for  
41           the government in the performance of  
42           such attorney's duty to enforce federal  
43           criminal law.

44           (B) Any person to whom matters are dis-  
45           closed under subparagraph (A)(ii) of this  
46           paragraph shall not utilize that grand jury  
47           material for any purpose other than assist-  
48           ing the attorney for the government in the  
49           performance of such attorney's duty to  
50           enforce federal criminal law. An attorney  
51           for the government shall promptly provide  
52           the district court, before which was im-  
53           paneled the grand jury whose material has  
54           been so disclosed, with the names of the  
55           persons to whom such disclosure has been  
56           made.

57           (C) Disclosure otherwise prohibited by  
58           this rule of matters occurring before the  
59           grand jury may also be made--

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60 (i) when so directed by a court pre-  
61 liminarily to or in connection with a  
62 judicial proceedings; or

63 (ii) when permitted by a court at  
64 the request of the defendant, upon a  
65 showing that grounds may exist for a  
66 motion to dismiss the indictment because  
67 of matters occurring before the grand  
68 jury.

69 If the court orders disclosure of matters  
70 occurring before the grand jury, the dis-  
71 closure shall be made in such manner, at  
72 such time, and under such conditions as  
73 the court may direct.

74 (34) Sealed Indictments. \* \* \*

ADVISORY COMMITTEE NOTE

Rule 6(e)(1)

Proposed subdivision (e)(1) requires that all proceedings, except when the grand jury is deliberating or voting, be recorded. The existing rule does not require that grand jury proceedings be recorded. The provision in rule 6(d) that "a stenographer or operator of a recording device may be present while the grand jury is in session" has been taken to mean that recordation is permissive and not mandatory; see United States v. Aloisio, 440 F.2d 705 (7th Cir. 1971), collecting the cases. However, the cases rather frequently state that recordation of the proceedings is the

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better practice; see United States v. Aloisio, supra; United States v. Cramer, 447 F.2d 210 (2d Cir. 1971); Schlinsky v. United States, 379 F.2d 735 (1st Cir. 1967); and some cases require the district court, after a demand, to exercise discretion as to whether the proceedings should be recorded. United States v. Price, 474 F.2d 1223 (9th Cir. 1973); United States v. Thoresen, 428 F.2d 654 (9th Cir. 1970). Some district courts have adopted a recording requirement. See, e.g. United States v. Aloisio, supra; United States v. Gramolini, 301 F. Supp. 39 (D.R.I. 1969). Recording of grand jury proceedings is currently a requirement in a number of states. See, e.g., Cal. Pen. Code §§ 938 - 938.3; Iowa Code Ann. § 772.4; Ky. Rev. Stat. Ann. § 28.460; and Ky. R. Crim. P. § 5.16(2).

The assumption underlying the proposal is that the cost of such recording is justified by the contribution made to the improved administration of criminal justice. See United States v. Gramolini, supra, noting: "Nor can it be

claimed that the cost of recordation is prohibitive; in an electronic age, the cost of recordation must be categorized as miniscule." For a discussion of the success of electronic recording in Alaska, see Reynolds, Alaska's Ten Years of Electronic Reporting, 56 A.B.A.J. 1080 (1970).

Among the benefits to be derived from a recordation requirement are the following:

(1) Ensuring that the defendant may impeach a prosecution witness on the basis of his prior inconsistent statements before the grand jury. As noted in the opinion of Oakes, J., in United States v. Cramer: "First, since Dennis v. United States, 384 U.S. 855, 86 S. Ct. 1840, 16 L.Ed. 2d 973 (1966), a defendant has been entitled to examine the grand jury testimony of witnesses against him. On this point, the Court was unanimous, holding that there was 'no justification' for the District of Columbia Court of Appeals' 'relying upon [the] "assumption" that 'no inconsistencies would have come to light.' The Court's decision was based on the general proposition that '[i]n our adversary system for determining guilt or innocence, it

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is rarely justifiable for the prosecution to have exclusive access to a storehouse of relevant facts.' In the case at bar the prosecution did have exclusive access to the grand jury testimony of the witness Sager, by virtue of being present, and the defense had none--to determine whether there were any inconsistencies with, say, his subsequent testimony as to damaging admissions by the defendant and his attorney Richard Thaler. The Government claims, and it is supported by the majority here, that there is no problem since defendants were given the benefit of Sager's subsequent statements including these admissions as Jencks Act materials. But assuming this to be true, it does not cure the basic infirmity that the defense could not know whether the witness testified inconsistently before the grand jury."

(2) Ensuring that the testimony received by the grand jury is trustworthy. In United States v. Cramer, Oakes, J., also observed: "The recording of testimony is in a very real sense a circumstantial guaranty of trustworthiness. Without the restraint of being subject to prosecution for perjury, a restraint which is wholly meaningless or nonexistent if the testimony is unrecorded, a witness may make baseless accusations founded on hearsay or false accusations, all resulting in the indictment of a fellow citizen for a crime."

(3) Restraining prosecutorial abuses before the grand jury. As noted in United States v. Gramolini: "In no way does recordation inhibit the grand jury's investigation. True, recordation restrains certain prosecutorial practices which might, in its absence be used, but that is no reason not to record. Indeed, a sophisticated prosecutor must acknowledge that there develops between a grand jury and the prosecutor with whom the jury is closeted a rapport--a dependency relationship--which can easily be turned into an instrument of influence on grand jury deliberations. Recordation is the most effective restraint upon such potential abuses."

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(4) Supporting the case made by the prosecution at trial. Oakes, J., observed in United States v. Cramer: "The benefits of having grand jury testimony recorded do not all inure to the defense. See, e.g., United States v. DeSisto, 329 F.2d 929, 934 (2d Cir.), cert. denied, 377 U.S. 979, 84 S.Ct. 1885, 12 L.Ed.2d 747 (1964) (conviction sustained in part on basis of witnesses's prior sworn testimony before grand jury)." Fed.R.Evid. 801(d)(1)(A) excludes from the category of hearsay the prior inconsistent testimony of a witness given before a grand jury. United States v. Morgan, 555 F.2d 238 (9th Cir. 1977). See also United States v. Carlson, 547 F.2d 1346 (3rd Cir. 1976), admitting under Fed.R.Evid. 804(b)(3) the grand jury testimony of a witness who refused to testify at trial because of threats by the defendant.

Commentators have also supported a recording requirement. 8 Moore, Federal Practice par. 6.02[2][d] (2d ed. 1972) states: "Fairness to the defendant would seem to compel a change in the practice, particularly in view of the 1970 amendment to 18 USC § 3500 making grand jury testimony of government witnesses available at trial for purposes of impeachment. The requirement of a record may also prove salutary in controlling overreaching or improper examination of witnesses by the prosecutor." Similarly, 1 Wright, Federal Practice and Procedure - Criminal § 103 (1969), states that the present rule "ought to be changed, either by amendment or by judicial construction. The Supreme Court has emphasized the importance to the defense of access to the transcript of the grand jury proceedings [citing Dennis]. A defendant cannot have that advantage if the proceedings go unrecorded." American Bar Association, Report of the Special Committee on Federal Rules of Procedure, 52 F.R.D. 87, 94-95 (1971), renews the committee's 1965 recommendation "that all accusatorial grand jury proceedings either be transcribed by a reporter or recorded by electronic means."

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Under proposed subdivision (e)(1), if the failure to record is unintentional, the failure to record would not invalidate subsequent judicial proceedings. Under present law, the failure to compel production of grand jury testimony where there is no record is not reversible error. See Wyatt v. United States, 388 F.2d 395 (10th Cir. 1968).

The provision that the recording or reporter's notes or any transcript prepared therefrom are to remain in the custody or control (as where the notes are in the immediate possession of a contract reporter employed by the Department of Justice) of the attorney for the government is in accord with present practice. It is specifically recognized, however, that the court in a particular case may have reason to order otherwise.

It must be emphasized that the proposed changes in rule 6(e) deal only with the recording requirement, and in no way expand the circumstances in which disclosure of the grand jury proceedings is permitted or required. "Secrecy of grand jury proceedings is not jeopardized by recordation. The making of a record cannot be equated with disclosure of its contents, and disclosure is controlled by other means." United States v. Price, 474 F.2d 1223 (9th Cir. 1973). Specifically, the proposed changes do not provide for copies of the grand jury minutes to defendants as a matter of right, as is the case in some states. See, e.g., Cal. Pen. Code § 938.1; Iowa Code Ann. § 772.4. The matter of disclosure continues to be governed by other provisions, such as rule 16(a) (recorded statements of the defendant), 18 U.S.C. § 3500 (statements of government witnesses), and the unchanged portions of rule 6(e), and the cases interpreting these provisions. See, e.g., United States v. Howard, 433 F.2d 1 (5th Cir. 1970), and Beatrice Foods Co. v. United States, 312 F.2d 29 (8th Cir. 1963), concerning the showing which must be made of improper matters occurring before the grand jury before disclosure is required.

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Likewise, the proposed changes in rule 6(e) are not intended to make any change regarding whether a defendant may challenge a grand jury indictment. The Supreme Court has declined to hold that defendants may challenge indictments on the ground that they are not supported by sufficient or competent evidence. Costello v. United States, 350 U.S. 359 (1956); Lawn v. United States, 355 U.S. 339 (1958); United States v. Blue, 384 U.S. 251 (1966). Nor are the changes intended to permit the defendant to challenge the conduct of the attorney for the government before the grand jury absent a preliminary factual showing of serious misconduct.

### Rule 6(e)(3)(C)

The sentence added to subdivision (e)(3)(C) gives express recognition to the fact that if the court orders disclosure, it may determine the circumstances of the disclosure. For example, if the proceedings are electronically recorded, the court would have discretion in an appropriate case to deny defendant the right to a transcript at government expense. While it takes special skills to make a stenographic record understandable, an electronic recording can be understood by merely listening to it, thus avoiding the expense of transcription.

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Rule 7. The Indictment and the Information

1 \* \* \*

2 (c) NATURE AND CONTENTS.

3 \* \* \*

4 (2) Criminal Forfeiture. ~~When an~~  
5 ~~offense charged may result in a criminal~~  
6 ~~forfeiture~~ No judgment of forfeiture may  
7 be entered in a criminal proceeding unless  
8 the indictment or the information shall  
9 allege the extent of the interest or  
10 property subject to forfeiture.

11 \* \* \*

ADVISORY COMMITTEE NOTE

The amendment to rule 7(c)(2) is intended to clarify its meaning. Subdivision (c)(2) was added in 1972, and, as noted in the Advisory Committee Note thereto, was "intended to provide procedural implementation of the recently enacted criminal forfeiture provision of the Organized Crime Control Act of 1970, Title IX, § 1963, and the Comprehensive Drug Abuse Prevention and Control Act of 1970, Title II, § 408(a)(2)." These provisions reestablished a limited common law

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criminal forfeiture, necessitating the addition of subdivision (c)(2) and corresponding changes in rules 31 and 32, for at common law the defendant in a criminal forfeiture proceeding was entitled to notice, trial, and a special jury finding on the factual issues surrounding the declaration of forfeiture which followed his criminal conviction.

Although there is some doubt as to what forfeitures should be characterized as "punitive" rather than "remedial," see Note, 62 Cornell L.Rev. 768 (1977), subdivision (c)(2) is intended to apply to those forfeitures which are criminal in the sense that they result from a special verdict under rule 31(e) and a judgment under rule 32(b)(2), and not to those resulting from a separate in rem proceeding. Because some confusion in this regard has resulted from the present wording of subdivision (c)(2), United States v Hall, 521 F.2d 406 (9th Cir. 1975), a clarifying amendment is in order.

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Rule 9. Warrant or Summons Upon Indictment or Information

1 (a) ISSUANCE. Upon the request of the  
2 attorney for the government the court shall  
3 issue a warrant for each defendant named in ~~the~~  
4 an information, if it is supported by oath  
5 a showing of probable cause under oath as is  
6 required by Rule 4(a), or in the an indictment.  
7 ~~The clerk shall issue a summons instead of a~~  
8 ~~warrant~~ Upon the request of the attorney  
9 for the government a summons instead of a  
10 warrant shall issue ~~er-by-direction-of-the~~  
11 ~~court.~~ If no request is made, the court may  
12 issue either a warrant or a summons in its  
13 discretion. ~~Upon-like-request-or-direct-~~  
14 ~~ion-he-shall-issue~~ More than one warrant  
15 or summons may issue for the same defen-  
16 dant. ~~He~~ The clerk shall deliver the  
17 warrant or summons to the marshal or other  
18 person authorized by law to execute or  
19 serve it. If a defendant fails to appear  
20 in response to the summons, a warrant shall  
21 issue.

22 \* \* \*

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### ADVISORY COMMITTEE NOTE

Subdivision (a) is amended to make explicit the fact that a warrant may issue upon the basis of an information only if the information or an affidavit filed with the information shows probable cause for the arrest. This has generally been assumed to be the state of the law even though not specifically set out in rule 9; see C. Wright, *Federal Practice and Procedure: Criminal* § 151 (1969); 8 J. Moore, *Federal Practice* par. 9.02[2] (2d ed. 1976).

In Gerstein v. Pugh, 420 U.S. 103 (1975), the Supreme Court rejected the contention "that the prosecutor's decision to file an information is itself a determination of probable cause that furnishes sufficient reason to detain a defendant pending trial," commenting:

Although a conscientious decision that the evidence warrants prosecution affords a measure of protection against unfounded detention, we do not think prosecutorial judgment standing alone meets the requirements of the Fourth Amendment. Indeed, we think the Court's previous decisions compel disapproval of [such] procedure.

In Albrecht v. United States, 273 U.S. 1, 5, 47 S.Ct. 250, 251, 71 L.Ed. 505 (1927), the Court held that an arrest warrant issued solely upon a United States Attorney's information was invalid because the accompanying affidavits were defective. Although the Court's opinion did not explicitly state that the prosecutor's official oath could not furnish probable cause, that conclusion was implicit in the judgment that the arrest was illegal under the Fourth Amendment.

No change is made in the rule with respect to warrants issuing upon indictments. In Gerstein, the Court indicated it was not disturbing the prior rule that "an indictment, 'fair upon its

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face,' and returned by a 'properly constituted grand jury' conclusively determines the existence of probable cause and requires issuance of an arrest warrant without further inquiry." See Ex parte United States, 287 U.S. 241, 250 (1932).

The provision to the effect that a summons shall issue "by direction of the court" has been eliminated because it conflicts with the first sentence of the rule, which states that a warrant "shall" issue when requested by the attorney for the government, if properly supported. However, an addition has been made providing that if the attorney for the government does not make a request for either a warrant or summons, then the court may in its discretion issue either one. Other stylistic changes ensure greater consistency with comparable provisions in rule 4.

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Rule 11. Pleas

1 \* \* \*

2 (e) PLEA AGREEMENT PROCEDURE.

3 \* \* \*

4 (2) Notice of Such Agreement. If a  
5 plea agreement has been reached by the  
6 parties, the court shall, on the record,  
7 require the disclosure of the agreement  
8 in open court or, on a showing of good  
9 cause, in camera, at the time the plea  
10 is offered. ~~Thereupon~~ If the agreement  
11 is of the type specified in subdivision  
12 (e) (1) (A) or (C), the court may accept  
13 or reject the agreement, or may defer  
14 its decision as to the acceptance or  
15 rejection until there has been an oppor-  
16 tunity to consider the presentence report.  
17 If the agreement is of the type specified

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18 in subdivision (e)(1)(B), the court shall  
19 advise the defendant that if the court does not  
20 accept the recommendation or request the  
21 defendant nevertheless has no right to with-  
22 draw his plea.

23 \* \* \*

24 (6) Inadmissibility of Pleas, Offers of  
25 Pleas Plea Discussions, and Related State-  
26 ments. Except as otherwise provided in  
27 this paragraph, evidence of the following  
28 a plea of guilty, later withdrawn, or a  
29 plea of nolo contendere, or of an offer to  
30 plead guilty or nolo contendere to the crime  
31 charged or any other crime, or of statements  
32 made in connection with, and relevant to,  
33 any of the foregoing pleas or offers, is not,  
34 in any civil or criminal proceeding, admissi-  
35 ble in any civil or criminal proceeding  
36 against the person defendant who made the  
37 plea or offer; was a participant in the plea  
38 discussions:

39 (A) a plea of guilty which was later  
40 withdrawn;

41 (B) a plea of nolo contendere;

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42        (C) any statement made in the course  
43        of any proceedings under this rule regard-  
44        ing either of the foregoing pleas; or

45        (D) any statement made in the course  
46        of plea discussions with an attorney for  
47        the government which do not result in a  
48        plea of guilty or which result in a plea  
49        of guilty later withdrawn.

50        However, evidence of such a statement made  
51        in connection with, and relevant to, a plea  
52        of guilty, later withdrawn, a plea of not  
53        contented, or an offer to plead guilty or  
54        not contented to the crime charged or any  
55        other-crime, is admissible (i) in any pro-  
56        ceeding wherein another statement made in  
57        the course of the same plea or plea dis-  
58        cussions has been introduced and the state-  
59        ment ought in fairness be considered con-  
60        temporaneously with it, or (ii) in a  
61        criminal proceeding for perjury or false  
62        statement if the statement was made by the  
63        defendant under oath, on the record, and in  
64        the presence of counsel.

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ADVISORY COMMITTEE NOTE

Rule 11(e)(2)

The amendment to rule 11(e)(2) is intended to clarify the circumstances in which the court may accept or reject a plea agreement, with the consequences specified in subdivision (e)(3) and (4). The present language has been the cause of some confusion and has led to results which are not entirely consistent. Compare United States v. Sarubbi, 416 F.Supp. 633 (D.N.J. 1976); with United States v. Hull, 413 F.Supp. 145 (E.D.Tenn. 1976).

Rule 11(e)(1) specifies three types of plea agreements, namely, those in which the attorney for the government might

- (A) move for dismissal of other charges; or
- (B) make a recommendation, or agree not to oppose the defendant's request, for a particular sentence, with the understanding that such recommendation or request shall not be binding upon the court; or
- (C) agree that a specific sentence is the appropriate disposition of the case.

A (B) type of plea agreement is clearly of a different order than the other two, for an agreement to recommend or not to oppose is discharged when the prosecutor performs as he agreed to do. By comparison, critical to a type (A) or (C) agreement is that the defendant receive the contemplated charge dismissal or agreed-to sentence. Consequently, there must ultimately be an acceptance or rejection by the court of a type (A) or (C) agreement so that it may be determined whether the defendant shall receive the bargained-for concessions or shall instead be afforded an opportunity to withdraw his plea. But this is not so as to a type (B) agreement; there is no "disposition provided for" in such a plea agreement so as to make the acceptance provisions of subdivision (e)(3) applicable, nor is there a need for rejection with opportunity for withdrawal under subdivision (e)(4) in light of the fact that the defendant knew the nonbinding character of the recommendation or request. United States v. Henderson, 565 F.2d 1119 (9th Cir. 1977); United States v. Savage, 561 F.2d 554 (4th Cir. 1977).

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Because a type (B) agreement is distinguishable from the others in that it involves only a recommendation or request not binding upon the court, it is important that the defendant be aware that this is the nature of the agreement into which he has entered. The procedure contemplated by the last sentence of amended subdivision (e)(2) will establish for the record that there is such awareness. This provision conforms to ABA Standards Relating to Pleas of Guilty § 1.5 (Approved Draft, 1968), which provides that "the court must advise the defendant personally that the recommendations of the prosecuting attorney are not binding on the court."

Sometimes a plea agreement will be partially but not entirely of the (B) type, as where a defendant, charged with counts 1, 2 and 3, enters into an agreement with the attorney for the government wherein it is agreed that if defendant pleads guilty to count 1, the prosecutor will recommend a certain sentence as to that count and will move for dismissal of counts 2 and 3. In such a case, the court must take particular care to ensure that the defendant understands which components of the agreement involve only a (B) type recommendation and which do not. In the above illustration, that part of the agreement which contemplates the dismissal of counts 2 and 3 is an (A) type agreement, and thus under rule 11(e) the court must either accept the agreement to dismiss these counts or else reject it and allow the defendant to withdraw his plea. If rejected, the defendant must be allowed to withdraw the plea on count 1 even if the type (B) promise to recommend a certain sentence on that count is kept, for a multi-faceted plea agreement is nonetheless a single agreement. On the other hand, if counts 2 and 3 are dismissed and the sentence recommendation is made, then the defendant is not entitled to withdraw his plea even if the sentence recommendation is not accepted by the court, for the defendant received all he was entitled to under the various components of the plea agreement.

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### Rule 11(e)(6)

The major objective of the amendment to rule 11(e)(6) is to describe more precisely, consistent with the original purpose of the provision, what evidence relating to pleas or plea discussions is inadmissible. The present language is susceptible to interpretation which would make it applicable to a wide variety of statements made under various circumstances other than within the context of those plea discussions authorized by rule 11(e) and intended to be protected by subdivision (e)(6) of the rule. See United States v. Herman, 544 F.2d 791 (5th Cir. 1977), discussed herein.

Fed.R.Ev. 410, as originally adopted by Pub.L. 93-595, provided in part that "evidence of a plea of guilty, later withdrawn, or a plea of nolo contendere, or of an offer to plead guilty or nolo contendere to the crime charged or any other crime, or of statements made in connection with any of the foregoing pleas or offers, is not admissible in any civil or criminal action, case, or proceeding against the person who made the plea or offer." (This rule was adopted with the proviso that it "shall be superseded by any amendment to the Federal Rules of Criminal Procedure which is inconsistent with this rule.") As the Advisory Committee Note explained: "Exclusion of offers to plead guilty or nolo has as its

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purpose the promotion of disposition of criminal cases by compromise." The amendment of Fed.R.Crim.P. 11, transmitted to Congress by the Supreme Court in April 1974, contained a subdivision (e)(6) essentially identical to the rule 410 language quoted above, as a part of a substantial revision of rule 11. The most significant feature of this revision was the express recognition given to the fact that the "attorney for the government and the attorney for the defendant or the defendant when acting pro se may engage in discussions with a view toward reaching" a plea agreement. Subdivision (e)(6) was intended to encourage such discussions. As noted in H.R. Rep. No. 94-247, 94th Cong., 1st Sess. 7 (1975), the purpose of subdivision (e)(6) is to not "discourage defendants from being completely candid and open during plea negotiations." Similarly, H.R. Rep. No. 94-414, 94th Cong., 1st Sess. 10 (1975), states that "Rule 11(e)(6) deals with the use of statements made in connection with plea agreements." (Rule 11(e)(6) was thereafter enacted, with the addition of the proviso allowing use of statements in a prosecution for perjury, and with the qualification that the inadmissible statements must also be "relevant to" the inadmissible pleas or offers. Pub.L. 94-64; Fed.R.Ev. 410 was then amended to conform. Pub.L. 94-149.)

While this history shows that the purpose of *Fed.R.Ev. 410* and *Fed.R.Crim.P. 11(e)(6)* is to permit the unrestrained candor which produces effective plea discussions between the "attorney for the government and the attorney for the defendant or the defendant when acting pro se," given visibility and sanction in rule 11(e), a literal reading of the language of these two rules could reasonably lead to the conclusion that a broader rule of inadmissibility obtains. That is, because "statements" are generally inadmissible if "made in connection with, and relevant to" an "offer to plead guilty," it might be thought that an otherwise

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voluntary admission to law enforcement officials is rendered inadmissible merely because it was made in the hope of obtaining leniency by a plea. Some decisions interpreting rule 11(e)(6) point in this direction. See United States v. Herman, 544 F.2d 791 (5th Cir. 1977) (defendant in custody of two postal inspectors during continuance of removal hearing instigated conversation with them and at some point said he would plead guilty to armed robbery if the murder charge was dropped; one inspector stated they were not "in position" to make any deals in this regard; held, defendant's statement inadmissible under rule 11(e)(6) because the defendant "made the statements during the course of a conversation in which he sought concessions from the government in return for a guilty plea"); United States v. Brooks, 536 F.2d 1137 (6th Cir. 1976) (defendant telephoned postal inspector and offered to plead guilty if he got 2-year maximum; statement inadmissible).

The amendment makes inadmissible statements made "in the course of any proceedings under this rule regarding" either a plea of guilty later withdrawn or a plea of nolo contendere, and also statements "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." It is not limited to statements by the defendant himself, and thus would cover statements by defense counsel regarding defendant's incriminating admissions to him. It thus fully protects the plea discussion process authorized by rule 11 without attempting to deal with confrontations between suspects and law enforcement agents, which involve problems of quite different dimensions. See, e.g., ALI Model Code of Pre-Arrest Procedure art. 140 and § 150.2(8) (Proposed Official Draft, 1975) (latter section requires exclusion if "a law enforcement officer induces any person to make a statement by promising leniency"). This change, it must be emphasized, does not compel the conclusion that statements made to law enforcement agents, especially when the agents purport to have authority to bargain, are inevitably admissible. Rather, the point is that such cases are not covered by the per se rule of 11(e)(6) and thus must be resolved by that body of law dealing with police interrogations.

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If there has been a plea of guilty later withdrawn or a plea of nolo contendere, subdivision (e)(6)(C) makes inadmissible statements made "in the course of any proceedings under this rule" regarding such pleas. This includes, for example, admissions by the defendant when he makes his plea in court pursuant to rule 11 and also admissions made to provide the factual basis pursuant to subdivision (f). However, subdivision (e)(6)(C) is not limited to statements made in court. If the court were to defer its decision on a plea agreement pending examination of the presentence report, as authorized by subdivision (e)(2), statements made to the probation officer in connection with the preparation of that report would come within this provision.

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This amendment is fully consistent with all recent and major law reform efforts on this subject. ALI Model Code of Pre-Arrest Procedure § 350.7 (Proposed Official Draft, 1975), and ABA Standards Relating to Pleas of Guilty § 3.4 (Approved Draft, 1968) both provide:

Unless the defendant subsequently enters a plea of guilty or nolo contendere which is not withdrawn, the fact that the defendant or his counsel and the prosecuting attorney engaged in plea discussions or made a plea agreement should not be received in evidence against or in favor of the defendant in any criminal or civil action or administrative proceedings.

The Commentary to the latter states:

The above standard is limited to discussions and agreements with the prosecuting attorney. Sometimes defendants will indicate to the police their willingness to bargain, and in such instances these statements are sometimes admitted in court against the defendant. State v. Christian, 245 S.W.2d 895 (Mo. 1952). If the police initiate this kind of discussion, this may have some bearing on the admissibility of the defendant's statement. However, the policy considerations relevant to this issue are better dealt with in the context of standards governing in-custody interrogation by the police.

Similarly, Unif.R.Crim.P. 441(d) (Approved Draft, 1974), provides that except under limited circumstances "no discussion between the parties or statement by the defendant or his lawyer under this Rule," i.e., the rule providing "the parties may meet to discuss the possibility of pretrial diversion \* \* \* or of a plea agreement," are admissible. The amendment is likewise consistent with the typical state provision on this subject; see, e.g., Ill.S.Ct. Rule 402(f).

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The language of the amendment identifies with more precision than the present language the necessary relationship between the statements and the plea or discussion. See the dispute between the majority and concurring opinions in United States v. Herman, 544 F.2d 791 (5th Cir. 1977), concerning the meanings and effect of the phrases "connection to" and "relevant to" in the present rule. Moreover, by relating the statements to "plea discussions" rather than "an offer to plead," the amendment ensures "that even an attempt to open plea bargaining [is] covered under the same rule of inadmissibility." United States v. Brooks, 536 F.2d 1137 (6th Cir. 1976).

The last sentence of Rule 11(e)(6) is amended to provide a second exception to the general rule of nonadmissibility of the described statements. Under the amendment, such a statement is also admissible "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." This change is necessary so that, when evidence of statements made in the course of or as a consequence of a certain plea or plea discussions are introduced under circumstances not prohibited by this rule (e.g., not "against" the person who made the plea), other statements relating to the same plea or plea discussions may also be admitted when relevant to the matter at issue. For example, if a defendant upon a motion to dismiss a prosecution on some ground were able to admit certain statements made in aborted plea discussions in his favor, then other relevant statements made in the same plea discussions should be admissible against the defendant in the interest of determining the truth of the matter at issue. The language of the amendment follows closely that in Fed.R.Evid. 106, as the considerations involved are very similar.

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The phrase "in any civil or criminal proceeding" has been moved from its present position, following the word "against," for purposes of clarity. An ambiguity presently exists because the word "against" may be read as referring either to the kind of proceeding in which the evidence is offered or the purpose for which it is offered. The change makes it clear that the latter construction is correct. No change is intended with respect to provisions making evidence rules inapplicable in certain situations. See, e.g., Fed.R.Evid. 104(a) and 1101(d).

Unlike ABA Standards Relating to Pleas of Guilty § 3.4 (Approved Draft, 1968), and ALI Model Code of Pre-Arrest Procedure § 350.7 (Proposed Official Draft, 1975), rule 11(e)(6) does not also provide that the described evidence is inadmissible "in favor of" the defendant. This is not intended to suggest, however, that such evidence will inevitably be admissible in the defendant's favor. Specifically, no disapproval is intended of such decisions as United States v. Verdoorn, 528 F.2d 103 (8th Cir. 1976), holding that the trial judge properly refused to permit the defendants to put into evidence at their trial the fact the prosecution had attempted to plea bargain with them, as "meaningful dialogue between the parties would, as a practical matter, be impossible if either party had to assume the risk that plea offers would be admissible in evidence."

## Rule 17. Subpoena

\* \* \* \* \*

1       (h) INFORMATION NOT SUBJECT TO SUBPOENA.  
2       Statements made by witnesses or prospective  
3       witnesses may not be subpoenaed from the  
4       government or the defendant under this rule,  
5       but shall be subject to production only in  
6       accordance with the provisions of Rule 26.2.

## ADVISORY COMMITTEE NOTE

This addition to rule 17 is necessary in light of proposed rule 26.2, which deals with the obtaining of statements of government and defense witnesses.

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### Rule 18. Place of Prosecution and Trial

1        Except as otherwise permitted by statute  
2        or by these rules, the prosecution shall  
3        be had in a district in which the offense  
4        was committed. The court shall fix the  
5        place of trial within the district with due  
6        regard to the convenience of the defendant  
7        and the witnesses: and the prompt adminis-  
8        tration of justice.

#### ADVISORY COMMITTEE NOTE

This amendment is intended to eliminate an inconsistency between rule 18, which in its present form has been interpreted not to allow trial in a division other than that in which the offense was committed except as dictated by the convenience of the defendant and witnesses, Dupoint v. United States, 388 F.2d 39 (5th Cir. 1968), and the Speedy Trial Act of 1974. This Act provides:

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In any case involving a defendant charged with an offense, the appropriate judicial officer, at the earliest practicable time, shall, after consultation with the counsel for the defendant and the attorney for the Government, set the case for trial on a day certain, or list it for trial on a weekly or other short-term trial calendar at a place within the judicial district, so as to assure a speedy trial.

18 U.S.C. § 3161(a). This provision is intended to "permit the trial of a case at any place within the judicial district. This language was included in anticipation of problems which might occur in districts with statutory divisions, where it could be difficult to set trial outside the division." H.R. Rep. No. 93-1508, 93d Cong., 2d Sess. 29 (1974).

The change does not offend the venue or vicinage provisions of the Constitution. Article III, § 2, clause 3 places venue (the geographical location of the trial) "in the State where the said Crimes shall have been committed," while the Sixth Amendment defines the vicinage (the geographical location of the jurors) as "the State and District wherein the crime shall have been committed, which district shall have been previously ascertained by law." The latter provision makes "no reference to a division within a judicial district." United States v. James, 528 F.2d 999 (5th Cir. 1976). "It follows a fortiori that when a district is not separated into divisions, \* \* \* trial at any place within the district is allowable under the Sixth Amendment \* \* \*." United States v. Fernandez, 480 F.2d 726 (2d Cir. 1975). See also Zicarelli v. Gray, 543 F.2d 466 (3d Cir. 1976) and cases cited therein.

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Nor is the change inconsistent with the Declaration of Policy in the Jury Selection and Service Act of 1968, which reads:

It is the policy of the United States that all litigants in Federal courts entitled to trial by jury shall have the right to grand and petit juries selected at random from a fair cross section of the community in the district or division wherein the court convenes.

28 U.S.C. § 1861. This language does not mean that the Act requires "the trial court to convene not only in the district but also in the division wherein the offense occurred," as:

There is no hint in the statutory history that the Jury Selection Act was intended to do more than provide improved judicial machinery so that grand and petit jurors would be selected at random by the use of objective qualification criteria to ensure a representative cross section of the district or division in which the grand or petit jury sits.

United States v. Cates, 485 F.2d 26 (1st Cir. 1974).

The amendment to rule 18 does not eliminate either of the existing considerations which bear upon fixing the place of trial within a district, but simply adds yet another consideration in the interest of ensuring compliance with the requirements of the Speedy Trial Act of 1974. The amendment does not authorize the fixing of the place of trial for yet other reasons. Cf. United States v. Fernandez, 480 F.2d 726 (2d Cir. 1973) (court in the exercise of its supervisory power held improper the fixing of the place of trial "for no apparent reason other than the convenience of the judge").

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Rule 26.2. Production of Statements of Witnesses

1           (a) MOTION FOR PRODUCTION. After a wit-  
2           ness other than the defendant called by the  
3           government has testified on direct examina-  
4           tion, the court, on motion of a party who  
5           did not call the witness, the defendant,  
6           shall order the attorney for the govern-  
7           ment or the defendant and his attorney, as  
8           the case may be, to produce, for the exami-  
9           nation and use of the moving party defendant,  
10          any statement of the witness that is in the  
11          their possession of the United States and  
12          that relates to the subject matter concern-  
13          ing which the witness has testified.

14          (b) PRODUCTION OF ENTIRE STATEMENT. If  
15          the entire contents of the statement relate  
16          to the subject matter concerning which the  
17          witness has testified, the court shall  
18          order that the statement be delivered to  
19          the moving party defendant.

20          (c) PRODUCTION OF EXCISED STATEMENT.  
21          If the other party attorney for the govern-  
22          ment claims that the statement contains

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23 matter that does not relate to the subject  
24 matter ~~of the testimony~~ concerning which  
25 the witness has testified, the court shall  
26 order that it be delivered to the court in  
27 camera. Upon inspection, the court shall  
28 excise the portions of the statement that  
29 do not relate to the subject matter con-  
30 cerning which the witness has testified,  
31 and shall order that the statement, with  
32 such material excised, be delivered to the  
33 moving party defendant. Any portion of the  
34 statement that is withheld from the defend-  
35 ant over his objection shall be preserved  
36 by the attorney for the government, and,  
37 in the event of a conviction and an appeal  
38 by the defendant, shall be made available  
39 to the appellate court for the purpose of  
40 determining the correctness of the decision  
41 to excise the portion of the statement.

42 (d) RECESS FOR EXAMINATION OF STATEMENT.

43 Upon delivery of the statement to the moving  
44 party defendants, the court, upon application

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45 of that party the defendant, may recess  
46 proceedings in the trial for the examina-  
47 tion of such statement by the defendant  
48 and for his preparation for its use in the  
49 trial.

50 (e) SANCTION FOR FAILURE TO PRODUCE  
51 STATEMENT. If the other party attorney  
52 for the government elects not to comply  
53 with an order to deliver a statement to  
54 the moving party defendant, the court shall  
55 order that the testimony of the witness be  
56 stricken from the record and that the  
57 trial proceed, or, if it is the attorney  
58 for the government who elects not to comply,  
59 shall declare a mistrial if required by the  
60 interest of justice.

61 (f) DEFINITION. As used in this rule,  
62 a "statement" of a government witness means:

- 63 (1) a written statement made by the  
64 witness that is signed or otherwise  
65 adopted or approved by him;  
66 (2) a substantially verbatim recital

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67 of an oral statement made by the witness  
68 that is recorded contemporaneously with  
69 the making of the oral statement and  
70 that is contained in a stenographic,  
71 mechanical, electrical, or other record-  
72 ing or a transcription thereof; or  
73 (3) a statement, however taken or  
74 recorded, or a transcription thereof,  
75 made by the witness to a grand jury.

ADVISORY COMMITTEE NOTE

S. 1437, 95th Cong., 1st Sess. (1977), would place in the criminal rules the substance of what is now 18 U.S.C. § 3500 (the Jencks Act). Underlying this and certain other additions to the rules contemplated by S. 1437 is the notion that provisions which are purely procedural in nature should appear in the Federal Rules of Criminal Procedure rather than in Title 18. See Reform of the Federal Criminal Laws, Part VI: Hearings on S.1, S. 716, and S. 1400, Subcomm. on Criminal Laws and Procedures, Senate Judiciary Comm., 93rd Cong., 1st Sess. (statement of Judge Albert B. Maris, at page 5503). Rule 26.2 is identical to the S. 1437 rule except as indicated by the marked additions and deletions. As those changes show, rule 26.2 provides for production of the statements of defense witnesses at trial in essentially the same manner as is now provided for with respect to the statements of government witnesses. Thus, the proposed rule reflects these two judgments: (i) that the subject matter -- production of the statements of witnesses-- is more appropriately dealt with in the criminal rules; and (ii) that in light of United States v. Nobles, 422 U.S. 225 (1975), it is important to establish procedures for the production of defense witnesses' statements as well. The rule is not intended to discourage the practice of voluntary disclosure at an earlier time so as to avoid delays at trial.

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In Nobles, defense counsel sought to introduce the testimony of a defense investigator who prior to trial had interviewed prospective prosecution witnesses and had prepared a report embodying the essence of their conversation. When the defendant called the investigator to impeach eyewitness testimony identifying the defendant as the robber, the trial judge granted the prosecutor the right to inspect those portions of the investigator's report relating to the witnesses' statements, as a potential basis for cross-examination of the investigator. When the defense declined to produce the report, the trial judge refused to permit the investigator to testify. The Supreme Court unanimously upheld the trial court's actions, finding that neither the Fifth nor Sixth Amendments nor the attorney work product doctrine prevented disclosure of such a document at trial. Noting "the federal judiciary's inherent power to require the prosecution to produce the previously recorded statements of its witnesses so that the defense may get the full benefit of cross-examinations and the truth-finding process may be enhanced," the Court rejected the notion "that the Fifth Amendment renders criminal discovery 'basically a one-way street,'" and thus concluded that "in a proper case, the prosecution can call upon that same power for production of witness statements that facilitate 'full disclosure of all the [relevant] facts.'"

The rule, consistent with the reasoning in Nobles, is designed to place the disclosure of prior relevant statements of a defense witness in the possession of the defense on the same legal footing as is the disclosure of prior statements of prosecution witnesses in the hands of the government under the Jencks Act, 18 U.S.C. § 3500 (which S. 1437 would replace with the rule set out therein). See United States v. Pulvirenti, 408 F.Supp. 12 (E.D.Mich. 1976), holding that under Nobles "[t]he obligation [of disclosure] placed on the defendant should be the reciprocal of that placed upon the government \* \* \* [as] defined by the Jencks Act." Several state courts have likewise concluded that witness statements in the hands of the defense at trial should be disclosed on the same basis that prosecution witness statements are disclosed, in order to promote the concept of the trial as a search for truth. See, e.g., People v. Sanders, 110 Ill. App. 2d 85, 249 N.E.2d 124 (1969); State v. Montague, 55 N.J. 371, 262 A.2d 398 (1970); People v. Damon, 24 N.Y.2d 256, 299 N.Y.S.2d 830, 247 N.E.2d 651 (1959).

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The rule, with minor exceptions, makes the procedure identical for both prosecution and defense witnesses, including the provision directing the court, whenever a claim is made that disclosure would be improper because the statement contains irrelevant matter, to examine the statements in question and excise such matter as should not be disclosed. This provision acts as a safeguard against abuse and will enable a defendant who believes that a demand is being improperly made to secure a swift and just resolution of the issue.

The treatment as to defense witnesses of necessity differs slightly from the treatment as to prosecution witnesses in terms of the sanction for a refusal to comply with the court's disclosure order. Under the Jencks Act and the rule proposed in S. 1437, if the prosecution refuses to abide by the court's order, the court is required to strike the witness's testimony unless in its discretion it determines that the more serious sanction of a mistrial in favor of the accused is warranted. Under this rule, if a defendant refuses to comply with the court's disclosure order, the court's only alternative is to enter an order striking or precluding the testimony of the witness, as was done in Nobles.

Under subdivision (a) of the rule, the motion for production may be made by "a party who did not call the witness." Thus, it also requires disclosure of statements in the possession of either party when the witness is called neither by the prosecution nor the defense but by the court pursuant to the Federal Rules of Evidence. Present law does not deal with this situation, which consistency requires be treated in an identical manner as the disclosure of statements of witnesses called by a party to the case.

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Rule 32. Sentence and Judgment

1 \* \* \*

2 (c) PRESENTENCE INVESTIGATION.

3 \* \* \*

4 (3) Disclosure.

5 \* \* \*

6 (E) The reports of studies and  
7 recommendations contained therein made  
8 by the Director of the Bureau of Prisons  
9 or the ~~Youth-Correction-Division-of-the~~  
10 ~~Board-of Parole~~ Commission pursuant to  
11 18 U.S.C. §§ ~~4208(b)~~ 4205(c), 4252,  
12 5010(e), or ~~5034~~ 5037(c) shall be con-  
13 sidered a presentence investigation  
14 within the meaning of subdivision (c)(3)  
15 of this rule.

16 \* \* \*

(1) REVOCATION OF PROBATION. (Abrogated.)

ADVISORY COMMITTEE NOTE

Rule 32(c)(3)(E)

The amendment to rule 32(c)(3)(E) is necessary in light of recent changes in the applicable statutes.

Rule 32(f)

This subdivision is abrogated. The subject matter is now dealt with in greater detail in proposed new rule 32.1.

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Rule 32.1. Revocation or Modification  
of Probation

1 (a) REVOCATION OF PROBATION.

2 (1) Preliminary Hearing. Whenever a pro-  
3 bationer is held in custody on the ground  
4 that he has violated a condition of his pro-  
5 bation, he shall be afforded a prompt hearing  
6 before any judge, or a United States magistrate  
7 who has been given authority pursuant to  
8 28 U.S.C. § 636 to conduct such hearings, in  
9 order to determine whether there is probable  
10 cause to hold the probationer for a revocation  
11 hearing. The probationer shall be given

12 (A) notice of the preliminary hearing  
13 and its purpose and of the alleged viola-  
14 tion of probation;

15 (B) an opportunity to appear at the  
16 hearing and present evidence in his own  
17 behalf;

18 (C) upon request, the opportunity to  
19 question witnesses against him unless,  
20 for good cause, the federal magistrate  
21 decides that justice does not require the  
22 appearance of the witness; and

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23           (D) notice of his right to be repre-  
24           sented by counsel.

25   The proceedings shall be recorded stenograph-  
26   ically or by an electronic recording device.  
27   If probable cause is found to exist, the pro-  
28   bationer shall be held for a revocation hear-  
29   ing. The probationer may be released pursuant  
30   to Rule 46(c) pending the revocation hearing.  
31   If probable cause is not found to exist, the  
32   proceedings shall be dismissed.

33           (2) Revocation Hearing. The revocation  
34   hearing, unless waived by the probationer,  
35   shall be held within a reasonable time in  
36   the district of probation jurisdiction. The  
37   probationer shall be given

38           (A) written notice of the alleged  
39   violation of probation;

40           (B) disclosure of the evidence  
41   against him;

42           (C) an opportunity to appear and to  
43   present evidence in his own behalf;

44           (D) the opportunity to question  
45   witnesses against him; and

46           (E) notice of his right to be repre-  
47   sented by counsel.

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48           (b) MODIFICATION OF PROBATION. A hearing  
49           and assistance of counsel are required before  
50           the terms or conditions of probation can be  
51           modified, unless the relief granted to the  
52           probationer upon his request or the court's  
53           own motion is favorable to him.

ADVISORY COMMITTEE NOTE

Rule 32.1(a)(1)

Since Morrissey v. Brewer, 408 U.S. 471 (1972), and Gagnon v. Scarpelli, 411 U.S. 778 (1973), it is clear that a probationer can no longer be denied due process in reliance on the dictum in Escoe v. Zerbst, 295 U.S. 490, 492 (1935), that probation is an "act of grace." See Van Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law*, 81 Harv.L.Rev. 1439 (1968); President's Commission on Law Enforcement and Administration of Justice, Task Force Report: Corrections 86 (1967).

Subdivision (a)(1) requires, consistent with the holding in Scarpelli, that a prompt preliminary hearing must be held whenever "a probationer is held in custody on the ground that he has violated a condition of his probation." See 18 U.S.C. § 3653 regarding arrest of the probationer with or without a warrant. If there is to be a revocation hearing but there has not been a holding in custody for a probation violation, there need not be a preliminary hearing. It was the fact of such a holding in custody "which prompted the Court to determine that a preliminary as well as a final revocation hearing was required to afford the petitioner due process of law," United States v. Tucker, 524 F.2d 77 (5th Cir. 1975). Consequently, a preliminary hearing need not be held if the probationer was at large and was not arrested but was allowed to appear voluntarily, United States v. Strada, 503 F.2d 1081 (8th Cir. 1974), or in response to a show cause order which "merely requires his appearance in court,"

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United States v. Langford, 369 F.Supp. 1107 (N.D. Ill. 1973); if the probationer was in custody pursuant to a new charge, Thomas v. United States, 391 F.Supp. 202 (W.D.Pa. 1975), or pursuant to a final conviction of a subsequent offense, United States v. Tucker, supra; or if he was arrested but obtained his release.

Subdivision (a)(1)(A), (B) and (C) list the requirements for the preliminary hearing, as developed in Morrissey and made applicable to probation revocation cases in Scarpelli. Under (A), the probationer is to be given notice of the hearing and its purpose and of the alleged violation of probation. "Although the allegations in a motion to revoke probation need not be as specific as an indictment, they must be sufficient to apprise the probationer of the conditions of his probation which he is alleged to have violated, as well as the dates and events which support the charge." Kartman v. Parratt, 397 F.Supp. 531 (D. Nebr. 1975). Under (B), the probationer is permitted to appear and present evidence in his own behalf. And under (C), upon request by the probationer, adverse witnesses shall be made available for questioning unless the magistrate determines that the informant would be subjected to risk of harm if his identity were disclosed.

Subdivision (a)(1)(D) provides for notice to the probationer of his right to be represented by counsel at the preliminary hearing. Although Scarpelli did not impose as a constitutional requirement a right to counsel in all instances, under 18 U.S.C. § 3006A(b) a defendant is entitled to be represented by counsel whenever charged "with a violation of probation."

The federal magistrate (see definition in rule 54(c)) is to keep a record of what transpires at the hearing and, if he finds probable cause of a violation, hold the probationer for a revocation hearing. The probationer may be released pursuant to rule 46(c) pending the revocation hearing.

### Rule 32.1(a)(2)

Subdivision (a)(2) mandates a final revocation hearing within a reasonable time to determine whether the probationer has, in fact, violated the conditions of his probation and whether his

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probation should be revoked. Ordinarily this time will be measured from the time of the probable cause finding (if a preliminary hearing was held) or of the issuance of an order to show cause. However, what constitutes a reasonable time must be determined on the facts of the particular case, such as whether the probationer is available or could readily be made available. If the probationer has been convicted of and is incarcerated for a new crime, and that conviction is the basis of the pending revocation proceedings, it would be relevant whether the probationer waived appearance at the revocation hearing.

The hearing required by rule 32.1(a)(2) is not a formal trial; the usual rules of evidence need not be applied. See Morrissey v. Brewer, supra ("the process should be flexible enough to consider evidence including letters, affidavits, and other material that would not be admissible in an adversary criminal trial"); Rule 1101(d)(e) of the Federal Rules of Evidence (rules not applicable to proceedings "granting or revoking probation"). Evidence that would establish guilt beyond a reasonable doubt is not required to support an order revoking probation. United States v. Francischine, 512 F.2d 827 (5th Cir.1975). This hearing may be waived by the probationer.

Subdivisions (a)(2)(A)-(E) list the rights to which a probationer is entitled at the final revocation hearing. The final hearing is less a summary one because the decision under consideration is the ultimate decision to revoke rather than a mere determination of probable cause. Thus, the probationer has certain rights not granted at the preliminary hearing: (i) the notice under (A) must be written; (ii) under (B) disclosure of all the evidence against the probationer is required; and (iii) under (D) the probationer does not have to specifically request the right to confront adverse witnesses, and the court may not limit the opportunity to question the witnesses against him.

Under subdivision (a)(2)(E) the probationer must be given notice of his right to be represented by counsel. Although Scarpelli holds that the Constitution does not compel counsel in all probation revocation hearings, under 18 U.S.C. § 3006A(b) a defendant is entitled to be represented by counsel whenever charged "with a violation of probation."

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Revocation of probation is proper if the court finds a violation of the conditions of probation and that such violation warrants revocation. Revocation followed by imprisonment is an appropriate disposition if the court finds on the basis of the original offense and the intervening conduct of the probationer that:

(i) confinement is necessary to protect the public from further criminal activity by the offender; or

(ii) the offender is in need of correctional treatment which can most effectively be provided if he is confined; or

(iii) it would unduly depreciate the seriousness of the violation if probation were not revoked.

See American Bar Association, Standards Relating to Probation § 5.1 (Approved Draft, 1970)

If probation is revoked, the probationer may be required to serve the sentence originally imposed, or any lesser sentence, and if imposition of sentence was suspended he may receive any sentence which might have been imposed. 18 U.S.C. § 3653. When a split sentence is imposed under 18 U.S.C. § 3651 and probation is subsequently revoked, the probationer is entitled to credit for the time served in jail but not for the time he was on probation. Thomas v. United States, 327 F. 2d 795 (10th Cir.), cert. denied 377 U.S. 1000 (1964); Schley v. Peyton, 280 F.Supp. 307 (W.D.Va. 1968).

### Rule 32.1(b)

Subdivision (b) concerns proceedings on modification of probation (as provided for in 18 U.S.C. § 3651). The probationer should have the right to apply to the sentencing court for a clarification or change of conditions. American Bar Association, Standards Relating to Probation § 3.1(c) (Approved Draft, 1970). This avenue is important for two reasons: (1) the probationer should be able to obtain resolution of a dispute over an ambiguous term or the meaning of a condition without first having to violate it; and (2) in cases of neglect, overwork, or simply unreasonableness on the part of the probation officer, the probationer should have recourse to the sentencing court when a condition needs clarification or modification.

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Probation conditions should be subject to modification, for the sentencing court must be able to respond to changes in the probationer's circumstances as well as new ideas and methods of rehabilitation. See generally ABA Standards, supra, §3.3. The sentencing court is given the authority to shorten the term or end probation early upon its own motion without a hearing. And while the modification of probation is a part of the sentencing procedure, so that the probationer is ordinarily entitled to a hearing and presence of counsel, a modification favorable to the probationer may be accomplished without a hearing in the presence of defendant and counsel. United States v. Bailey, 343 F.Supp. 76 (W.D.Mo. 1971).

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Rule 35. Correction or Reduction of Sentence

1        (a) CORRECTION OF SENTENCE. The court  
2        may correct an illegal sentence at any time  
3        and may correct a sentence imposed in an  
4        illegal manner within the time provided  
5        herein for the reduction of sentence.

6        (b) REDUCTION OF SENTENCE. The court  
7        may reduce a sentence within 120 days after  
8        the sentence is imposed, or within 120 days  
9        after receipt by the court of a mandate  
10       issued upon affirmance of the judgment  
11       or dismissal of the appeal, or within 120  
12       days after entry of any order or judgment  
13       of the Supreme Court denying review of,  
14       or having the effect of upholding, a judg-  
15       ment of conviction. The court may also  
16       reduce a sentence upon revocation of pro-  
17       bation as provided by law. Changing a  
18       sentence from a sentence of incarceration  
19       to a grant of probation shall constitute  
20       a permissible reduction of sentence under  
21       this subdivision.

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### ADVISORY COMMITTEE NOTE

Rule 35 is amended in order to make it clear that a judge may, in his discretion, reduce a sentence of incarceration to probation. To the extent that this permits the judge to grant probation to a defendant who has already commenced service of a term of imprisonment, it represents a change in the law. See United States v. Murray, 275 U.S. 347 (1928) (Probation Act construed not to give power to district court to grant probation to convict after beginning of service of sentence, even in the same term of court); Affronti v. United States, 350 U.S. 79 (1955) (Probation Act construed to mean that after a sentence of consecutive terms on multiple counts of an indictment has been imposed and service of sentence for the first such term has commenced, the district court may not suspend sentence and grant probation as to the remaining term or terms). In construing the statute in Murray and Affronti, the Court concluded Congress could not have intended to make the probation provisions applicable during the entire period of incarceration (the only other conceivable interpretation of the statute), for this would result in undue duplication of the three methods of mitigating a sentence - probation, pardon and parole - and would impose upon district judges the added burden of responding to probation applications from prisoners throughout the service of their terms of imprisonment. Those concerns do not apply to the instant provisions, for the reduction may occur only within the time specified in subdivision (b). This change gives "meaningful effect" to the motion-to-reduce remedy by allowing the court "to consider all alternatives that were available at the time of imposition of the original sentence." United States v. Golp in, 362 F.Supp. 698 (W.D. Pa. 1973).

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Should the reduction to a sentence of probation occur after the defendant has been incarcerated more than six months, this would put into issue the applicability of 18 U.S.C. § 3651, which provides that initially the court "may impose a sentence in excess of six months and provide that the defendant be confined in a jail-type institution for a period not exceeding six months and that the execution of the remainder of the sentence be suspended and the defendant placed on probation for such period and upon such terms and conditions as the court deems best."

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Rule 40. Commitment to Another District

1       (a) APPEARANCE BEFORE FEDERAL MAGISTRATE.  
2       If a person is arrested in a district  
3       other than that in which the offense is  
4       alleged to have been committed, he shall  
5       be taken without unnecessary delay  
6       before the nearest available federal  
7       magistrate. Preliminary proceedings con-  
8       cerning the defendant shall be conducted  
9       in accordance with Rules 5 and 5.1, except  
10       that if no preliminary examination is held  
11       because an indictment has been returned  
12       or an information filed or because the  
13       defendant elects to have the preliminary  
14       examination conducted in the district in  
15       which the prosecution is pending, the per-  
16       son shall be held to answer upon a finding  
17       that he is the person named in the indict-  
18       ment, information or warrant. If the

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19 defendant is held to answer, he shall be  
20 held to answer in the district court in  
21 which the prosecution is pending, pro-  
22 vided that a warrant is issued in that  
23 district if the arrest was made without  
24 a warrant, upon production of the warrant  
24a or a certified copy thereof.

25 (b) STATEMENT BY FEDERAL MAGISTRATE.  
26 In addition to the statements required  
27 by Rule 5, the federal magistrate shall  
28 inform the defendant of the provisions  
29 of Rule 20.

30 (c) PAPERS. If a defendant is held or  
31 discharged, the papers in the proceeding  
32 and any bail taken shall be transmitted  
33 to the clerk of the district court in  
34 which the prosecution is pending.

35 (d) ARREST OF PROBATIONER. If a person  
36 is arrested for a violation of his proba-  
37 tion in a district other than the district  
38 of supervision, he shall be taken without  
39 unnecessary delay before the nearest avail-  
40 able federal magistrate. The federal mag-

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41 istrate shall:

42 (1) Proceed in accordance with Rule  
43 32.1(a) if jurisdiction over the proba-  
44 tioner is transferred to that district  
45 pursuant to 18 U.S.C. § 3653;

46 (2) Hold a prompt preliminary hearing  
47 in accordance with Rule 32.1(a)(1) if  
48 the alleged violation occurred in  
49 that district, and either (i) hold the  
50 probationer to answer in the district  
51 court of the district having probation  
52 supervision or (ii) dismiss the pro-  
53 ceedings and so notify that court; or

54 (3) Otherwise order the probationer  
55 held to answer in the district court  
56 of the district having probation jur-  
57 isdiction upon production of certified  
58 copies of the probation order, the  
59 warrant, and the application for the  
60 warrant, and upon a finding that the  
61 person before him is the person named  
62 in the warrant.

63 (e) ARREST FOR FAILURE TO APPEAR. If a

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64 person is arrested on a warrant in a dis-  
65 trict other than that in which the warrant  
66 was issued, and the warrant was issued be-  
67 cause of the failure of the person named  
68 therein to appear as required pursuant to  
69 a subpoena or the terms of his release,  
70 the person arrested shall be taken with-  
71 out unnecessary delay before the nearest  
72 available federal magistrate. Upon pro-  
73 duction of the warrant or a certified  
74 copy thereof and upon a finding that the  
75 person before him is the person named in  
76 the warrant, the federal magistrate shall  
77 hold the person to answer in the district  
78 in which the warrant was issued.

79 (f) BAIL. If bail was previously fixed  
80 in another district where a warrant, in-  
31 formation or indictment issued, the federal  
82 magistrate shall take into account the  
83 amount of bail previously fixed and the  
84 reasons set forth therefor, if any, but  
85 will not be bound by the amount of bail

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86 previously fixed. If the federal magistrate  
87 fixes bail different from that previously  
88 fixed, he shall set forth the reasons for his  
89 action in writing.

ADVISORY COMMITTEE NOTE

This substantial revision of rule 40 abolishes the present distinction between arrest in a nearby district and arrest in a distant district, clarifies the authority of the magistrate with respect to the setting of bail where bail had previously been fixed in the other district, adds a provision dealing with arrest of a probationer in a district other than the district of supervision, and adds a provision dealing with arrest of a defendant or witness for failure to appear in another district.

Rule 40(a)

Under subdivision (a) of the present rule, if a person is arrested in a nearby district (another district in the same state, or a place less than 100 miles away), the usual rule 5 and 5.1 preliminary proceedings are conducted. But under subdivision (b) of the present rule, if a person is arrested in a distant district, then a hearing leading to a warrant of removal is held. New subdivision (a) would make no distinction between these two situations and would provide for rule 5 and 5.1 proceedings in all instances in which the arrest occurs outside the district where the warrant issues or where the offense is alleged to have been committed.

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This abolition of the distinction between arrest in a nearby district and arrest in a distant district rests upon the conclusion that the procedures prescribed in rules 5 and 5.1 are adequate to protect the rights of an arrestee wherever he might be arrested. If the arrest is without a warrant, it is necessary under rule 5 that a complaint be filed forthwith complying with the requirements of rule 4(a) with respect to the showing of probable cause. If the arrest is with a warrant, that warrant will have been issued upon the basis of an indictment or of a complaint or information showing probable cause, pursuant to rules 4(a) and 9(a). Under rule 5.1, dealing with the preliminary examination, the defendant is to be held to answer only upon a showing of probable cause that an offense has been committed and that the defendant committed it.

Under subdivision (a), there are two situations in which no preliminary examination will be held. One is where "an indictment has been returned or an information filed," which pursuant to rule 5(c) obviates the need for a preliminary examination. The other is where "the defendant elects to have the preliminary examination conducted in the district in which the prosecution is pending." A defendant might wish to elect that alternative when, for example, the law in that district is that the complainant and other material witnesses may be required to appear at the preliminary examination and give testimony. See Washington v. Clemmer, 339 F.2d 715 (D.C. Cir. 1964).

New subdivision (a) continues the present requirement that if the arrest was without a warrant a warrant must thereafter issue in the district in which the offense is alleged to have been committed. This will ensure that in the district of anticipated prosecution there will have been a probable cause determination by a magistrate or grand jury.

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### Rule 40(b)

New subdivision (b) follows existing subdivision (b)(2) in requiring the magistrate to inform the defendant of the provisions of rule 20 applicable in the particular case. Failure to so notify the defendant should not invalidate the proceedings.

### Rule 40(c)

New subdivision (c) follows existing subdivision (b)(4) as to transmittal of papers.

### Rule 40(d)

New subdivision (d) has no counterpart in the present rule. It provides a procedure for dealing with the situation in which a probationer is arrested in a district other than the district of supervision, consistent with 18 U.S.C. § 3653, which provides in part:

If the probationer shall be arrested in any district other than that in which he was last supervised, he shall be returned to the district in which the warrant was issued, unless jurisdiction over him is transferred as above provided to the district in which he is found, and in that case he shall be detained pending further proceedings in such district.

One possibility, provided for in subdivision (d)(1), is that of transferring jurisdiction over the probationer to the district in which he was arrested. This is permissible under the aforementioned statute, which provides in part:

Whenever during the period of his probation, a probationer heretofore or hereafter placed on probation, goes from the district in which he is being supervised to another district, jurisdiction over him may be transferred, in the discretion of the court, from the court for the district from which he goes to the court for the other district, with the concurrence of the latter court. Thereupon the court for the district to which jurisdiction is transferred shall have all power with respect to the probationer that was previously possessed by

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the court for the district from which the transfer is made, except that the period of probation shall not be changed without the consent of the sentencing court. This process under the same conditions may be repeated whenever during the period of his probation the probationer goes from the district in which he is being supervised to another district.

Such transfer may be particularly appropriate when it is found that the probationer has now taken up residence in the district where he was arrested or where the alleged occurrence deemed to constitute a violation of probation took place in the district of arrest. In current practice, probationers arrested in a district other than that of their present supervision are sometimes unnecessarily returned to the district of their supervision, at considerable expense and loss of time, when the more appropriate course of action would have been transfer of probation jurisdiction.

Subdivisions (d) (2) and (3) deal with the situation in which there is not a transfer of probation jurisdiction to the district of arrest. If the alleged probation violation occurred in the district of arrest, then, under subdivision (d) (2), the preliminary hearing provided for in rule 32.1(a) (1) is to be held in that district. This is consistent with the reasoning in Morrissey v. Brewer, 408 U.S. 471 (1972), made applicable to probation cases in Gagnon v. Scarpelli, 411 778 (1973), where the Court stressed that often a parolee "is arrested at a place distant from the state institution, to which he may be returned before the final decision is made concerning revocation," and cited this as a factor contributing to the conclusion that due process requires "that some minimal inquiry be conducted at or reasonably near the

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place of the alleged parole violation or arrest and as promptly as convenient after arrest while information is fresh and sources are available." As later noted in Gerstein v. Pugh, 420 U.S. 103 (1975):

In Morrissey v. Brewer \* \* \* and Gagnon v. Scarpelli \* \* \* we held that a parolee or probationer arrested prior to revocation is entitled to an informal preliminary hearing at the place of arrest, with some provision for live testimony. \* \* \* That preliminary hearing, more than the probable cause determination required by the Fourth Amendment, serves the purpose of gathering and preserving live testimony, since the final revocation hearing frequently is held at some distance from the place where the violation occurred.

However, if the alleged violation did not occur in that district, then first-hand testimony concerning the violation is unlikely to be available there, and thus the reasoning of Morrissey and Gerstein does not call for holding the preliminary hearing in that district.

In such a case, as provided in subdivision (d) (3), the probationer should be held to answer in the district court of the district having probation jurisdiction. The purpose of the proceeding there provided for is to ascertain the identity of the probationer and provide him with copies of the warrant and the application for the warrant. A probationer is subject to the reporting condition at all times and is also subject to the continuing power of the court to modify such conditions. He therefore stands subject to return back to the jurisdiction district without the necessity of conducting a hearing in the district of arrest to determine whether there is probable cause to revoke his probation.

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### Rule 40(e)

New subdivision (e) has no counterpart in the present rule. It has been added because some confusion currently exists as to whether present rule 40(b) is applicable to the case in which a bench warrant has issued for the return of a defendant or witness who has absented himself and that person is apprehended in a distant district. In Bandy v. United States, 408 F.2d 518 (8th Cir. 1969), a defendant, who had been released upon his personal recognizance after conviction and while petitioning for certiorari and who failed to appear as required after certiorari was denied, objected to his later arrest in New York and removal to Leavenworth without compliance with the rule 40 procedures. The court concluded:

The short answer to Bandy's first argument is found in Rush v. United States, 290 F.2d 709, 710 (5 Cir. 1961): "The provisions of Rules 5 and 40, Federal Rules of Criminal Procedure, 18 U.S.C.A. may not be availed of by a prisoner in escape status \* \* \*." As noted by Holtzoff, "Removal of Defendants in Federal Criminal Procedure", 4 F.R.D. 455, 458 (1946):

"Resort need not be had, however, to this [removal] procedure for the purpose of returning a prisoner who has been recaptured after an escape from custody. It has been pointed out that in such a case the court may summarily direct his return under its general power to issue writs not specifically provided for by statute, which may be necessary for the exercise of its jurisdiction and agreeable to the usages and principles of law. In fact, in such a situation no judicial process appears necessary. The prisoner may be retaken and administratively returned to the custody from which he escaped."

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Bandy's arrest in New York was pursuant to a bench warrant issued by the United States District Court for the District of North Dakota on May 1, 1962, when Bandy failed to surrender himself to commence service of his sentence on the conviction for filing false income tax refunds. As a fugitive from justice, Bandy was not entitled upon apprehension to a removal hearing, and he was properly removed to the United States Penitentiary at Leavenworth, Kansas to commence service of sentence.

Consistent with Bandy, new subdivision (e) does not afford such a person all of the protections provided for in subdivision (a). However, subdivision (e) does ensure that a determination of identity will be made before that person is held to answer in the district of arrest.

### Rule 40(f)

Although the matter of bail is dealt with in rule 46 and 18 U.S.C. §§ 3146 and 3148, new subdivision (f) has been added to clarify the situation in which a defendant makes his initial appearance before the United States magistrate and there is a warrant issued by a judge of a different district who has endorsed the amount of bail on the warrant. The present ambiguity of the rule is creating practical administrative problems. If the United States magistrate concludes that a lower bail is appropriate, the judge who fixed the original bail on the warrant has, on occasion, expressed the view that this is inappropriate conduct by the magistrate. If the magistrate, in such circumstances, does not reduce the bail to the amount supported by all of the facts, there may be caused unnecessary inconvenience to the defendant, and there would arguably be a violation of at least the spirit of the Bail Reform Act and the Eighth Amendment.

The Procedures Manual for United States Magistrates, issued under the authority of the Judicial Conference of the United States, provides in ch. 6, pp. 8-9:

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Where the arrest occurs in a "distant" district, the rules do not expressly limit the discretion of the magistrate in the setting of conditions of release. However, whether or not the magistrate in the district of arrest has authority to set his own bail under Rule 40, considerations of propriety and comity would dictate that the magistrate should not attempt to set bail in a lower amount than that fixed by

a judge in another district. If an unusual situation should arise where it appears from all the information available to the magistrate that the amount of bail endorsed on the warrant is excessive, he should consult with a judge of his own district or with the judge in the other district who fixed the bail in order to resolve any difficulties. (Where an amount of bail is merely recommended on the indictment by the United States attorney, the magistrate has complete discretion in setting conditions of release.)

Rule 40 as amended would encourage the above practice and hopefully would eliminate the present confusion and misunderstanding.

The last sentence of subdivision (f) requires that the magistrate set forth the reasons for his action in writing whenever he fixes bail in an amount different from that previously fixed. Setting forth the reasons for the amount of bail fixed, certainly a sound practice in all circumstances, is particularly appropriate when the bail differs from that previously fixed in another district. The requirement that reasons be set out will ensure that the "considerations of propriety and comity" referred to above will be specifically taken into account.

RULES OF CRIMINAL PROCEDURE

Rule 41. Search and Seizure

1 (a) AUTHORITY TO ISSUE WARRANT. A  
2 search warrant authorized by this rule  
3 may be issued by a federal magistrate or  
4 a judge of a state court of record within  
5 the district wherein the property or  
6 person sought is located, upon request  
7 of a federal law enforcement officer or  
8 an attorney for the government.

9 (b) PROPERTY OR PERSONS WHICH MAY BE  
10 SEIZED WITH A WARRANT. A warrant may be  
11 issued under this rule to search for and  
12 seize any (1) property that constitutes  
13 evidence of the commission of a criminal  
14 offense; or (2) contraband, the fruits of  
15 crime, or things otherwise criminally  
16 possessed; or (3) property designed or  
17 intended for use or which is or has been  
18 used as the means of committing a criminal  
19 offense; or (4) person for whose arrest  
20 there is probable cause, or who is unlaw-  
21 fully restrained.

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22 (c) ISSUANCE AND CONTENTS.

23 (1) Warrant Upon Affidavit. A war-  
24 rant other than a warrant upon oral  
25 testimony under paragraph (2) of this  
26 subdivision shall issue only on an affi-  
27 davit or affidavits sworn to before the  
28 *federal magistrate or state judge and es-*  
29 *tablising the grounds for issuing the*  
30 *warrant. If the federal magistrate*  
31 *or state judge is satisfied that*  
32 grounds for the application exist or  
33 that there is probable cause to be-  
34 lieve that they exist, he shall issue  
35 a warrant identifying the property  
36 or person to be seized and naming  
37 or describing the person or place to  
38 be searched. The finding of probable  
39 cause may be based upon hearsay evi-  
40 dence in whole or in part. Before  
41 ruling on a request for a warrant the  
42 *federal magistrate or state judge may*  
43 *require the affiant to appear person-*  
44 *ally and may examine under oath the*

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45       affiant and any witnesses he may pro-  
46       duce, provided that such proceeding  
47       shall be taken down by a court reporter  
48       or recording equipment and made part  
49       of the affidavit. The warrant shall  
50       be directed to a civil officer of the  
51       United States authorized to enforce or  
52       assist in enforcing any law thereof or  
53       to a person so authorized by the Presi-  
54       dent of the United States. It shall  
55       command the officer to search, within  
56       a specified period of time not to exceed  
57       10 days, the person or place named for  
58       the property or person specified. The  
59       warrant shall be served in the daytime,  
60       unless the issuing authority, by appro-  
61       priate provision in the warrant, and  
62       for reasonable cause shown, authorizes  
63       its execution at times other than day-  
64       time. It shall designate a federal mag-  
65       istrate to whom it shall be returned.

\* \* \*

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ADVISORY COMMITTEE NOTE

This amendment to Rule 41 is intended to make it possible for a search warrant to issue to search for a person under two circumstances: (i) when there is probable cause to arrest that person; or (ii) when that person is being unlawfully restrained. There may be instances in which a search warrant would be required to conduct a search in either of these circumstances. Even when a search warrant would not be required to enter a place to search for a person, a procedure for obtaining a warrant should be available so that law enforcement officers will be encouraged to resort to the preferred alternative of acquiring "an objective predetermination of probable cause," Katz v. United States, 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967), in this instance, that the person sought is at the place to be searched.

That part of the amendment which authorizes issuance of a search warrant to search for a person unlawfully restrained is consistent with ALI Model Code of Pre-Arrest Procedure § SS 210.3(1)(d) (Proposed Official Draft, 1975), which specifies that a search warrant may issue to search for "an individual \* \* \* who is unlawfully held in confinement or other restraint." As noted in the Commentary thereto, *id.* at p. 507:

Ordinarily such persons will be held against their will and in that case the persons are, of course, not subject to "seizure." But they are, in a sense, "evidence" of crime, and the use of search warrants for these purposes presents no conceptual difficulties.

Some state search warrant provisions also provide for issuance of a warrant in these circumstances. See, e.g., Ill.Rev.Stat. ch. 38, § 108-3 ("Any person who has been kidnapped in violation of the laws of this State, or

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who has been kidnapped in another jurisdiction and is now concealed within this State").

It may be that very often exigent circumstances, especially the need to act very promptly to protect the life or well-being of the kidnap victim, would justify an immediate warrantless search for the person restrained. But this is not inevitably the case. Moreover, as noted above, there should be available a process whereby law enforcement agents may acquire in advance a judicial determination that they have cause to intrude upon the privacy of those at the place where the victim is thought to be located.

That part of the amendment which authorizes issuance of a search warrant to search for a person to be arrested is also consistent with ALI Model Code of Pre-Arrest Procedure § SS 210.3(1)(d) (Proposed Official Draft, 1975), which states that a search warrant may issue to search for "an individual for whose arrest there is reasonable cause." As noted in the Commentary thereto, *id.* at p. 507, it is desirable that there be "explicit statutory authority for such searches." Some state search warrant provisions also expressly provide for the issuance of a search warrant to search for a person to be arrested. See, e.g., Del. Code Ann. tit. 11, § 2305 ("Persons for whom a warrant of arrest has been issued"). This part of the amendment to Rule 41 covers a defendant or witness for whom an arrest warrant has theretofore issued, or a defendant for whom grounds to arrest exist even though no arrest warrant has theretofore issued. It also covers the arrest of a deportable alien under 8 U.S.C. § 1252, whose presence at a certain place might be important evidence of criminal conduct by another person, such as the harboring of undocumented aliens under 8 U.S.C. § 1324(a)(3).

## RULES OF CRIMINAL PROCEDURE

In United States v. Watson, 423 U.S. 411, 96 S.Ct. 820, 46 L.Ed.2d 598 (1976), the Court once again alluded to "the still unsettled question" of whether, absent exigent circumstances, officers acting without a warrant may enter private premises to make an arrest. Some courts have indicated that probable cause alone ordinarily is sufficient to support an arrest entry, United States v. Fernandez, 480 F.2d 726 (2d Cir. 1973); United States ex rel. Wright v. Woods, 432 F.2d 1143 (7th Cir. 1970). There exists some authority, however, that except under exigent circumstances a warrant is required to enter the defendant's own premises, United States v. Calhoun, 542 F.2d 1094 (9th Cir. 1976); United States v. Lindsay, 506 F.2d 166 (D.C.Cir. 1974); Dorman v. United States, 435 F.2d 385 (D.C.Cir. 1970), or, at least, to enter the premises of a third party, Virgin Islands v. Gereau, 502 F.2d 914 (3d Cir. 1974); Fisher v. Volz, 496 F.2d 333 (3d Cir. 1974); Huotari v. Vanderport, 380 F.Supp. 645 (D. Minn. 1974).

It is also unclear, assuming a need for a warrant, what kind of warrant is required, although it is sometimes assumed that an arrest warrant will suffice, e.g., United States v. Calhoun, supra; United States v. James, 528 F.2d 999 (5th Cir. 1976). There is a growing body of authority, however, that what is needed to justify entry of the premises of a third party to arrest is a search warrant, e.g., Virgin Islands v. Gereau, supra; Fisher v. Volz, supra. The theory is that if the privacy of this third party is to be protected adequately, what is needed is a probable cause determination by a magistrate that the wanted person is presently within that party's premises. "A warrant for the arrest of a suspect may indicate that the police officer has probable cause to believe the suspect committed the crime; it affords no basis to believe the suspect is in some stranger's home." Fisher v. Volz, supra.

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It has sometimes been contended that a search warrant should be required for a nonexigent entry to arrest even when the premises to be entered are those of the person to be arrested. Rotenberg & Tanzer, *Searching for the Person to be Seized*, 35 Ohio St.L.J. 56, 69 (1974). Case authority in support is lacking, and it may be that the protections of a search warrant are less important in such a situation because ordinarily "rudimentary police procedure dictates that a suspect's residence be eliminated as a possible hiding place before a search is conducted elsewhere." People v. Sprovieri, 95 Ill.App.2d 10, 238 N.E.2d 115 (1968).

Despite these uncertainties, the fact remains that in some circuits under some circumstances a search warrant is required to enter private premises to arrest. Moreover, the law on this subject is in a sufficient state of uncertainty that this position may be taken by other courts. It is thus important that Rule 41 clearly express that a search warrant for this purpose may issue. And even if future decisions head the other direction, the need for the amendment would still exist. It is clear that law enforcement officers "may not constitutionally enter the home of a private individual to search for another person, though he be named in a valid arrest warrant in their possession, absent probable cause to believe that the named suspect is present within at the time." Fisher v. Volz, supra. The cautious officer is entitled to a procedure whereby he may have this probable cause determination made by a neutral and detached magistrate in advance of the entry.

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Rule 44. Right to and Assignment of Counsel

\* \* \*

1        (c) JOINT REPRESENTATION. Whenever  
2        two or more defendants have been jointly  
3        charged pursuant to Rule 8(b) or have  
4        been joined for trial pursuant to Rule  
5        13, and are represented by the same re-  
6        tained or assigned counsel or by retained  
7        or assigned counsel who are associated  
8        in the practice of law, the court shall  
9        promptly inquire with respect to such  
10       joint representation and shall personally  
11       advise each defendant of his right to the  
12       effective assistance of counsel, including  
13       separate representation. Unless it ap-  
14       pears that there is good cause to believe  
15       no conflict of interest is likely to  
16       arise, the court shall take such measures  
17       as may be appropriate to protect each  
18       defendant's right to counsel.

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### ADVISORY COMMITTEE NOTE

Rule 44(c) establishes a procedure for avoiding the occurrence of events which might otherwise give rise to a plausible post-conviction claim that because of joint representation the defendants in a criminal case were deprived of their Sixth Amendment right to the effective assistance of counsel. Although "courts have differed with respect to the scope and nature of the affirmative duty of the trial judge to assure that criminal defendants are not deprived of their right to the effective assistance of counsel by joint representation of conflicting interests," Holloway v. Arkansas, 98 S.Ct. 1173 (1978) (where the Court found it unnecessary to reach this issue), this amendment is generally consistent with the current state of the law in several circuits. As held in United States v. Carrigan, 543 F.2d 1053 (2d Cir. 1976):

When a potential conflict of interest arises, either where a court has assigned the same counsel to represent several defendants or where the same counsel has been retained by co-defendants in a criminal case, the proper course of action for the trial judge is to conduct a hearing to determine whether a conflict exists to the degree that a defendant may be prevented from receiving advice and assistance sufficient to afford him the quality of representation guaranteed by the Sixth Amendment. The defendant should be fully advised by the trial court of the facts underlying the potential conflict and be given the opportunity to express his views.

See also United States v. Lawrie, 568 F.2d 93 (8th Cir. 1977) (duty

on trial judge to make inquiry where joint representation by appointed or retained counsel, and "without such an inquiry a finding of knowing and intelligent waiver will seldom, if ever, be sustained by this Court");

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Abraham v. United States, 549 F.2d 236 (2d Cir. 1977); United States v. Mari, 526 F.2d 117 (2d Cir. 1975); United States v. Truglio, 493 F.2d 574 (4th Cir. 1974) (joint representation should cause trial judge "to inquire whether the defenses to be presented in any way conflict"); United States v. DeBerry, 487 F.2d 488 (2d Cir. 1973); United States ex rel. Hart v. Davenport, 478 F.2d 203 (3d Cir. 1973) (noting there "is much to be said for the rule . . . which assumes prejudice and nonwaiver if there has been no on-the-record inquiry by the court as to the hazards to defendants from joint representation"); United States v. Alberti, 470 F.2d 878 (2d Cir. 1973); United States v. Foster, 469 F.2d 1 (1st Cir. 1972) (lack of sufficient inquiry shifts the burden of proof on the question of prejudice to the government); Campbell v. United States, 352 F.2d 359 (D.C.Cir. 1965) (where joint representation, court "has a duty to ascertain whether each defendant has an awareness of the potential risks of that course and nevertheless has knowingly chosen it"). Some states have taken a like position; see, e.g., State v. Olsen, --- Minn. ---, 258 N.W.2d 898 (1977).

This procedure is also consistent with that recommended in the ABA Standards Relating to the Function of the Trial Judge (Approved Draft, 1972), which provide in § 3.4(b):

Whenever two or more defendants who have been jointly charged, or whose cases have been consolidated, are represented by the same attorney, the trial judge should inquire into potential conflicts which may jeopardize the right of each defendant to the fidelity of his counsel.

Avoiding a conflict-of-interest situation is in the first instance a responsibility of the attorney. If a lawyer represents "multiple clients having potentially differing interests, he must weigh carefully the possibility that

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his judgment may be impaired or his loyalty divided if he accepts or continues the employment," and he is to "resolve all doubts against the propriety of the representation." Code of Professional Responsibility, Ethical Consideration 5-15. See also ABA Standards Relating to the Defense Function § 3.5(b) (Approved Draft, 1971), concluding that the "potential for conflict of interest in representing multiple defendants is so grave that ordinarily a lawyer should decline to act for more than one of several co-defendants except in unusual situations when, after careful investigation, it is clear that no conflict is likely to develop and when the several defendants give an informed consent to such multiple representation."

It by no means follows that the inquiry provided for by rule 44(c) is unnecessary. For one thing, even the most diligent attorney may be unaware of facts giving rise to a potential conflict. Often "counsel must operate somewhat in the dark and feel their way uncertainly to an understanding of what their clients may be called upon to meet upon a trial" and consequently "are frequently unable to foresee developments which may require changes in strategy." United States v. Carrigan, supra (concurring opinion). "Because the conflicts are often subtle it is not enough to rely upon counsel, who may not be totally disinterested, to make sure that each of his joint clients has made an effective waiver." United States v. Lawriw, supra.

Moreover, it is important that the trial judge ascertain whether the effective and fair administration of justice would be adversely affected by continued joint representation, even when an actual conflict is not then apparent. As noted in United States v. Mari, supra (concurring opinion):

Trial court insistence that, except in extraordinary circumstances, codefendants retain separate counsel will in the long

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run . . . prove salutary not only to the administration of justice and the appearance of justice but the cost of justice; habeas corpus petitions, petitions for new trials, appeals and occasionally retrials . . . can be avoided. Issues as to whether there is an actual conflict of interest, whether the conflict has resulted in prejudice, whether there has been a waiver, whether the waiver is intelligent and knowledgeable, for example, can all be avoided. Where a conflict that first did not appear subsequently arises in or before trial, . . . continuances or mistrials can be saved. Essentially by the time a case . . . gets to the appellate level the harm to the appearance of justice has already been done, whether or not reversal occurs; at the trial level it is a matter which is so easy to avoid.

A rule 44(c) inquiry is required whether counsel is assigned or retained. It "makes no difference whether counsel is appointed by the court or selected by the defendants; even where selected by the defendants the same dangers of potential conflict exist, and it is also possible that the rights of the public to the proper administration of justice may be affected adversely." United States v. Mari, supra (concurring opinion). See also United States v. Lawriw, supra. When there has been "no discussion as to possible conflict initiated by the court," it cannot be assumed that the choice of counsel by the defendants "was intelligently made with knowledge of any possible conflict." United States v. Carrigan, supra. As for assigned counsel, it is provided by statute that "the court shall appoint separate counsel for defendants having interests that cannot properly be represented by the same counsel, or when other good cause is shown." 18 U.S.C. § 3006(A)(b). Rule 44(c) is not intended to prohibit the automatic

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appointment of separate counsel in the first instance, see Ford v. United States, 379 F.2d 123 (D.C.Cir. 1967); Lollar v. United States, 376 F.2d 243 (D.C.Cir. 1967), which would obviate the necessity for an inquiry.

Under rule 44(c), an inquiry is called for when the joined defendants are represented by the same attorney and also when they are represented by attorneys "associated in the practice of law." This is consistent with Code of Professional Responsibility, Disciplinary Rule 5-105(D) (providing that if "a lawyer is required to decline employment or to withdraw from employment" because of a potential conflict, "no partner or associate of his or his firm may accept or continue such employment"); and ABA Standards Relating to the Defense Function § 3.5(b) (Approved Draft, 1971) (applicable to "a lawyer or lawyers who are associated in practice"). Attorneys representing joined defendants should so advise the court if they are associated in the practice of law.

The rule 44(c) procedure is not limited to cases expected to go to trial. Although the more dramatic conflict situations, such as when the question arises as to whether the several defendants should take the stand, Morgan v. United States, 396 F.2d 110 (2d Cir. 1968), tend to occur in a trial context, serious conflicts may also arise when one or more of the jointly represented defendants pleads guilty.

The problem is that even where as here both codefendants pleaded guilty there are frequently potential conflicts of interest . . . [T]he prosecutor may be inclined to accept a guilty plea from one codefendant which may harm the interests of the other. The contrast in the dispositions of the cases may have a harmful impact on the codefendant who does not initially plead guilty; he may be pressured into pleading guilty himself rather than face his codefendant's bargained-for testimony at a trial. And it will be his own counsel's recommendation to the initially

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pleading codefendant which will have contributed to this harmful impact upon him . . . [I]n a given instance it would be at least conceivable that the prosecutor would be willing to accept pleas to lesser offenses from two defendants in preference to a plea of guilty by one defendant to a greater offense.

United States v. Mari, supra (concurring opinion). To the same effect is ABA Standards Relating to the Defense Function at 213-14.

It is contemplated that under rule 44(c) the court will make appropriate inquiry of the defendants and of counsel regarding the possibility of a conflict of interest developing. Whenever it is necessary to make a more particularized inquiry into the nature of the contemplated defense, the court should "pursue the inquiry with defendants and their counsel on the record but in chambers" so as "to avoid the possibility of prejudicial disclosures to the prosecution." United States v. Foster, supra. It is important that each defendant be "fully advised of the facts underlying the potential conflict and is given an opportunity to express his or her views." United States v. Alberti, supra. The rule specifically requires that the court personally advise each defendant of his right to effective assistance of counsel, including separate representation. See United States v. Foster, supra, requiring that the court make a determination that jointly represented defendants "understand that they may retain separate counsel, or if qualified, may have such counsel appointed by the court and paid for by the government."

Under rule 44(c), the court is to take appropriate measures to protect each defendant's right to counsel unless it appears "there is good cause to believe no conflict of interest is likely to arise" as a consequence of the continuation of such joint representation. A less demanding standard would not adequately protect the Sixth Amendment right to effective

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assistance of counsel or the effective administration of criminal justice. Although joint representation "is not per se violative of constitutional guarantees of effective assistance of counsel, Holloway v. Arkansas, supra, it would not suffice to require the court to act only when a conflict of interest is then apparent, for it is not possible to "anticipate with complete accuracy the course that a criminal trial may take." Fryar v. United States, 404 F.2d 1071 (10th Cir. 1968). This is particularly so in light of the fact that if a conflict later arises and a defendant thereafter raises a Sixth Amendment objection, a court must grant relief without indulging "in nice calculations as to the amount of prejudice arising from its denial." Glasser v. United States, 315 U.S. 60 (1942). This is because, as the Supreme Court more recently noted in Holloway v. Arkansas, supra, "in a case of joint representation of conflicting interests the evil ... is in what the advocate finds himself compelled to refrain from doing," and this makes it "virtually impossible" to assess the impact of the conflict.

Rule 44(c) does not specify what particular measures must be taken. It is appropriate to leave this within the court's discretion, for the measures which will best protect each defendant's right to counsel may well vary from case to case. One possible course of action is for the court to obtain a knowing, intelligent and voluntary waiver of the right to separate

representation, for, as noted in Holloway v. Arkansas, supra, "a defendant may waive his right to the assistance of an attorney unhindered by a conflict of interests." See United States v.

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DeBerry, supra, holding that defendants should be jointly represented only if "the court has ascertained that . . . each understands clearly the possibilities of a conflict of interest and waives any rights in connection with it." It must be emphasized that a "waiver of the right to separate representation should not be accepted by the court unless the defendants have each been informed of the probable hazards; and the voluntary character of their waiver is apparent." ABA Standards Relating to the Function of the Trial Judge at 45. United States v. Garcia, supra, spells out in significant detail what should be done to assure an adequate waiver:

As in Rule 11 procedures, the district court should address each defendant personally and forthrightly advise him of the potential dangers of representation by counsel with a conflict of interest. The defendant must be at liberty to

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question the district court as to the nature and consequences of his legal representation. Most significantly, the court should seek to elicit a narrative response from each defendant that he has been advised of his right to effective representation, that he understands the details of his attorney's possible conflict of interest and the potential perils of such a conflict, that he has discussed the matter with his attorney or if he wishes with outside counsel, and that he voluntarily waives his Sixth Amendment protections. It is, of course, vital that the waiver be established by "clear, unequivocal, and unambiguous language." . . . Mere assent in response to a series of questions from the bench may in some circumstances constitute an adequate waiver, but the court should nonetheless endeavor to have each defendant personally articulate in detail his intent to forego this significant constitutional protection. Recordation of the waiver colloquy between defendant and judge will also serve the government's interest by assisting in shielding any potential conviction from collateral attack, either on Sixth Amendment grounds or on a Fifth or Fourteenth Amendment "fundamental fairness" basis.

See also Hyman, Joint Representation of Multiple Defendants in a Criminal Trial: The Court's Headache, 5 Hofstra L.Rev. 315, 334 (1977).

Another possibility is that the court will order that the defendants be separately represented in subsequent proceedings in the case.

Though the court must remain alert to and take account of the fact that "certain advantages might accrue from joint representation," Holloway v. Arkansas, supra, it need not permit the joint representation to continue merely because the defendants express a willingness to so proceed. That is,

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there will be cases where the court should require separate counsel to represent certain defendants despite the expressed wishes of such defendants. Indeed, failure of the trial court to require separate representation may . . . require a new trial, even though the defendants have expressed a desire to continue with the same counsel. The right to effective representation by counsel whose loyalty is undivided is so paramount in the proper administration of criminal justice that it must in some cases take precedence over all other considerations, including the expressed preference of the defendants concerned and their attorney.

United States v. Carrigan, supra (concurring opinion). See also United States v. Lawriw, supra; Abraham v. United States, supra; ABA Standards Relating to the Defense Function at 213, concluding that in some circumstances "even full disclosure and consent of the client may not be a adequate protection." As noted in United States v. Dolan, 570 F.2d 1177 (3d Cir. 1978), such an order may be necessary where the trial judge is

not satisfied that the waiver is proper. For example, a defendant may be competent enough to stand trial, but not competent enough to understand the complex, subtle, and sometimes unforeseeable dangers inherent in multiple representation. More importantly, the judge may find that the waiver cannot be intelligently made simply because he is not in a position to inform the defendant of the foreseeable prejudices multiple representation might entail for him.

As concluded in Dolan, "exercise of the court's supervisory powers by disqualifying an attorney representing multiple criminal defendants in spite of the defendants' express desire to retain that attorney does not necessarily abrogate

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defendant's sixth amendment rights". It does not follow from the absolute right of self-representation recognized in Faretta v. California, 422 U.S. 806 (1975), that there is an absolute right to counsel of one's own choice. Thus,

when a trial court finds an actual conflict of interest which impairs the ability of a criminal defendant's chosen counsel to conform with the ABA Code of Professional Responsibility, the court should not be required to tolerate an inadequate representation of a defendant. Such representation not only constitutes a breach of professional ethics and invites disrespect for the integrity of the court, but it is also detrimental to the independent interest of the trial judge to be free from future attacks over the adequacy of the waiver or the fairness of the proceedings in his own court and the subtle problems implicating the defendant's comprehension of the waiver. Under such circumstances, the court can elect to exercise its supervisory authority over members of the bar to enforce the ethical standard requiring an attorney to decline multiple representation.

United States v. Dolan, supra. See also Geer, Conflict of Interest and Multiple Defendants in a Criminal Case: Professional Responsibilities of the Defense Attorney, 62 Minn.L.Rev. 119 (1978); Note, Conflict of Interests in Multiple Representation of Criminal Co-Defendants, 68 J.Crim.L. & C. 226 (1977).

The failure in a particular case to conduct a rule 44(c) inquiry would not, standing alone, necessitate the reversal of a conviction of a jointly represented defendant. However, as is currently the case, a reviewing court is more likely to assume a conflict resulted from the joint representation when no inquiry or an inadequate inquiry was conducted. United States v. Carrigan, supra; United States v.

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DeBerry, supra. On the other hand, the mere fact that a rule 44(c) inquiry was conducted in the early stages of the case does not relieve the court of all responsibility in this regard thereafter. The obligation placed upon the court by rule 44(c) is a continuing one, and thus in a particular case further inquiry may be necessary on a later occasion because of new developments suggesting a potential conflict of interest.

PROPOSED AMENDMENTS  
TO RULES GOVERNING SECTION 2254 CASES  
IN THE UNITED STATES DISTRICT COURTS

Rule 10. Powers of Magistrates

1       The duties imposed upon the judge of  
2       the district court by these rules 2, 3,  
3       4, 6, and 7 may be performed by a United  
4       States magistrate pursuant to 28 U.S.C.  
5       § 636. if and to the extent that he is  
6       so empowered by rule of the district  
7       court, and to the extent the district  
8       court has established standards and cri-  
9       teria for the performance of such duties,  
10       except that when such duties involve the  
11       making of an order, under rule 4, dis-  
12       missing the petition, the magistrate shall  
13       submit to the court his report as to the  
14       facts and his recommendation with respect  
15       to the order to be made by the court.

RULES GOVERNING SECTION 2254 CASES

ADVISORY COMMITTEE NOTE

This amendment conforms the rule to subsequently enacted legislation clarifying and further defining the duties which may be assigned to a magistrate, 18 U.S.C. § 636, as amended in 1976 by Pub.L. 94-577. To the extent that rule 10 is more restrictive than § 636, the limitations are of no effect, for the statute expressly governs "[n]otwithstanding any provision of law to the contrary."

The reference to particular rules is stricken, as under § 636(b)(1)(A) a judge may designate a magistrate to perform duties under other rules as well (e.g., order that further transcripts be furnished under rule 5; appoint counsel under rule 8). The reference to "established standards and criteria" is stricken, as § 636(4) requires each district court to "establish rules pursuant to which the magistrates shall discharge their duties." The exception with respect to a rule 4 order dismissing a petition is stricken, as that limitation appears in § 636(b)(1)(B) and is thereby applicable to certain other actions under these rules as well (e.g., determination of a need for an evidentiary hearing under rule 3; dismissal of a delayed or successive petition under rule 9).

PROPOSED AMENDMENTS TO THE  
RULES GOVERNING SECTION 2255 PROCEEDINGS FOR  
THE UNITED STATES DISTRICT COURTS

Rule 10. Powers of Magistrates

1       The duties imposed upon the judge of  
2       the district court by these rules 2, 3,  
3       4, 6, and 7 may be performed by a United  
4       States magistrate pursuant to 28 U.S.C.  
5       § 636, if and to the extent that he is so  
6       empowered by rule of the district court,  
7       and to the extent the district court has  
8       established standards and criteria for the  
9       performance of such duties, except that,  
10       when such duties involve the making of  
11       an order under rule 4 dismissing the  
12       motion, the magistrate shall submit to  
13       the court his report as to the facts and  
14       his recommendation with respect to the  
15       order to be made by the court.

ADVISORY COMMITTEE NOTE

This amendment conforms the rule to 18 U.S.C.  
§ 636. See Advisory Committee Note to rule 10  
of the Rules Governing Section 2254 Cases in the  
United States District Courts.

RULES GOVERNING SECTION 2255 PROCEEDINGS

Rule 11. Time for Appeal

1        The time for appeal from an order  
2        entered on a motion for relief made pur-  
3        suant to these rules is as provided in  
4        Rule 4(a) of the Federal Rules of Appellate  
5        Procedure. Nothing in these rules shall  
6        be construed as extending the time to  
7        appeal from the original judgment of con-  
8        viction in the district court.

ADVISORY COMMITTEE NOTE

Prior to the promulgation of the Rules Govern-  
ing Section 2255 Proceedings, the courts consist-  
ently held that the time for appeal in a section  
2255 case is as provided in Fed.R.App.P. 4(a),  
that is, 60 days when the government is a party,  
rather than as provided in appellate rule 4(b),  
which says that the time is 10 days in criminal  
cases. This result has often been explained on  
the ground that rule 4(a) has to do with civil  
cases and that "proceedings under section 2255  
are civil in nature." E.g., Rothman v. United  
States, 508 F.2d 648 (3d Cir. 1975). Because  
the new section 2255 rules are based upon the  
premise "that a motion under § 2255 is a further  
step in the movant's criminal case rather than  
a separate civil action," see Advisory Committee  
Note to rule 1, the question has arisen whether  
the new rules have the effect of shortening the  
time for appeal to that provided in appellate  
rule 4(b). A sentence has been added to rule  
11 in order to make it clear that this is not  
the case.

## RULES GOVERNING SECTION 2255 PROCEEDINGS

Even though section 2255 proceedings are a further step in the criminal case, the added sentence correctly states current law. In United States v. Hayman, 342 U.S. 205 (1952), the Supreme Court noted that such appeals "are governed by the civil rule applicable to appeals from final judgment in habeas corpus actions." In support, the Court cited Mercado v. United States, 183 F.2d 486 (1st Cir. 1950), a case rejecting the argument that because § 2255 proceedings are criminal in nature the time for appeal is only 10 days. The Mercado court concluded that the situation was governed by that part of 28 U.S.C. § 2255 which reads: "An appeal may be taken to the court of appeals from the order entered on the motion as from a final judgment on application for a writ of habeas corpus." Thus, because appellate rule 4(a) is applicable in habeas cases, it likewise governs in § 2255 cases even though they are criminal in nature.

PROPOSED AMENDMENT  
TO THE FEDERAL RULES OF EVIDENCE

Rule 410. Inadmissibility of Pleas, Offers of  
Plea Discussions, and Related Statements

1        Except as otherwise provided in this  
2 rule, evidence of the following a plea of  
3 guilty, later withdrawn, or a plea of  
4 nolo contendere, or of an offer to plead  
5 guilty or nolo contendere to the crime  
6 charged or any other crime, or of state-  
7 ments made in connection with, and rele-  
8 vant to, any of the foregoing pleas or  
9 offers, is not, in any civil or criminal  
10 proceeding, admissible in any civil or  
11 criminal proceeding against the person de-  
12 fendant who made the plea or offer was a  
13 participant in the plea discussions:

- 14        (1) a plea of guilty which was later  
15        withdrawn;  
16        (2) a plea of nolo contendere;  
17        (3) any statement made in the course of  
18        any proceedings under Rule 11 of the Federal  
19        Rules of Criminal Procedure or comparable  
20        state procedure regarding either of the  
21        foregoing pleas; or

RULES OF EVIDENCE

22           (4) any statement made in the course  
23           of plea discussions with an attorney for  
24           the prosecuting authority which do not  
25           result in a plea of guilty or which result  
26           in a plea of guilty later withdrawn.

27 However, evidence of such a statement made  
28 in connection with, and relevant to, a plea  
29 of guilty, later withdrawn, a plea of nolo  
30 contendere, or an offer to plead guilty or  
31 nolo contendere to the crime charged or any  
32 other crime, is admissible (i) in any pro-  
33 ceeding wherein another statement made in  
34 the course of the same plea or plea dis-  
35 cussions has been introduced and the state-  
36 ment ought in fairness be considered con-  
37 temporaneously with it, or (ii) in a  
38 criminal proceeding for perjury or false  
39 statement if the statement was made by  
40 the defendant under oath, on the record  
41 and in the presence of counsel.

## RULES OF EVIDENCE

### ADVISORY COMMITTEE NOTE

Present rule 410 conforms to rule 11(e)(6) of the Federal Rules of Criminal Procedure. A proposed amendment to rule 11(e)(6) would clarify the circumstances in which pleas, plea discussions and related statements are inadmissible in evidence; see Advisory Committee Note thereto. The amendment proposed above would make comparable changes in rule 410.