# ADVISORY COMMITTEE
# ON
# CRIMINAL RULES

**Washington, D.C.**

**April 22-23, 1993**

**AGENDA**
**CRIMINAL RULES COMMITTEE**
**MEETING**

**April 22-23, 1993**
**Washington, D.C.**

## I. PRELIMINARY MATTERS

**A. Introduction and Comments**

**B. Approval of Minutes of October 1992, Meeting**

## II. CRIMINAL RULES UNDER CONSIDERATION

**A. Rules Approved by Judicial Conference at Fall 1992 Meeting and Forwarded to Supreme Court (No Memo).**

1. Rule 12.1, Production of Statements.
2. Rule 16(a), Discovery of Experts.
3. Rule 26.2, Production of Statements.
4. Rule 26.3, Mistrial.
5. Rule 32(f), Production of Statements.
6. Rule 32.1, Production of Statements.
7. Rule 40, Commitment to Another District.
8. Rule 41, Search and Seizure.
9. Rule 46, Production of Statements.
10. Rule 8, Rules Governing § 2255 Hearings.
11. Technical Amendments.

**B. Rules Approved by Standing Committee and Published for Public Comment on Expedited Basis.**

1. Rule 16(a)(1)(A), Disclosure of Statements by Organizational Defendants (Memo).
2. Rule 29(b), Delayed Ruling on Judgment of Acquittal (Memo)
3. Rule 32, Sentence and Judgment (Memo)

4. Rule 40(d), Conditional Release of Probationer (Memo).

**C. Other Criminal Procedure Rules Under Consideration by the Advisory Committee**

1. Rule 5(a), DOJ Proposal to Amend Rule 5 re Appearances for Persons Arrested for UFAP Offenses (Memo).

2. Rules 10 and 43, Proposal from Bureau of Prisons to Permit In Absentia Arraignments, Etc., by Use of Video Equipment (Memo).

3. Rule 12, Proposal to Amend Rule 12(b) to Require Defense to Raise Entrapment Defense as Motion (Memo).

4. Rule 16, Proposal to Require Government Disclosure of Witnesses (Memo).

5. Rule 24(b), Proposal to Save Court Costs by Reducing Number of Peremptory Challenges (Memo).

6. Rule 43, DOJ Proposal to Permit Sentencing of Absent Defendant (Memo).

7. Rule 53, Proposed Amendment to Permit Cameras in Courtrooms, etc. Under Guidelines Established by Judicial Conference (Memo).

8. Other Proposals

**D. Rules and Projects Pending Before Standing Committee and Judicial Conference**

1. Rule 57, Materials Re Local Rules (Memo).

2. Rule 59, Proposed Amendments Concerning Technical Amendments to Rules by the Judicial Conference (Memo).

3. Report on Proposal to Implement Filing by Facsimile (Memo).

4. Report on Efforts to Implement Uniform Renumbering of Rules of Procedure (Memo).

III. EVIDENCE RULES UNDER CONSIDERATION

A. Appointment of Advisory Committee on Rules of Evidence (Memo).

B. Status Report on Proposed Amendments to Federal Rule of Evidence 412 (memo).

IV. MISCELLANEOUS

V. DESIGNATION OF TIME AND PLACE OF NEXT MEETING.

AGENDA I-A
Washington, DC
April 22-23, 1993

# ORAL PRESENTATION

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# MINUTES
# ADVISORY COMMITTEE
# FEDERAL RULES OF CRIMINAL PROCEDURE

**October 12 & 13, 1992**
**Seattle, Washington**

The Advisory Committee on the Federal Rules of Criminal Procedure met in Seattle, Washington on October 12 and 13, 1992. These minutes reflect the actions taken at that meeting.

## CALL TO ORDER

Judge Hodges, Chair of the Committee, called the meeting to order at 9:00 a.m. on Monday, October 12, 1992 at the Stouffer Madison Hotel in Seattle, Washington. The following persons were present for all or a part of the Committee's meeting:

Hon. Wm. Terrell Hodges, Chairman
Hon. John F. Keenan
Hon. Sam A. Crow
Hon. Harvey E. Schlesinger
Hon. D. Lowell Jensen
Hon. B. Waugh Crigler
Prof. Stephen A. Saltzburg
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Mr. Tom Karas, Esq.
Mr. Edward Marek, Esq.
Mr. Roger Pauley, Jr., designate of Mr. Robert S. Mueller III, Assistant Attorney General

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Also present at the meeting were: Judge Robert Keeton and Mr. Bill Wilson, chairman and member respectively, of the Standing Committee on Rules of Practice and Procedure; Mr. Peter McCabe, Mr. David Adair, and Mr. John Rabiej of the Administrative Office of the United States Courts; and Mr. William Eldridge of the Federal Judicial Center. Judge DeAnda was not able to attend.

## I. INTRODUCTIONS AND COMMENTS

Judge Hodges welcomed the attendees and noted the absence of Judge DeAnda, who had expressed his disappointment at not being able to attend what would have been his last meeting as a member of the Committee, due to his retirement.

## II. APPROVAL OF MINUTES

Judge Keenan moved that the minutes of the Committee's April 1992 meeting in Washington, D.C., be approved. Mr. Karas seconded the motion which carried by a unanimous vote.

## III. CRIMINAL RULE AMENDMENTS UNDER CONSIDERATION

### A. Rules Approved by the Supreme Court and by Congress

The Reporter informed the Committee that there were currently no proposed amendments which had been approved by the Supreme Court and forwarded to Congress.

### B. Rules Approved by the Standing Committee and Forwarded to the Judicial Conference

The Reporter also informed the Committee that at its June 1992 meeting the Standing Committee had approved the following rules and had forwarded them to the Judicial Conference, which had in turn approved and forwarded them to the Supreme Court:

1. Rule 12.1, Production of Statements.
2. Rule 16(a), Discovery of Experts.
3. Rule 26.2, Production of Statements.
4. Rule 26.3, Mistrial.
5. Rule 32(f), Production of Statements.
6. Rule 32.1, Production of Statements.
7. Rule 40, Commitment to Another District.
8. Rule 41, Search and Seizure.
9. Rule 46, Production of Statements.
10 Rule 8, Rules Governing § 2255 Proceedings.
11 Technical Amendments to other rules.

### C. Rules Approved by the Standing Committee to be Circulated for Public Comment

The Committee was informed that at its June 1992 meeting in Washington, D.C., the Standing Committee had approved amendments to two rules, Rule 16(a)(1)(A) governing disclosure of statements by organization defendants, and Rule 29(b), concerning delayed ruling on judgment of acquittal. The proposed amendments had not yet been published for public comment, however, pending the move of the Rules Committee Support Office into its new quarters and the possibility of an expedited comment period on other pending rules.

The Committee generally discussed the problems associated with the delays in the Rules Enabling Act, which may account for several years from the time of the initial

draft in the Advisory Committee to final enactment. Mr. Pauley observed that the necessary delays in the process had, in the past, prompted the Department of Justice to seek amendments directly from Congress. Judge Hodges observed that perhaps the problem associated with the lengthy process was worth further discussion by the Standing Committee.

## D. Rules Under Consideration by the Advisory Committee

### 1. Rule 5(a), Appearances for Persons Arrested for UFAP Offenses.

Judge Hodges gave a brief overview of a proposed amendment to Rule 5 concerning release of defendants arrested for violating 18 U.S.C. § 1073 (unlawful flight to avoid prosecution). Magistrate Judge Crigler had raised the issue, noting that for all practical purposes, UFAP offenses are rarely prosecuted. But Rule 5 requires federal authorities to bring an arrested defendant promptly before a federal magistrate. He noted that all of the participants need to know how to fairly handle UFAP cases and that the problem may be more practical than theoretical. Judge Hodges noted that the prevalent practice is to arrest UFAP defendants, using federal authorities, who then turn them over to state officials for prosecution for the underlying state offense.

Following some additional discussion about the background of the problem Judge Jensen moved that Rule 5 be amended to specifically exempt UFAP defendants from the prompt appearance requirement. Mr. Pauley seconded the motion.

Mr. Pauley noted that of approximately 2,800 UFAP arrests only 6 were actually prosecuted in federal court. He added that Congress enacted § 1073 knowing that most arrestees would not be prosecuted under that provision. He added that there are a variety of practices within the districts and that any proposed solution should provide some flexibility in Rules 5 and 40 for dealing with UFAPs. In response to a question from Judge Hodges, Mr. Pauley indicated that he did not know how many UFAP warrants are sought.

Magistrate Judge Crigler observed that a defendant may not even be aware of pending state charges and that Rule 5 does a good job of protecting a defendant. Mr. Karas agreed with that observation and added that state public defenders may not be permitted to represent Ufos. Mr. Marek echoed Mr. Karas' statements and noted that there is a real danger that a UFAP defendant could be turned over to state

authorities and nothing would happen in the case. Mr. Pauley responded that the defendant's interests would be protected by *Riverside*'s requirements of a prompt appearance before a magistrate to determine if probable cause exists for pretrial confinement.

In the ensuing discussion, the Committee noted a variety of potential problems with amending Rule 5 to meet the UFAP problem. Judge Keeton noted that it might be easier to simply amend the statute to permit federal authorities to arrest a state defendant without relying upon a separate, rarely prosecuted, substantive federal crime. Several members raised the issue of jurisdiction to arrest a UFAP defendant and the most appropriate forum for complying with Rule 5. Judge Hodges thereafter appointed a subcommittee consisting of Judge Jensen (Chair), Judge Schlesinger, Magistrate Judge Crigler, Mr. Karas, and Mr. Pauley, to consider the proposed amendment and report to the Committee at its next meeting. No vote was taken on the motion to amend.

**2. Rules 10 and 43, In Absentia Arraignments.**

Judge Hodges provided a brief overview of a proposal from the Federal Bureau of Prisons to provide for teleconferencing arraignments and recognized the presence of Mr. Phillip S. Wise from the Bureau who would be available to answer questions from the Committee. He noted that the gist of the proposal was to provide some contact between the defendant, counsel, and the court without the necessity of the defendant's actual appearance before the court.

Judge Jensen moved to amend Rules 10 and 43 to provide for teleconferencing of arraignments. Mr. Pauley seconded the motion.

Judge Hodges observed that the proposal had been previously considered and rejected by the Committee and Mr. Marek questioned whether the proposed amendments would be limited to arraignments. Mr. Wise answered that the Bureau's preference would be that as many pretrial proceedings as possible, e.g., pretrial detention hearings, be covered. He further explained the two-way technology used in some state courts; the defendant can see the judge and the witness box and the judge can see the defendant. The defense counsel may or may not be with the defendant. Professor Saltzburg indicated that although he favored teleconferencing for arraignment, he would be opposed to such a procedure wherever evidence would be considered.

Mr. Marek expressed concern that the amendment would lead to a slippery slope and that he opposed any

teleconferencing, even for arraignments. He noted that there was a false assumption that nothing happens at an arraignment; the defendant should see the dynamics of the situation. There are significant issues to be decided at pretrial sessions, such as setting bail and determining competency of the defendant. He noted that although the Bureau of Prisons might save money by not transporting defendants to court, the court would incur additional expenses in terms of equipment and operating costs. In his view, the proponents had not made a case for overriding the important interests associated with personal appearances.

Judge Hodges indicated that it might be beneficial to treat Rules 10 and 43 separately and raised the question of whether it would make a difference if the defendant had the option of deciding to waive a personal appearance. Mr. Marek indicated that the right should not be waivable and Mr. Karas added that if a waiver provision were added, only those who could afford counsel, would appear.

A brief discussion ensued on the problems associated with prison overcrowding and the logistical problems associated with transporting defendants to court, especially in larger metropolitan areas. Judge Jensen noted that even in such areas of congestion, there is no authority under the rules for experimenting.

On a vote to amend Rule 10 to provide for teleconferencing of arraignments, the motion was defeated by a vote if five to four with one abstention. Judge Jensen thereafter withdrew his motion concerning a similar amendment to Rule 43; Mr. Pauley consented to the withdrawal.

The Committee then engaged in a brief discussion on the possibility of providing for some experimentation with teleconferencing. Mr. Eldridge indicated that it might be difficult to devise any pilot programs but would be more than willing to work with the Committee. Following a straw poll of the Committee, Judge Hodges appointed a subcommittee consisting of Judge Keenan (Chair), Judge Crow, Mr. Doar, Mr. Marek, and Professor Saltzburg. The subcommittee was directed to study the issue of amending Rules 10 and 43 to provide for experimental teleconferencing where the defendant has consented to such.

### 3. Rule 11, Advising Defendant of Impact of Negotiated Factual Stipulations.

Judge Hodges briefly introduced the topic of advising a defendant who is entering a guilty plea of the impact of a negotiated factual stipulation. He noted that the issue had

been addressed at some length in an article by David Adair and Toby Slawsky of the Administrative Office but that the authors had not recommended any particular amendment to the rules of criminal procedure.

Judge Keenan moved that the Committee discuss the concept to amend Rule 11 to require that factual stipulations be addressed in the judge's colloquy with the defendant and that the defendant be apprised of the fact that the court would not be bound by the stipulated facts. Judge Jensen seconded the motion.

Judge Keenan indicated that he assumed that the court would be required to insure that the plea was not a sham. Mr. Adair briefly indicated that his research had indicated that several cases had equated factual stipulations with binding Rule 11(e)(1)(C) agreement regarding the sentence. Judge Keeton replied that the court has an obligation to reject a stipulation which is not true and Mr. Marek observed that the truth in the stipulation is not always easily determined. He noted that if it appears that there is a problem with an 11(e)(1)(C) agreement, the defendant should be able to withdraw the guilty plea. Judge Keeton added that some United States Attorneys are being instructed not to use 11(e)(1)(C) agreements. Following brief discussion on the use of written pretrial agreements, the motion to consider an amendment to Rule 11 was withdrawn by Judge Keenan with the consent of Judge Jensen. No further motions were made on the issue.

**4. Rule 16, Disclosure of Materials Implicating Defendant.**

Judge Hodges introduced a proposal from Judge O'Brien and Professor Charles Ehrhardt which would amend Rule 16. The proposed amendment would require the government to either (1) identify any documents which directly name the defendant or (2) make available to the defendant any existing indexing system which would facilitate examination of the documents. In a brief discussion of the issue, Mr. Pauley indicated that the Department of Justice was strongly opposed to any requirement which would either reveal the theory of the case or attorney work product. Mr. Doar thereafter moved that the Committee adopt the first option. That motion failed for lack of a second and there were no further motions concerning either of the proposals.

**5. Rule 16, Disclosure of Witness' Identity.**

Mr. Wilson proposed that the Committee consider amendments to Rule 16 which would expand federal criminal discovery. He observed that under current practice there is

not any meaningful discovery under the rule and that in a complex case a defendant cannot get a fair trial. He also expressed concern that the Department of Justice continues to resist additional discovery.

Professor Saltzburg indicated that he too was concerned about Rule 16 vis a vis names of government witnesses. He noted that there are really two key issues at stake: First, he agreed that in a complex case there could not be a fair trial without more complete discovery. And second, he recognized that in some cases there may be a danger to witnesses if their identity is revealed to the defense. But he emphasized that it is not necessary to take an all or nothing approach. He suggested that some middle ground could be found and in support of that position observed that the Model Code of Arraignment requires the prosecutor to disclose the names of its witnesses unless the prosecution submits in writing reasons why doing so would present a danger to the witnesses. The court's decision on whether to disclose those witnesses is not reviewable.

Judge Hodges noted that in the past most prosecutors had provided an "open file" to the defense but that in some districts that was no longer the policy. Judge Keenan added that although the Committee had previously considered the issue, he believed it should be reviewed. Mr. Pauley responded that if the "open file" system is no longer as commonly in effect, it is probably due to the increase in drug prosecutions where there is often danger to government witnesses. He noted that the prosecution is in the best position to decide whether there is a danger to witnesses.

Mr. Marek expressed confidence that an amendment could be devised which would permit the court to decide, under all of the facts and circumstances, if production of a witness' name was required.

Judge Hodges asked Professor Saltzburg to assist Mr. Wilson in drafting language for Rule 16 which would address the disclosure of government witnesses to the defense.

**6. Rule 32, Amendments to Entire Rule.**

Judge Hodges provided background information on the proposed amendments to Rule 32, which had been discussed at the Committee's last meeting. He noted that at the time of the enactment of the Sentencing Guidelines, the Sentencing Commission had sketched out a some procedural guidelines for preparing presentence reports. The Probation and Criminal Law Committee of the Judicial Conference, however, prepared a more detailed model local rule for preparation and consideration of presentence reports under guideline

sentencing. The chair of that Committee, Judge Tjoflat, circulated that model local rule to the district courts along with an accompanying report. In addition, the Judicial Center had begun a study of the implementation of the model rule and guideline sentencing. He believed that the time was thus ripe for considering major changes to Rule 32 which would more closely reflect actual practice. Asking for the sense of the Committee as to whether it believed that some amendments were needed, Judge Hodges determined that a majority of the members believed the amendments should be considered.

The Committee's discussion focused on a draft of an amendment proposed, and circulated, by Judge Hodges. He noted that several members had made suggested changes to that draft and that he included them for discussion and any necessary votes by the Committee at large. Turning first to the issue of timing, Judge Hodges observed that it would probably be better to set a fixed deadline for sentencing and noted that probation officers had indicated that 35 days would be necessary to complete a presentence report. Several members questioned whether it might not be better to simply leave the language as general as possible and leave it to the court to accelerate or delay the proceedings. Following comments from Judge Keeton that it would be preferable to state any specific time limits in the rule in 7-day increments, Mr. Pauley moved that Rule 32 be amended to provide that (1) the sentence be imposed within 70 days; (2) the probation officer provide a copy of the presentence report to the parties at least 35 days before sentencing; (3) the parties must provide any objections to the report to the probation officer within 14 days of receipt; and (4) not less than 7 days before the sentencing hearing, the probation officer must submit the report to the court (thereby allowing 14 days after receipt of the objections by the probation officer for the probation officer to attempt to resolve them). Judge Schlesinger seconded the motion which carried by a vote of 8 to 0, with two abstentions.

In response to comments by Judge Jensen, Judge Hodges suggested a slight revision to the proposed amendment which would permit the court to accept the presentence report as its findings of fact, except for any objection to the report which had not been resolved. The Committee agreed with the change.

Judge Hodges indicated that the proposed amendments included, at Mr. Marek's suggestion, a provision for defense counsel's presence at any interview of the defendant conducted by the probation officer. Mr. Adair indicated that at least in the Ninth Circuit, that was already in

practice. The proposed language was approved by a vote of 8 to 0 with 2 abstentions.

Following a brief discussion on the issue of disclosing certain information in the presentence report (e.g., confidential information), Judge Schlesinger moved that the proposed amendment be changed to reflect language suggested by Mr. Marek which would permit the court to disclose, pursuant to local rule or in its discretion, the probation officer's recommendation concerning a sentence and other specified information; any matter not disclosed, but relied upon in sentencing, would have to be summarized. Professor Saltzburg seconded the motion. Mr. Pauley indicated disagreement with the proposed language and Judge Hodges noted that as a practical matter a court would not consider evidence not disclosed. Following a discussion on the benefits and costs of disclosing information in the report, especially the recommendation concerning sentence, the motion was withdrawn. Thereafter, Judge Keenan moved to adopt the language in Judge Hodges' draft; the motion was seconded by Judge Crow and carried by a vote of 6 to 4. Following additional brief discussion on the matter, the Committee agreed with Judge Hodges' proposal that the rule provide that certain information not be disclosed but that the court, either by local rule or in individual cases could withhold any recommendation concerning the sentence. The Committee agreed to that change.

Mr. Marek moved to delete the provision which would permit the probation officer to require the defendant, the defendant's counsel, and the attorney for the government to meet with the probation officer to discuss objections to the report. Magistrate Judge Crigler seconded the motion. In a very brief discussion about the benefits of the proposal, it was noted that it seems to work in those districts which have implemented it. The motion was withdrawn.

On the issue of proposed victim allocution at sentencing in Judge Hodges' draft, Judge Keenan expressed opposition to the idea. He noted that under guideline sentencing the victim's testimony would have little, if any, impact on the sentence and that victims could thus become even more frustrated with the criminal justice system. Judge Hodges noted the political pressure on Congress to permit victims to personally appear in sentencing hearings. Mr. Pauley observed that the proposed language in the rule would strike a good compromise; it would be limited to a very narrow class of victims and that that step would provide valuable experience in determining whether victim allocution is feasible. Mr. Wilson noted that the amendment would provide some comfort to victims and would not unnecessarily impede the sentencing procedures. Both Judge

Jensen and Mr. Karas believed that the right of allocution should be extended to any victim.

The Committee voted by a margin of 8 to 2 to exclude any reference in the amendments to victim allocution.

Judge Jensen then moved to amend existing language in the rule which requires the probation office to "verify" victim impact evidence and to present it in "nonargumentative style." Mr. Doar seconded the motion which carried by a unanimous vote. Professor Saltzburg moved to amend the rule by giving victims an opportunity to see the presentence report. That motion failed for lack of a second.

Following a few brief comments, the Committee voted unanimously to approve the amendments to Rule 32 and to forward them to the Standing Committee for publication and comment by the public. Judge Hodges noted that the Reporter had suggested the possibility of using these major amendments to reorganize Rule 32. Through the years, the rule had become a hodge podge of provisions; for example, the provision for presentence reports currently follows provisions dealing with the sentencing hearing. Judge Hodges indicated that once the Committee's changes had been incorporated into the proposed amendment, he and the Reporter would work on a possible reorganization of the rule and circulate it to the Committee.

**7. Rule 40(d), Conditional Release of Probationer.**

The Reporter briefly introduced a proposal from Magistrate Judge Robert Collings that Rule 40(d) be amended to permit explicitly a magistrate to set terms of release for probationers or supervised releasees who are arrested in a district other than the one imposing the probation or supervised release. Mr. Pauley indicated that the proposed amendment might create jurisdictional problems if the originating district is not inclined to transfer jurisdiction to the district where the arrest occurred. Magistrate Judge Crigler expressed agreement with the proposal, noting that there is a real question about the ability of a magistrate to set conditions for release of a probationer in the circumstances outlined by Magistrate Judge Collings. Magistrate Judge Crigler thereafter moved that the proposed amendment be made to Rule 40(d), i.e., that the following language be added to Rule 40(d): "The person may be released under Rule 46(c)," and that the amendment be forwarded to the Standing Committee for publication. The motion was seconded by Mr. Marek.

Judge Jensen expressed concern that the proposed amendment did not include changes to Rule 46 and several other members discussed the possibility of making cross-references in Rule 46 to Rules 32.1 and 40(d). The Committee thereafter approved the motion by a vote of 5 to 3 with 2 abstentions.

**8. Rule 43(b), Sentencing of Absent Defendant.**

Mr. Pauley explained the Justice Department's proposal that Rule 43(b) be amended to provide that sentencing could proceed even where a defendant was absent. He noted that absent defendants could delay sentencing for years and that under guideline sentencing it is difficult to make findings of fact where the defendant is absent. He added that such delays can result in changes in counsel and the court and that the proposal simply places rule 43 on the same plane as other portions of the trial. In his view, a defendant can voluntarily relinquish the right to be present at sentencing. Judge Hodges observed that the combination of guideline sentencing and the finality of sentences under Rule 35, there may be a dilemma; once the defendant returns after a sentence is imposed, no changes could be made in the sentence.

Mr. Pauley moved that Rule 43 be amended to provide for in absentia sentencing and Professor Saltzburg seconded the motion.

Mr. Marek noted that there is pressure from prosecutors and probation officers to sentence absent defendants but that under current practice, the sentencing proceeding need not come to a complete halt. For example, the presentence report can be prepared, and it does not necessarily follow that evidence will be forever lost if the defendant absconds. He agreed with Judge Hodges' observation that once a sentence has been imposed, it cannot be changed.

Mr. Pauley noted that there is an inconsistency in Rule 43; a trial may proceed even where the defendant is absent but sentencing may not. He observed that it was an historical accident that in absentia sentencing was not included in Rule 43. He added that the courts have some flexibility in deciding whether to proceed with an in absentia trial and that the same rules should apply to sentencing. In additional discussion on the issue, Professor Saltzburg noted that the Supreme Court is currently considering the issue of whether an absent defendant forfeits the right to appeal. Mr Pauley noted that the Court is also reviewing the issue of in absentia trials. He thereafter withdrew his motion and substituted a motion to table the proposal with the understanding that it

would be considered at the first meeting following the Supreme Court's decisions on these cases. The Committee unanimously consented to that motion. At Mr. Pauley's request, Judge Hodges indicated that he would inform the Committee on Criminal Law and Probation of the proposal and seek its comments on the issue as well as urging that the Committee consider recommending to the Probation Service that presentence reports be prepared for absconding defendants.

**9. Rule 53, Cameras in the Courtroom.**

The Reporter informed the Committee that a coalition of news organizations was proposing that Rule 53 be amended to permit the Judicial Conference to decide whether to establish a pilot program for cameras in criminal trials. Professor Saltzburg provided some additional background information on the proposal. Judge Keeton observed that the Judicial Conference had already approved a pilot program for civil cases and would probably resist any further amendments at this point. Judge Hodges indicated that the proposal would appear on the agenda for the Committee's next meeting.

## IV. EVIDENCE RULES UNDER CONSIDERATION

### A. Proposal to Create Separate Rules of Evidence Advisory Committee

Judge Keeton informed the Committee that at its June 1992 meeting, the Standing Committee had discussed extensively the problem of handling proposed amendments to the Federal Rules of Evidence and had finally voted to recommend to the Judicial Conference that the Chief Justice appoint a free-standing Evidence Advisory Committee which would include some cross-over members from both the Criminal and Civil Rules Advisory Committees; the Evidence Committee would have its own Reporter. Because of that action, a number of proposed amendments to the Rules of Evidence had been placed on hold, with the exception of Federal Rule of Evidence 412. Judge Keeton also reported that the Judicial Conference had approved that proposal at its meeting in September and that the Chief Justice had agreed that a Committee should be appointed.

### B. Evidence Rules Under Consideration by the Criminal Rules Committee[1]

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1. The initial discussion on Rule 412 occurred on the morning of the first day of the meeting; final discussion and a vote on the proposed amendments occurred on the second day.

**1. Federal Rule of Evidence 412.**

Judge Hodges noted that Congress had failed to act on Senator Biden's proposed Violence Against Women Act but that the bill would almost certainly be re-introduced in the next session of Congress. That bill included proposed amendments which would, inter alia, make Federal Rule of Evidence 412 applicable to both civil and criminal proceedings and would include a right of the victim to appeal the court's evidentiary ruling. Judge Hodges noted that a subcommittee, chaired by Professor Saltzburg, had prepared a draft amendment to Rule 412 which had been considered by the Committee at its April 1992 meeting. Based upon assurances by Judge Stanley Marcus (Chair of Judicial Conference's Ad Hoc Committee on Gender-Based Violence) to Senator Biden that Rule 412 would be given early and prompt consideration under the Rules Enabling Act, Judge Keeton suggested that any proposed amendments be forwarded to the Standing Committee for its consideration. He also envisioned that if the Standing Committee approved the amendments, they would be published on an abbreviated comment period.

Following a brief general discussion about the likelihood of Congress considering Senator Biden's proposed changes to the rules of evidence, Professor Saltzburg distributed copies of the subcommittee's most recent proposed amendments to Rule 412 and explained the two key issues raised in the amendment. First, he noted that the Committee would have to decide whether to make Rule 412 applicable to both civil and criminal trials. As amended, the Rule would essential treat all cases the same, for example in the balance to be struck between the offered evidence's probative value and prejudicial dangers. Second, there were some differences in the provision concerning admissibility of specific instances of sexual behavior on what is now currently referred to as "constitutional" grounds for admission in a criminal case. Professor Saltzburg noted that the proposed amendment would permit introduction of such acts in a civil case if it would necessary to insure a "fair trial." In a criminal case, such evidence would be admitted if the constitution would require it.

Judge Hodges indicated that the subcommittee's report would be treated as a motion (and second) to amend Rule 412.

The Committee's discussion of the proposed amendment reflected concern that application of the rule to both civil and criminal cases could be accomplished. Judge Keenan noted the difficulty of translating the rule from criminal to civil practice and Judge Crigler expressed concern that the rule could be meaningfully applied. Mr. Pauley stated

the Department of Justice's strong concern that the current constitutional standard in criminal cases not be diluted by the proposed "fair trial" test and that the latter would be necessarily subjective and lead to disparate results. Judge Jensen observed that the proposed amendment focused on sexual behavior and propensities of "victims." But in a civil case, the victim might be the plaintiff and the defendant might be a business. Professor Saltzburg responded that the solution might rest in referring the person alleged to be a victim. He also noted the potential interplay between Rule 412 and Rule 404 which generally prohibits propensity evidence. Several participants questioned the interplay between those rules and the possibility that separate rules would be required for civil and criminal rules. Professor Saltzburg noted that the subcommittee had decided not to include an appeal provision in its draft, primarily because it would unnecessarily delay the proceedings.

Later in the meeting, the subcommittee offered several changes in its draft, based upon the foregoing discussions. First, language concerning the catchall provision for admitting specific instances of sexual conduct (proposed subdivision (b)(3)) was modified to reflect the differences in criminal and civil cases. Second, the rule recognizes the possible interplay of Rule 412 with other character evidence rules.

Judge Keenan moved that the Committee accept the subcommittee's proposed amendment and forward it to the Standing Committee for publication. Judge Schlesinger seconded the motion, which carried unanimously.

**2. Federal Rule of Evidence 804.**

The Reporter indicated that the Standing Committee had considered, and remanded, the Committee's proposed amendment to Federal Rule of Evidence 804(a) which would have added an "unavailability" provision for hearsay declarants of tender years. After a brief discussion on the proposed amendment and the issues raised by the Standing Committee, the chair observed that there was a clear consensus that the proposed amendment should be tabled pending consideration by the new evidence Advisory Committee.

**3. Federal Rule of Evidence 1102.**

The Reporter briefly indicated that the Reporter for the Standing Committee would be coordinating proposed amendments to the various procedure rules, and Federal Rule of Evidence 1102, concerning the authority of the Judicial Conference to make technical changes.

## V. MISCELLANEOUS AND DESIGNATION OF TIME AND PLACE OF NEXT MEETING

The Committee publicly expressed its compliments to Judge Hodges and personnel the Administrative Office for choice of the location and the hotel accommodations. Judge Hodges announced that the next meeting of the Committee would be held in Washington, D.C. on April 22 and 23, 1993.

L. RALPH MECHAM
DIRECTOR

JAMES E. MACKLIN, JR.
DEPUTY DIRECTOR

ADMINISTRATIVE OFFICE OF THE
UNITED STATES COURTS

WASHINGTON, D.C. 20544

November 17, 1992

MEMORANDUM TO THE CHIEF JUSTICE OF THE UNITED STATES AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT

By direction of the Judicial Conference of the United States, pursuant to the authority conferred by 28 U.S.C. § 331, I have the honor to transmit herewith for the consideration of the Court proposed amendments to the Federal Rules of Criminal Procedure and a proposed amendment to the Rules Governing Proceedings in the United States District Courts Under Section 2255 of Title 28, United States Code. The Judicial Conference recommends that these amendments be approved by the Court and transmitted to the Congress pursuant to law.

The changes recommended by the Conference include: proposed new Criminal Rule 26.3, and proposed amendments to Criminal Rules 1, 3, 4, 5, 5.1, 6, 9, 12, 16, 17, 26.2, 32, 32.1, 40, 41, 44, 46, 49, 50, 54, 55, 57, and 58; and a proposed amendment to Rule 8 of the Rules Governing Section 2255 Proceedings.

For your assistance in considering these proposed amendments, I am also transmitting an excerpt from the Report of the Committee on Rules of Practice and Procedure to the Judicial Conference and the Report of the Advisory Committee on the Federal Rules of Criminal Procedure.

L. Ralph Mecham

Enclosures

AGENDA II-B-1
Washington, DC
April 22-23, 1993

**MEMO TO: Advisory Committee on Criminal Rules**

**FROM: Dave Schlueter, Reporter**

**RE: Amendment to Rule 16(a)(1)(A) re Organizational Defendants; Public Comments**

**DATE: March 11, 1993**

At its December 1992 meeting, the Standing Committee approved for publication and comment the Advisory Committee's proposed amendment to Rule 16(a)(1)(A). The amendment is intended to extend the disclosure requirements to statements by organizational defendants.

To the best of my knowledge there have been no written comments on the proposed change. The rule, as it was published for comment, is attached.

**PRELIMINARY DRAFT
OF PROPOSED AMENDMENTS TO THE
FEDERAL RULES OF CRIMINAL PROCEDURE***

Rule 16. Discovery and Inspection

(a)DISCLOSURE OF EVIDENCE BY THE GOVERNMENT.

(1)Information Subject to Disclosure.

(A) STATEMENT OF DEFENDANT. Upon request of a defendant the government must ~~shall~~ disclose to the defendant and make available for inspection, copying or photographing: any relevant written or recorded statements made by the defendant, or copies thereof, within the possession, custody or control of the government,

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



the existence of which is known, or by the exercise of due diligence may become known, to the attorney for the government; that portion of any written record containing the substance of any relevant oral statement made by the defendant whether before or after arrest in response to interrogation by any person then known to the defendant to be a government agent; and recorded testimony of the defendant before a grand jury which relates to the offense charged. The government must ~~shall~~ also disclose to the defendant the substance of any other relevant oral statement made by the defendant whether

before or after arrest in response to interrogation by any person then known by the defendant to be a government agent if the government intends to use that statement at trial. Upon request of a ~~Where the~~ defendant which is an organization such as a corporation, partnership, association, or labor union, the government must disclose to the defendant any of the foregoing statements made by a person ~~the court may grant the defendant, upon its motion, discovery of relevant recorded testimony of any witness before a grand jury~~ who (1) was, at the time of making the statement ~~that~~



~~testimony~~, so situated as a ~~an~~ director, officer, ~~or~~ employee, or agent as to have been able legally to bind the defendant in respect to the subject of the statement ~~conduct constituting the offense~~, or (2) was, at the time of offense, personally involved in the alleged conduct constituting the offense and so situated as a ~~an~~ director, officer, ~~or~~ employee, or agent as to have been able legally to bind the defendant in respect to that alleged conduct in which the ~~witness~~ person was involved.

* * * * *

COMMITTEE NOTE

The amendment is intended to clarify that the discovery and disclosure requirements of the rule apply equally to individual and organizational defendants. See In re United

States, 918 F.2d 138 (11th Cir. 1990)(rejecting distinction between individual and organizational defendants). Because an organizational defendant may not know what its officers or agents have said or done in regard to a charged offense, it is important that it have access to statements made by persons whose statements or actions could be binding on the defendant. See also United States v. Hughes, 413 F.2d 1244, 1251-52 (5th Cir. 1969), vacated as moot, 397 U.S. 93 (1970)(prosecution of corporations "often resembles the most complex civil cases, necessitating a vigorous probing of the mass of detailed facts to seek out the truth").

The amendment defines defendant in a broad, nonexclusive, fashion. See also 18 U.S.C. § 18 (the term "organization" includes a person other than an individual). And the amendment recognizes that an organizational defendant could be bound by an agent's statement, see, e.g., Federal Rule of Evidence 801(d)(2), or be vicariously liable for an agent's actions. The amendment does not address, however, the issue of what, if any, showing an organizational defendant would be required to establish that a particular person was in a position to legally bind the organizational defendant. But as with individual defendants, the organizational defendant is entitled to the statements without first seeking court approval. If disclosure is denied and the defendant seeks relief from the court, the Committee envisions that the organizational defendant might have to offer some evidence, short of a binding stipulation or judicial admission, that the person in question was able to bind legally the defendant.

AGENDA II-B-2
Washington, DC
April 22-23, 1993

**MEMO TO: Advisory Committee on Criminal Rules**

**FROM: Dave Schlueter, Reporter**

**RE: Comments on Proposed Amendment to Rule 29(b)**

**DATE: March 11, 1993**

At the suggestion of the Department of Justice, the Advisory Committee adopted a proposed amendment to Rule 29(b) at its Spring meeting in 1992. The amendment was approved for public comment by the Standing Committee at its summer 1992 meeting. But publication was delayed in part because of the Administrative Office's move to its new quarters last fall.

At its December 1992 meeting, the Standing Committee directed that the proposed amendment be published on an expedited basis -- to coincide with the same time limits for Federal Rule of Evidence 412.

To date, there have been no written comments from the public on the proposed amendment, which is attached.

Rule 29. Motion for Judgment of Acquittal

* * * * *

(b) RESERVATION OF DECISION ON MOTION. ~~If a motion for judgment of acquittal is made at the close of all the evidence, the~~ The court may reserve decision on ~~the~~ a motion for judgment of acquittal, proceed with the trial (where the motion is made before the close of all the evidence), submit the case to the jury and decide the motion either before the jury returns a verdict or after it returns a verdict of guilty or is discharged without having returned a verdict. If the court reserves decision, it must decide the motion on the basis of the evidence at the time the ruling was reserved.

* * * * *

COMMITTEE NOTE

The amendment permits the reservation of a motion for a judgment of acquittal made at the close of the government's case in the same manner as the rule now permits for motions made at the close of all of the evidence. Although the rule as written did not permit the court to reserve such motions made at the end of the government's case, trial courts on occasion have nonetheless reserved ruling. See, e.g., United States v. Bruno, 873 F.2d 555 (2d Cir.), cert. denied, 110 S.Ct. 125 (1989); United States v. Reifsteck, 841 F.2d 701 (6th Cir. 1988). While the amendment will not affect a large number of cases, it should remove the dilemma in those close cases where at the end of the government's case the trial court would feel pressured into making an immediate, and possibly erroneous, decision or violating the rule as presently written by reserving its ruling on the motion.



The amendment also permits the trial court to balance the defendant's interest in an immediate resolution of the motion against the interest of the government in being able to appeal, should a guilty verdict result, a subsequent unfavorable ruling and thus attempt to have the verdict reinstated. Under the double jeopardy clause the government may appeal the granting of a motion for judgment of acquittal only if there would be no necessity for another trial, i.e., only where the jury has returned a verdict of guilty. United States v. Martin Linen Supply Co., 430 U.S. 564 (1977). Thus, the government's right to appeal a rule 29 motion is only preserved where the ruling is reserved until after the verdict.

In addressing the issue of preserving the government's right to appeal and at the same

time recognizing double jeopardy concerns, the Supreme Court observed:

We should point out that it is entirely possible for a trial court to reconcile the public interest in the Government's right to appeal from an erroneous conclusion of law with the defendant's interest in avoiding a second prosecution. In United States v. Wilson, 420 U.S. 332 (1975), the court permitted the case to go to the jury, which returned a verdict of guilty, but it subsequently dismissed the indictment for preindictment delay on the basis of evidence adduced at trial. Most recently in United States v. Ceccolini, 435 U.S. 168 (1978), we described similar action with approval: "The District Court had sensibly made its finding on the factual question of guilty or innocence, and then ruled on the motion to suppress; a reversal of these rulings would require no further proceeding in the District Court, but merely a reinstatement of the finding of guilt." Id. at 271.

United States v. Scott, 437 U.S. 82, 100 n. 13 (1978). By analogy, reserving a ruling on a motions for judgment of acquittal strikes the same balance as that reflected by the Supreme Court in Scott.

Reserving a ruling on a motion made at the end for the government's case does pose problems, however, where the defense decides to present its evidence and run the risk that its evidence would support the government's case. To minimize that problem, the amendment provides that the trial court is to consider only the evidence submitted at the time of the motion in making its ruling, whenever made.

AGENDA II-B-3
Washington, DC
April 22-23, 1993

**MEMO TO: Advisory Committee on Criminal Rules**

**FROM: Dave Schlueter, Reporter**

**RE: Rule 32; Publication for Comment by Bench and Bar**

**DATE: March 15, 1993**

In December 1992, the Standing Committee approved for publication and comment the Committee's proposed amendments to Rule 32. The abbreviated comment period ends on April 15th -- one week before the Committee's meeting in Washington. To date, the Committee has received a number of comments, mostly from probation officers who have expressed concern about the specific time limits in the proposed amendments. Because I expect more written comments, I am delaying for now the preparation of a summary of the comments, until we can be sure that we have most, if not all, of letters sent to the Committee. My hope is that before the meeting, I will be able to compile the comments and categorize them for the Committee.

I am attaching a copy of Rule 32 as it was published for public comment. I am also attaching a marked copy of changes made to the Rule by the Standing Committee at its December meeting. You will recall that at the October 1992 meeting, the proposed amendments did not include a major reorganization of the rule. But with the Committee's approval, the rule was reorganized before being submitted to the Standing Committee. Although there was general support for such reorganization, that Committee had some "style" and organization suggestions of its own; those changes are reflected in the "marked" copy.

**[Rule 32 is deleted and replaced with the following]**

**Rule 32. Sentence and Judgment**

(a) IN GENERAL; TIME FOR SENTENCING.

When a presentence investigation and report are made under subdivision (b), sentence should be imposed by the end of 70 days from the finding of guilt. The time for imposing sentence, and the other time limits prescribed in this rule, may be either advanced or continued for good cause.

(b) PRESENTENCE INVESTIGATION AND REPORT.

(1) *When Made.* The probation officer shall make a presentence investigation and submit a report to the court before the sentence is imposed,



unless:

(A) the court finds that the information in the record enables it to exercise its sentencing authority meaningfully under 18 U.S.C. 3553; and

(B) the court explains this finding on the record.

(2) *Presence of Counsel.* On request, the defendant's counsel is entitled to attend any interview of the defendant by a probation officer in the course of a presentence investigation.

(3) *Nondisclosure.* The report must not be submitted to the court or its contents disclosed to anyone unless the

defendant has consented in writing, has pleaded guilty or nolo contendere, or has been found guilty.

(4) *Contents of the Presentence Report.* The presentence report must contain—

(A) information about the defendant's history and characteristics, including any prior criminal record, financial condition, and any circumstances that, because they affect the defendant's behavior, may be helpful in imposing sentence or in correctional treatment;

(B) the classification



of the offense and of the defendant under the categories established by the Sentencing Commission under 28 U.S.C. 994(a), as the probation officer determines to be applicable to the defendant's case; the kinds of sentence and the sentencing range suggested for such a category of offense committed by such a category of defendant as set forth in the guidelines issued by the Sentencing Commission under 28 U.S.C. 994 (a)(1); and the probation officer's explanation of any factors

that may suggest a different sentence — within or without the applicable guideline — that would be more appropriate, given all the circumstances;

(C) a reference to any pertinent policy statement issued by the Sentencing Commission under 28 U.S.C. 994(a)(2);

(D) verified information, stated in a nonargumentative style, containing an assessment of the financial, social, psychological, and medical impact on any individual against whom the offense has been committed;



(E) unless the court orders otherwise, information about the nature and extent of nonprison programs and resources available for the defendant;

(F) any report and recommendation resulting from a study ordered by the court under 18 U.S.C. 3552(b); and

(G) any other information required by the court.

(5) Exclusions. The presentence report must exclude:

(A) any diagnostic opinions that, if disclosed, might seriously

disrupt a program of rehabilitation;

(B) sources of information obtained upon a promise of confidentiality; or

(C) any other information that, if disclosed, might result in harm, physical or otherwise, to the defendant or other persons.

(6) Disclosure and Objections.

(A) Not less than 35 days before the sentencing hearing — unless the defendant waives this minimum period — the probation officer shall



furnish the presentence report to the defendant, the defendant's counsel, and the attorney for the Government. The court may, by local rule or in individual cases, direct the probation officer, in disclosing the presentence report, to withhold the probation officer's recommendation, if any, on the sentence.

(B) Within 14 days after receiving the presentence report, the parties shall communicate in writing to the probation officer, and to each other, any objections to any

material information, sentencing classifications, sentencing guideline ranges, and policy statements contained in or omitted from the presentence report. After receiving objections, the probation officer may require the defendant, the defendant's counsel, and the attorney for the Government to meet with the probation officer to discuss unresolved factual and legal issues. The probation officer may also conduct a further investigation and revise the presentence report as



appropriate.

(C) Not later than 7 days before the sentencing hearing, the probation officer shall submit the presentence report to the court, together with an addendum setting forth any unresolved objections, the grounds for those objections, and the probation officer's comments on the objections. At the same time, the probation officer shall furnish the revisions of the presentence report and the addendum to the defendant, the defendant's counsel, and the attorney

for the Government.

(D) Except for any unresolved objection under subdivision (b)(6)(B), the court may, at the presentencing hearing, accept the presentence report as its findings of fact. For good cause shown, the court may allow a new objection to be raised at any time before imposing sentence.

(c) SENTENCE

(1) *Sentencing Hearing.* At the sentencing hearing, the court shall afford counsel for the defendant and for the Government an opportunity to comment on the probation



officer's determinations and on other matters relating to the appropriate sentence, and shall rule on any unresolved objections to the presentence report. The court may, in its discretion, permit the parties to introduce testimony or other evidence on the objections. For each matter controverted, the court shall make either a finding on the allegation or a determination that no finding is necessary because the controverted matter will not be taken into account or will not affect sentencing. A written record of these findings and determinations must be appended to any copy of the presentence

report made available to the Bureau of Prisons.

(2) *Production of Statements at Sentencing Hearing.* Rule 26.2(a)-(d), (f) applies at a sentencing hearing under this rule. If a party elects not to comply with an order under Rule 26.2(a) to deliver a statement to the movant, the court may not consider the affidavit or testimony of the witness whose statement is withheld.

(3) *Imposition of Sentence.* Before imposing sentence, the court shall:

(A) verify that the defendant and defendant's counsel have read and



discussed the presentence report made available under subdivision (b)(6)(A). If the court has received information excluded from the presentence report under subdivision (b)(5) the court – in lieu of making that information available – shall summarize it, orally or in writing, if the information will be relied on in determining sentence. The court shall also give the defendant and the defendant's counsel an opportunity to comment on that information.

(B) afford defendant's counsel an opportunity to speak

on behalf of the defendant;

(C) address the defendant personally and determine whether the defendant wishes to make a statement and to present any information in mitigation of the sentence; and

(D) afford the attorney for the Government an equivalent opportunity to speak to the court.

(4) *In Camera Proceedings.* The court's summary of information under subdivision (c)(3)(A) may be in camera. Upon joint motion by the defendant and by the attorney for the Government, the court



may hear in camera the statements — made under subdivision (c)(3)(B), (C), and (D) — by the defendant, the defendant's counsel, or the attorney for the Government.

(5) *Notification of Right to Appeal.* After imposing sentence, the court shall advise the defendant of the right to appeal, including any right to appeal the sentence, and of the right of a person who is unable to pay the cost of an appeal to apply for leave to appeal in forma pauperis. If the defendant so requests, the clerk of the court shall immediately prepare and file a notice of appeal on behalf of the

defendant.

(d) JUDGMENT.

(1) *In General.* A judgment of conviction must set forth the plea, the verdict or findings, the adjudication, and the sentence. If the defendant is found not guilty or for any other reason is entitled to be discharged, judgment must be entered accordingly. The judgment must be signed by the judge and entered by the clerk.

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



court considers proper.

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

COMMITTEE NOTE

The amendments to Rule 32 are intended to accomplish two primary objectives. First, the amendments incorporate elements of a "Model Local Rule for Guideline Sentencing" which was proposed by the Judicial Conference Committee on Probation Administration in 1987. That model rule, and the accompanying report, were prepared to assist trial judges in implementing guideline sentencing mandated by the Sentencing Reform Act of 1984. See Committee on the Admin. of the Probation Sys., Judicial Conference of the U.S., Recommended Procedures for Guideline Sentencing and Commentary: Model Local Rule for Guideline Sentencing, Reprinted in T.

Hutchinson & D. Yellen, Federal Sentencing Law and Practice, app. 8, at 431 (1989). It was anticipated that sentencing hearings would become more complex due to the new fact finding requirements imposed by guideline sentencing methodology. See U.S.S.G. 6A1.2. Accordingly, the model rule focused on preparation of the presentence report as a means of identifying and narrowing the issues to be decided at the sentencing hearing.

Second, in the process of effecting those amendments, the rule was reorganized. Over time, numerous amendments to the rule had created a sort of hodge podge; the reorganization represents an attempt to reflect an appropriate sequential order in the sentencing procedures.

**Subdivision (a).** Subdivision (a) includes several changes. First, instead of the general requirement that the sentence be imposed "without unnecessary delay," the rule now contains a 70-day provision. The purpose of the 70-day time period is to provide a sufficient overall window of time for the probation officer to complete and disclose to the parties the presentence report, for the submission of objections by the parties, for resolution of those objections, if possible, by the probation officer before the sentencing hearing, and for a report to the court concerning unresolved objections so that the court can prepare for the hearing in an orderly way. Under the rule, however, the sentencing judge may either shorten or extend that time for good cause. The establishment of time limits is not intended to create any new



substantive right for the defendant or the Government which would entitle either to relief if a time limit prescribed in the rule is not kept.

The second change to subdivision (a) is that the remainder of the provision, which addressed the sentencing hearing, is now located in subdivision (c).

**Subdivision (b).** Subdivision (b) (formerly subdivision (c)) which addresses the presentence investigation, has been modified in several respects. First, subdivision (b)(2) is a new provision which provides that, on request, defense counsel is entitled to be present at any interview of the defendant conducted by the probation officer. Although the courts have not held that presentence interviews are a critical stage of the trial for purposes of the Sixth Amendment right to counsel, the amendment reflects case law which has indicated that requests for counsel to be present should be honored. See, e.g., United States v. Herrera-Figureroa, 918 F.2d 1430, 1437 (9th Cir. 1990)(court relied on its supervisory power to hold that probation officers must honor request for counsel's presence); United States v. Tisdale, 952 F.2d 934, 940 (6th Cir. 1992)(court agreed with rule requiring probation officers to honor defendant's request for attorney or request from attorney not to interview defendant in absence of counsel). The Committee believes that permitting counsel to be present during such interviews may avoid unnecessary misunderstandings between the probation officer and the defendant.

Subdivision (b)(6), formerly (c)(3), includes several changes which recognize the key role the presentence report is playing under guideline sentencing. The major thrust of these changes is to address the problem of resolving objections by the parties to the probation officer's presentence report. Subdivision (b)(6)(A) now provides that the probation officer must present the presentence report to the parties not later than 35 days before the sentencing hearing (rather than 10 days before imposition of the sentence) in order to provide some additional time to the parties and the probation officer to attempt to resolve objections to the report. There has been a slight change in the practice of deleting from the copy of the report given to the parties certain information specified in (b)(6)(A). Under that new provision (formerly subdivision (c)(3)(A)), the court now has the discretion (in an individual case or in accordance with a local rule) to decide whether to direct the probation officer to disclose any final recommendation concerning the sentence. But the prior practice of not disclosing confidential information, or other information which might result in harm to the defendant or other persons, is retained in (b)(5).

New subdivisions (b)(6)(B), (C), and (D) now provide explicit deadlines and guidance on resolving disputes about the contents of the presentence report. The amendments are intended to provide early resolution of such disputes by (1) requiring the parties to provide the probation officer with a written list of objections to the report within 14 days of receiving the



report; (2) permitting the probation officer to schedule compulsory conferences, conduct an additional investigation, and to make revisions to the report as deemed appropriate; (3) requiring the probation officer to submit the report to the court and the parties not later than 7 days before the sentencing hearing, noting any unresolved disputes; and (4) permitting the court to treat the report as its findings of fact, except for the parties' unresolved objections.

This procedure, which generally mirrors the approach in the Model Local Rule for Guideline Sentencing, supra, is intended to maximize judicial economy by providing for more orderly sentencing hearings while also providing fair opportunity for both parties to review, object to, and comment upon, the probation officer's report in advance of the sentencing hearing. Under the amendment, the parties would still be free at the sentencing hearing to comment on the presentence report, and in the discretion of the court, to introduce evidence concerning their objections to the report.

**Subdivision (c).** Subdivision (c) addresses the imposition of sentence and makes no changes in current practice. The provision consists largely of material formerly located in subdivision (a). Language formerly in (a)(1) referring to the court's disclosure to the parties of the probation officer's determination of the sentencing classifications and sentencing guideline range is now located in subdivisions (b)(4)(B) and (c)(1). Likewise, the brief reference in former

(a)(1) to the ability of the parties to comment on the probation officer's determination of sentencing classifications and sentencing guideline range is now located in (c)(1) and (c)(3). Subdivision (c)(1) is not intended to require that resolution of objections and imposition of the sentence occur at the same time or during the same hearing. It requires only that the court rule on any objections before sentence is imposed.

The provision for disclosure of a witness' statements, which was recently proposed as an amendment to Rule 32 as new subdivision (e), is now located in subdivision (c)(2).

**Subdivision (d).** Subdivision (d), dealing with entry of the court's judgment, is former subdivision (b).

**Subdivision (e).** Subdivision (e), which addresses the topic of withdrawing pleas, was formerly subdivision (d). Both provisions remain the same except for minor stylistic changes.

Under present practice, the court may permit, but is not required to hear, victim allocution before imposing sentence. The Committee considered, but rejected, a provision which would have required the court to permit victim allocution at sentencing. Although the Committee was sensitive to the interest of some victims in the sentence to be imposed, it also recognized a number of difficulties which the Committee ultimately concluded outweighed any value to the victim in



personally addressing the court. First, under guideline sentencing (which takes victim impact into account), the court has very limited sentencing discretion once the applicable guideline range has been determined, and the guideline range is usually below the maximum sentence allowed by statute. In most cases, therefore, the views of the victim would have little or no impact upon the sentence thereby producing a likelihood of victim frustration rather than victim satisfaction. Additionally, if the victim's allocution persuaded the court to consider a possible departure from the guideline sentencing range, due process might require notice and an opportunity to contest that result under Burns v. United States, ___ U.S. ___, 111 S.Ct. 2182 (1991). This could substantially complicate and delay the sentencing hearing. There is also a problem in the federal system in identifying victims who would have the right to allocution. While a single victim of a violent crime is easily identified, federal criminal law covers a broad range of violent as well as non-violent conduct which often results in numerous victims. In such cases, it simply would not be feasible to extend the right of allocution to all of the victims. Finally, the Committee also took into account existing law and procedure which keeps victims informed of the progress of the case, see, e.g., 42 U.S.C. 10601, et seq. (enumerated "victims' rights include, inter alia, the right to be notified of court proceedings, the right to be present at all public court proceedings, and the right to confer with the attorney for the Government) court proceedings permits the victim to be present at all stages of the

judicial proceeding including sentencing, and provides an opportunity for direct input in the preparation of the presentence report. See subdivision (b)(4)(D).

MARKED



**Rule 32. Sentence and Judgment.**

(a) IN GENERAL; TIME FOR SENTENCING. When a presentence investigation and report is ~~ordered~~ made under subdivision (b), sentence should be imposed by the end of 70 days from the finding of guilt. The time for imposing sentence, and the time limits prescribed in this rule, may be either advanced or continued for good cause.

(b) PRESENTENCE INVESTIGATION.

(1) *When Made.* The probation officer shall make a presentence investigation and report to the court before ~~imposing~~ sentence is imposed, unless:

(A) the court finds that the information in the record enables it to exercise its sentencing authority meaningfully under 18 U.S.C. § 3553; and

(B) the court explains this finding on the record.

(2) *Presence of Counsel.* On request, the defendant's counsel is entitled to attend any interview of the defendant by the probation officer in the course of the presentence investigation.

(3) *Submission to the Court.* Unless the defendant consents in writing, the report must not be submitted to the court or its contents disclosed to anyone unless the defendant has pleaded guilty or nolo contendere or has been found guilty.

(4) *Report.* (A) The report of the presentence investigation must contain—

(A) information about the defendant's history and characteristics, including any prior criminal record, financial condition, and any circumstances that, because they affect the defendant's behavior, may be helpful in imposing sentence or in correctional treatment;

(B) the classification of the offense and of the defendant under the categories established by the Sentencing Commission under 28 U.S.C. 994(a), as the probation officer determines to be applicable to the defendant's case; the kinds of sentence and the sentencing range suggested for such a category of offense committed by such a category of defendant as set forth in the guidelines issued by the Sentencing Commission under 28 U.S.C. 994 (a)(1); and the probation officer's explanation of any factors that may suggest a different sentence — within or without the applicable guideline — that would be more appropriate, given all the circumstances;

(C) a reference to any pertinent policy statement issued by the Sentencing Commission under 28 U.S.C. 994(a)(2);

(D) information containing an assessment of the financial, social, psychological, and medical impact on any individual against whom the offense has been committed;

(E) unless the court orders otherwise, information about the nature and extent of nonprison programs and resources available for the defendant; and

(F) any other information required by the court.

(5) *Disclosure and Objections.*

(A) Not less than 35 days before the sentencing hearing — unless the defendant waives this minimum period — the probation officer shall furnish the report of the presentence investigation to the defendant, the defendant's counsel, and the attorney for the Government.

~~The report must include the information required by subdivision (b)(4), together with~~ any report and recommendation resulting from a study ordered by the court under 18 U.S.C. 3552(b).

(B) The report must exclude: of the presentence investigation

(i) any diagnostic opinions that, if disclosed, might seriously disrupt a program of rehabilitation;

(ii) sources of information obtained upon a promise of confidentiality; or

(iii) any other information that, if disclosed, might result in harm, physical or otherwise, to the defendant or other persons.

(D) The court may, by local rule or in individual cases, direct the probation officer, in disclosing the presentence report, to withhold the probation officer's recommendation, if any, on the sentence.

(C) (B) Within 14 days after receiving the report of the presentence investigation, the parties shall communicate in writing to the probation officer and to each other, any objections to any material information, sentencing classifications, sentencing guideline ranges, and policy statements contained in or omitted from the report of the presentence investigation. After receiving objections, the probation officer may require the defendant, the defendant's counsel, and the attorney for the Government to meet with the probation officer to

discuss unresolved factual and legal issues. The probation officer may also conduct a further investigation and revise the presentence report as appropriate.

(C) Not later than 7 days before the sentencing hearing, the probation officer shall submit the presentence report to the court, together with an addendum setting forth any unresolved objections, the grounds for those objections, and the probation officer's comments on the objections. At the same time, the probation officer shall furnish the revisions of the presentence report and the addendum to the defendant, the defendant's counsel, and the attorney for the Government.

(D) Except for any unresolved objection under subdivision (b)(5)(B), the court may, at the presentencing hearing, accept the presentence ~~investigation~~ report as its findings of fact. For good cause shown, the court may allow a new objection to be raised at any time before imposing sentence.

(c) SENTENCE

(1) *Sentencing Hearing.* At the sentencing hearing, the court shall afford counsel for the defendant and for the Government an opportunity to comment on the probation officer's determination and on other matters relating to the appropriate sentence, and shall rule on any unresolved objections to the presentence report.

The court may, in its discretion, permit the parties to introduce testimony or other evidence on the objections.

The court shall, for each matter controverted, make either a finding on the allegation or a determination that no such finding is necessary because the controverted matter will not be taken into account or will not affect sentencing. A written record of such findings and determinations must be appended to any copy of the presentence investigation report made available to the Bureau of Prisons.

(2) *Production of Statements at Sentencing Hearing.* Rule 26.2(a)-(d), (f) applies at a sentencing hearing under this rule. If a party elects not to comply with an order under Rule 26.2(a) to deliver a statement to the movant, the court must not consider the affidavit or testimony of the witness whose statement is withheld.

(3) *Imposition of Sentence.* Before imposing sentence, the court shall:

(A) determine that the defendant and defendant's counsel have read and discussed the presentence investigation report made available under subdivision (b)(5)(A). If, however, the court believes that the

presentence report contains information that should not be disclosed under subdivision (b)(5)(A), the court — in lieu of making that part of the report available — shall summarize it, orally or in writing, if the information will be relied on in determining sentence. The court shall also give the defendant and the defendant's counsel an opportunity to comment on that information.

(B) afford defendant's counsel an opportunity to speak on behalf of the defendant;

(C) address the defendant personally and determine whether the defendant wishes to make a statement and to present any information in mitigation of the sentence; and

(D) afford the attorney for the Government an equivalent opportunity to speak to the court.

(4) *In Camera Proceeding.* If the court summarizes information under subdivision (c)(3)(A), it may do so in camera. Upon motion jointly filed by the defendant and by the attorney for the Government, the court may hear in camera the statements — made under subdivision (c)(3)(B), (C), and (D) — by the defendant, the defendant's counsel, or the attorney for the Government.

(5) *Notification of Right to Appeal.* After imposing sentence, the court shall advise the defendant of the defendant's right to appeal, including any right to appeal the sentence, and of the right of a person who is unable to pay the cost of an appeal to apply for leave to appeal in forma pauperis. If the defendant so requests, the clerk of the court shall immediately prepare and file a notice of appeal on behalf of the defendant.

(d) JUDGMENT.

(1) *In General.* A judgment of conviction must set forth the plea, the verdict or findings, the adjudication, and the sentence. If the defendant is found not guilty or for any other reason is entitled to be discharged, judgment must be entered accordingly. The judgment must be signed by the judge and entered by the clerk.

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

(e) PLEA WITHDRAWAL. If a motion for withdrawal of a plea of guilty or nolo contendere is made before sentence is imposed, the court may permit the plea to be withdrawn if the defendant shows any fair and just reason. At

any later time, a plea may be set aside only on direct appeal or by motion under 28 U.S.C. § 2255.

AGENDA II-B-4
Washington, DC
April 22-23, 1993

**MEMO TO: Advisory Committee on Criminal Rules**

**FROM: Dave Schlueter, Reporter**

**RE: Rule 40(d); Public Comments on Proposed Amendment to Explicitly Authorizing Magistrate Judge to Set Terms of Release of Probationer or Supervised Releasee.**

**DATE: March 12, 1993**

Attached is the published version of the proposed amendment to Rule 40(d). The amendment was originally proposed at the Committee's meeting last October in Seattle and was approved for publication and comment (on an expedited basis) by the Standing Committee at its December meeting. The deadline for comments is April 15th.

To date, I am unaware of any written comments on the proposal.

**Rule 40. Commitment to Another District**

* * * * *

(d) ARREST OF PROBATIONER OR SUPERVISED RELEASEE. If a person is arrested for a violation of probation or supervised release in a district other than the district having jurisdiction, such person shall be taken without unnecessary delay before the nearest available federal magistrate judge. The person may be released under Rule 46(c). The federal magistrate judge shall:

(1) Proceed under Rule 32.1 if jurisdiction over the person is transferred to that district;

(2) Hold a prompt preliminary hearing if the alleged violation occurred in that district, and either



(i) hold the person to answer in the district court of the district having jurisdiction or (ii) dismiss the proceedings and so notify that court; or

(3) Otherwise order the person held to answer in the district court of the district having jurisdiction upon production of certified copies of the judgment, the warrant, and the application for the warrant, and upon a finding that the person before the magistrate is the person named in the warrant. * * * * *

COMMITTEE NOTE

The amendment to subdivision (d) is intended to clarify the authority of a magistrate judge to set conditions of release in those cases where a probationer or supervised releasee is arrested in a district other than the district having jurisdiction. As written, there appeared to be a gap in Rule 40, especially under (d)(1) where the alleged violation occurs in a

jurisdiction other than the district having jurisdiction.

A number of rules contain references to pretrial, trial, and post-trial release or detention of defendants, probationers and supervised releasees. Rule 46, for example, addresses the topic of release from custody. Although Rule 46(c) addresses custody pending sentencing and notice of appeal, the rule makes no explicit provision for detaining or releasing probationers or supervised releasees who are later arrested for violating terms of their probation or release. Rule 32.1 provides guidance on proceedings involving revocation of probation or supervised release. In particular, Rule 32.1(1) recognizes that when a person is held in custody on the ground that the person violated a condition of probation or supervised release, the judge or United States magistrate judge may release the person under Rule 46(c), pending the revocation proceeding. But no other explicit reference is made in Rule 32.1 to the authority of a judge or magistrate judge to determine conditions of release for a probationer or supervised releasee who is arrested in a district other than the district having jurisdiction.

The amendment recognizes that a judge or magistrate judge considering the case of a probationer or supervised releasee under Rule 40(d) has the same authority vis a vis decisions regarding custody as a judge or magistrate proceeding under Rule 32.1(a)(1). Thus, regardless of the ultimate disposition of an arrested probationer or supervised releasee under Rule 40(d), a judge or



magistrate judge acting under that rule may rely upon Rule 46(c) in determining whether custody should be continued and if not, what conditions, if any, should be placed upon the person.

**MEMO TO: Advisory Committee on Criminal Rules**

**FROM: Dave Schlueter, Reporter**

**RE: Report of Subcommittee on Proposed Amendments to Rule 5; Exceptions for UFAP Arrestees.**

**DATE: March 15, 1993**

Last summer the Department of Justice recommended that Rule 5(a) be amended to reflect several interrelated problems in processing persons who have been arrested for violating 18 U.S.C. § 1073 (unlawful flight to avoid prosecution)(UFAP). As the attached original DOJ memo indicates, for all practical purposes, § 1073 offenses are rarely prosecuted. Instead, the statute serves as justification for federal authorities to assist state and local authorities in arresting fugitives wanted for non-federal offenses. Rule 5, however, recognizes no exceptions for the prompt appearance requirement before a federal magistrate. As the memo indicates, this can sometimes pose problems of delay and transportation. The solution suggested by DOJ is that Rule 5(a) be amended to specifically exempt those persons arrested solely on grounds of violation of § 1073, provided that the federal authorities promptly deliver the person to state officials and promptly move to dismiss the complaint.

At its October 1992 meeting in Seattle, the Committee considered the DOJ proposal (Minutes, p. 3). Following discussion, Judge Hodges appointed a subcommittee of the following members: Judge Jensen (Chair), Judge Schlesinger, Magistrate Judge Crigler, Mr. Karas, and Mr. Pauley.

Attached are various materials relating to the Subcommittee's work:

-- A letter, dated Jan. 13, 1993 (interim report) to me from Judge Jensen summarizing the subcommittee's findings;

-- a memo from Roger Pauley and attached DOJ memo responding to Judge Jensen's letter;

-- letters and memos from the subcommittee members with attached letters concerning Rule 5 UFAP practices in several jurisdictions; and

-- the original DOJ memos, with recommended language for an amendment to Rule 5.

This item is on the agenda for the Committee's April meeting in Washington.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO, CALIFORNIA 94102

CHAMBERS OF
D. LOWELL JENSEN
UNITED STATES DISTRICT JUDGE

January 13, 1993

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

Dear Professor Schlueter:

This is an interim report on the work of the Rule 5/UFAP Arrestees Subcommittee in preparation for the next meeting of the Advisory Committee. Thanks to the diligent efforts of the Subcommittee members we have conducted a survey of various system participants in an attempt to get a real world perspective on existing UFAP procedures. This survey is relatively broad, involving contact with U.S. Magistrates, federal and local prosecutors, defense counsel, federal agents, and local law enforcement officers. It is, however, not very deep as we were looking to develop relevant issues only. As it turns out, beyond the Department of Justice statistics, there is very little available hard data on this subject matter.

## Federal Proceedings

From our survey it appears that there are three basic scenarios for transferring an arrested person from federal to local custody when a fugitive is arrested on a UFAP warrant in a state other than the state where the warrant was originally issued. Before describing these scenarios, let me note that the procedure for issuing the UFAP warrant requires presenting proof to the U. S. Attorney of the existence of an underlying state warrant. Federal and state authorities, therefore, should have timely access to a copy of the state warrant at all times thereafter. If for some reason no copy is available, the warrant should in all cases be entered into and accessible through NCIC.

### Scenario 1

Federal agents (generally FBI or USMS) locate the fugitive in another state, but before an arrest is actually made, local law enforcement officials (LE) are notified and they are present at the arrest itself. In this circumstance local LE can make the original arrest of the fugitive on state law charges based on the underlying out of state warrant. The fugitive is then taken directly into local custody to await extradition proceedings handled by state officials. In this scenario Federal Rules of Criminal Procedure 5 (Rule 5) is not implicated as no federal arrest has taken place. Presumably federal authorities then

notify the relevant U.S. Attorney and the UFAP warrant is dismissed. Pursuant to U.S. Attorney's Manual, Sec. 9-69.431, only the issuing District can dismiss the UFAP complaint and warrant.

Scenario 2

Arrest of the fugitive is made by federal agents and the UFAP defendant goes into federal custody. Pursuant to Rule 5 the UFAP defendant is then brought before a U.S. Magistrate Judge. The government is represented by the U. S. Attorney and the defendant by appointed or retained counsel. In this case local LE is also present at the hearing, having been notified after the arrest and before the hearing. After federal proceedings have been conducted, which consists generally of notice by the U.S. Attorney that the UFAP complaint will not be prosecuted, the UFAP defendant is delivered directly into local custody. There are no further federal proceedings other than the subsequent dismissal of the UFAP warrant by the relevant U.S. Attorney. This, of course, requires that local LE has been able to obtain the necessary information to support the arrest and custody after notice of the arrest. As in Scenario 1, this is generally no problem as this information was necessarily obtained before the UFAP warrant was issued in the first place.

Our survey indicates that there can be some delay in this procedure caused by holding up the initial federal appearance to make sure that local LE will be present and will be able to take the UFAP defendant into local custody. There can, of course, be a delay (which can be significant in some cases) before the UFAP defendant, now a state prisoner, appears before a state judicial officer. In neither case does this delay appear to be a function of the Federal Criminal Procedure Rules.

We have also been told of an existing Scenario 2(b), following a federal arrest, where the federal agency delivers the UFAP defendant directly into local custody without a Rule 5 hearing ever being held. This is an apparent violation of Rule 5, but the FBI Airtels described in the Department of Justice memorandum on this subject matter would seem to foreclose any further use of this scenario unless Rule 5 is changed.

Scenario 3

In this case there is a federal arrest followed by a Rule 5 hearing, but there is no local LE presence at either the arrest or the initial appearance. The UFAP defendant is in federal custody both before and after the Rule 5 hearing. As in Scenario 2 it appears that in most cases a federal prosecutor and a federal public defender are at the hearing, although that is not

always the case. In many instances, particularly where the U.S. Magistrate is at some location remote from the U.S. Attorney's office, no lawyers are present at the hearing.

In these cases it appears that differing routines and orders have been developed in different Districts. In some cases it appears that a F.R.Crm.P. Rule 40 removal hearing is calendared, but in most instances it appears that no other court appearances are scheduled. At the initial appearance in these cases the U.S. Attorney notifies the court that there will be no federal prosecution under the UFAP statute and the Magistrate orders the U.S. Marshal to deliver the defendant to local custody for purposes of extradition. Where a Rule 40 hearing has been set, this procedure, of ordering the USMS to deliver the defendant to local custody, takes place at the subsequent hearing -- or local LE has now been notified and takes the defendant into local custody at the hearing. In the typical case, then, there is a Rule 5 hearing after the federal arrest, but it is essentially a pro forma event, using whatever is the historic practice of the District. The defendant leaves the court in federal custody, represented by counsel, but with no specific court order as to when transfer to local custody will take place. The actual transfer to local custody is a function of the interaction of the USMS and local LE dependent upon applicable state law and historic practice. We have learned that in some cases the federal custody continues until the UFAP warrant is actually dismissed although the state could have taken custody pursuant to the underlying state warrant before that time. It is interesting to note that in almost all cases "federal custody" means that the arrested person is actually in a local jail with the federal government paying for custody pursuant to contract. The arrested person then goes into "local custody," without leaving the jail, based upon applicable booking entries by local LE under state law.

State Court Proceedings

Once an arrested fugitive is in local custody appearance before a state court is a function of state statutes and procedures. In the typical case the fugitive is booked into local custody based upon the out of state warrant. The local LE custodian then files a complaint or similar process under state law and schedules an appearance in state court to begin extradition procedures. As already noted, there can be a delay in this process but it is apparently a delay common to all arrested persons in that jurisdiction, not just for fugitives. The local prosecutor is invariably represented at this court appearance but it appears that in some states there is a failure to assure that the arrested person is represented by counsel. Surprisingly enough, it appears from our survey that even in the same state an arrested fugitive will be provided counsel in one county and not in another. It appears that in virtually every

case where no state counsel is provided, it is contrary to state law. The Uniform Criminal Extradition Act has been adopted in almost every state and it specifically provides that the arrested person is to be informed of the right to "demand legal counsel." As an example, the implementing law in California provides that the arrested person, at his initial appearance, is to be "informed of the reason for his arrest and of his right to demand and procure counsel." CA. Penal Code § 1551.2. I believe that similar provisions are in place in each of the adopting states. As of this time only the District of Columbia, Mississippi, North Dakota, and South Carolina have not adopted the Uniform Act. Given this state of the law it would seem that failure to appoint state counsel must be viewed as an exceptional circumstance, but we do not have data to establish actual procedures in all states.

Footnote

The criminal justice system context which existed at the time the UFAP statute was enacted has been forever altered by technology and it may very well be that the UFAP warrant is now naught but a footnote in the system. All states now enter their outstanding warrants in NCIC. All states have statutory provisions for arrest by local LE for felony out of state warrants, and virtually every police station, if not every police car, has direct access to NCIC. As a result, the great bulk of arrests for out of state warrants and their subsequent extradition proceedings, take place without any federal involvement whatsoever. In Nothern California, I am told by local LE fugitive officers, that 95% of arrests based on out of state warrants are made by way of NCIC "hits." The UFAP scenarios do in fact take place but they are clearly the exception rather than the rule.

I would ask the members of the Subcommittee to forward any further information or observations on the subject matter and we will make it all available for consideration at the next meeting. Thanks to all and I look forward to seeing you.

Sincerely,

D. Lowell Jensen
United States District Judge

DLJ:mwj
cc: Hon. William Terrell Hodges, Chairman
Hon. Harvey E. Schlesinger
Hon. B. Waugh Crigler
Tom Karas, Esq.
Edward F. Marek, Esq.
Roger Pauley, Esq.

*Criminal Division*

**U. S. Department of Justice**

*Washington, D.C. 20530*

#930002803

February 19, 1993

Honorable D. Lowell Jensen
United States District Judge
P.O. Box 36060
450 Golden Gate Avenue
San Francisco, California 94102

Dear Lowell:

I found the enclosed memorandum well written and thoughtful and (with the permission of the author) am forwarding it to you and the other members of the Rule 5/ UFAP Subcommittee for your consideration.

I look forward to seeing you in April.

Sincerely,

Roger A. Pauley

Roger A. Pauley, Director
Office of Legislation

cc: Honorable Harvey E. Schlesinger
Honorable B. Waugh Crigler
Tom Karas, Esquire
Professor David A. Schlueter

U. S. Department of Justice

*Criminal Division*

*Washington, D.C. 20530*

FEB 17 1993

MEMORANDUM

TO: Roger Pauley, Director
Office of Legislation
Criminal Division

FROM: Mary C. Spearing, Chief
General Litigation and
Legal Advice Section
Criminal Division

SUBJECT: Interim Report of the "Rule 5/ UFAP Arrestees Subcommittee" Regarding Unlawful Flight to Avoid Prosecution Federal Post-Arrest Procedures

Reference is made to your referral of the response from D. Lowell Jensen, United States District Judge for the Northern District of California, regarding the work of the judicial "Rule 5/ UFAP Arrestees Subcommittee" on the issue of whether Rule 5 of the Federal Rules of Criminal Procedure should be amended to address logistical and other procedural problems encountered following federal arrests for unlawful flight to avoid prosecution[1] (UFAP) violations. You will recall that this Section advocated United States Code or Federal Rules of Criminal Procedure amendments to authorize the direct federal law enforcement agency transfer of custody of a UFAP arrestee to the appropriate local police agency in the jurisdiction of arrest as an alternative to the present requirement that there be an appearance before a U.S. Magistrate Judge prior to a transfer of custody for the purpose of local extradition.

Our proposed alternate procedure would be utilized only for prisoners arrested by federal authorities pursuant to federal UFAP warrants in the absence of an intention to prosecute the federal charges. In such instances, direct transfer of the arrestees to local custody would preserve federal resources and permit arrestees to assert their local extradition or substantive offense defenses earlier.

[1] 18 U.S.C. § 1073

While we essentially agree with the interim report's description of potential UFAP arrest scenarios, we are concerned that the descriptions of various conditions under which Rule 5 does not present logistical or procedural problems tend to deemphasize the very real problems which exist when an arrestee who will not face federal charges must be transported substantial distances, possibly detained overnight, and subjected to a federal proceeding prior to transfer to local custody for local extradition.

In the vast majority of federal UFAP arrests, there is no federal intent to prosecute the defendant. This is consistent with the statutory intent that the UFAP statute primarily serves as a basis for federal investigative and apprehension jurisdiction, and that a federal UFAP arrest warrant usually will not result in federal prosecution. Accordingly, both the Federal Government and the arrestee should share an interest in initiating local extradition processes as promptly and efficiently as possible. An appearance before a U.S. Magistrate Judge seemingly provides no benefit to either the defendant or criminal justice interests, yet will likely involve resource expenditures by numerous federal law enforcement, prosecutorial, and judicial personnel. The cost of the Rule 5 proceedings is not limited to the time of the federal personnel; transport and secure lodging for the arrestee may also be involved.

As recognized in the description of "scenario 3" of the interim report, for a variety of reasons local law enforcement officers may not be present at a Rule 5 hearing. In some instances, local extradition practice may require that the local law enforcement agency with jurisdiction over the site of the initial apprehension (which is often not the same local jurisdiction in which the Rule 5 proceeding is conducted) must execute the local arrest and initiate local extradition proceedings. The need to transport arrestees across several counties to reach the nearest magistrate then back along the same route to initiate local extradition is most common in rural districts, often the same districts in which the personnel resource commitment is most damaging.

Though the burden of Rule 5 procedures can be avoided by having local police execute an initial arrest, factors such as local police resource conservation efforts and uncertainty regarding when federal officers will actually locate a sought fugitive often lead to fugitive apprehensions at which local officers are not present. We question the benefit of barring the transfer to local police custody of an arrestee immediately after federal arrest, when there is no continuing federal interest in the arrestee, solely because the local police were not present at precisely the time of arrest on a UFAP warrant. Rule 5 appears to require a proceeding before a federal magistrate, possibly on the following day and possibly in a local jurisdiction where local authorities are not even empowered to extradite the arrestee,

before local officers who initially could have arrested the subject are permitted to accept custody from federal officers. The practical effect of these procedures is that the fiction of federal prosecutive interest, legislatively established to create federal investigative jurisdiction, is extended to conflict with the arrestee's, Federal Government's, and two state governments' interests.

In conclusion, while the interim report may be correct in concluding that most fugitive arrests are made by local officers acting without federal participation, and that other fugitive arrests are made jointly by federal and local officers (and thus require no Rule 5 proceeding), there remains a significant category of federal UFAP arrests which are made exclusively by federal officers yet will not lead to federal prosecution. That scenario raises serious procedural and resource concerns because Rule 5 appears to require that the fiction of an intent to prosecute in the federal system be continued to require the commitment of personnel, transportation, lodging, records keeping, and other resources which do not offer any criminal justice benefit to either the defendant or the interested governments.

Permitting federal law enforcement officers to bring a fugitive arrested pursuant to a federal UFAP warrant to either a Rule 5 proceeding or to local law enforcement officers empowered to take custody based upon the out-of-state arrest warrant or other local authority, would seemingly conserve substantial federal law enforcement and judicial resources and reduce federal liability exposure while accelerating a defendant's opportunity to exercise procedural rights applicable to the local charges which he or she will face. Despite the observation that these problems arise only in the minority of fugitive arrests, they are significant when they arise, have generated a series of inquiries and complaints from numerous components of the Department of Justice -- including U.S. Marshals Service, Federal Bureau of Investigation, and United States Attorneys' offices -- and can seemingly be cured with no adverse consequences through a Rule 5 amendment which recognizes the unique nature of federal UFAP charges -- the legislatively endorsed practice of lodging such federal charges when no federal prosecution is anticipated.

United States District Court
Middle District of Florida
United States Courthouse
311 West Monroe Street
Post Office Box 1740
Jacksonville, Florida 32201-1740

Chambers of
Harvey E. Schlesinger
United States District Judge

February 4, 1993

(904) 232-2931

Honorable D. Lowell Jensen
United States District Judge
Post Office Box 36060
San Francisco, CA 94102

Dear Lowell:

Since my letter to you of November 16, I have received additional information from North Carolina and Alabama which is enclosed. It does not add anything to the information previously provided.

Sincerely yours,

Enclosures

C:

Hon. Wm. Terrell Hodges, Chairman
Advisory Committee on Criminal Rules

Honorable B. Waugh Crigler
United States Magistrate Judge
United States Courthouse
255 West Main Street, Room 328
Charlottesville, VA 22901

Tom Karas, Esquire
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Prof. David A. Schlueter
St. Mary's University of San Antonio
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San Antonio, TX 78248

**UNITED STATES DISTRICT COURT**
OFFICE OF THE UNITED STATES MAGISTRATE JUDGE
EASTERN DISTRICT OF NORTH CAROLINA
624 UNITED STATES COURTHOUSE
310 NEW BERN AVENUE
RALEIGH, NORTH CAROLINA 27611-5610

JUDGE ALEXANDER B. DENSON

P O BOX 25610
FTS 672-4710

(919) 856-4710

November 17, 1992

Hon. Harvey E. Schlesinger
United States District Judge
Post Office Box 1740
Jacksonville, Florida 32201-1740

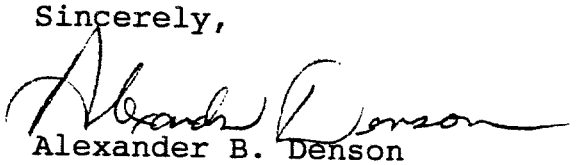
Dear Judge Schlesinger:

This responds to your letter of October 27 to Ken McCotter and others seeking input for the Advisory Committee on Criminal Rules about the Department of Justice proposal to amend Rule 5 in UFAP cases to avoid an initial appearance and Rule 40 proceedings.

I enthusiastically support the proposal. Every time I have these proceedings in UFAP cases I am again struck by how meaningless they are. We take a half-hour or so to go through all that is required in a legitimate federal case and then explain to the defendant that the federal case is being dismissed immediately and that he will be delivered to local state authorities who will deliver him to authorities of another state where he will actually be prosecuted. Often, the defendant is thoroughly confused.

I suggest that some time limit be imposed on how long the defendant may be held in federal custody and that: 1) so long as that limit is not exceeded; and 2) the U.S. Attorney in fact dismisses the UFAP charges that no initial appearance or Rule 40 proceeding be required.

Sincerely,



Alexander B. Denson

cc: Hon. Charles K. McCotter, Jr.

*OFFICE OF THE UNITED STATES MAGISTRATE JUDGE*
*UNITED STATES DISTRICT COURT*
*United States Courthouse, Rm. 203*
*413-415 Middle Street*
*New Bern, North Carolina 28560*

*CHARLES K. MCCOTTER, JR.*
*United States Magistrate Judge*

*Fax No. (919) 638-1529*
*Tel. No. (919) 637-3811*

*November 18, 1992*

Hon. Harvey E. Schlesinger
United States District Judge
Post Office Box 1740
Jacksonville, Florida 32201-1749

Dear Harvey:

Thank you for your letter of October 27, seeking input for the Advisory Committee on Criminal Rules about the Department of Justice proposal to amend Rule 5 in UFAP cases to avoid an initial appearance and Rule 40 proceedings. I support the proposal. The initial appearance and Rule 40 proceeding in these cases is a total waste of time. Generally, the federal case is dismissed immediately and the defendant is delivered to local state authorities, who will deliver him to authorities of another state where the defendant will actually be prosecuted.

Furthermore, the UFAP proceedings are often complicated by requests for detention, which requires a detention hearing, generally two or three days later. Usually, the UFAP charge has been dismissed prior to the detention hearing, but the court is required to go through the mechanics of scheduling the UFAP detention hearing and appointing counsel for the defendant for that purpose. On at least one occasion, I have had to actually conduct a detention hearing because the government had not dismissed the UFAP warrant until after I had denied the motion for detention and set conditions of release. The defendant was then released from federal custody and then arrested on the state charges. The proceedings were confusing, difficult, and a complete waste of time.

Rule 5 should be amended in UFAP cases to avoid the initial appearance and Rule 40 proceedings. A brief time limit should be imposed as to how long the defendant may be held in federal custody, and so long as that limit is not exceeded and the U. S. Attorney in fact dismisses the UFAP charges, no Rule 40 proceeding would be required.

With warmest personal regards, I remain

Sincerely yours,

Ken

CHARLES K. McCOTTER, JR.
United States Magistrate Judge

CKMc,Jr.:sab

cc: Hon. Alexander B. Denson

United States District Court
Southern District of Alabama
113 St. Joseph Street
John Archibald Campbell
United States Courthouse
Mobile, Alabama 36602

William E. Cassady
United States Magistrate Judge

Telephone:
(205) 690-2345

December 1, 1992

Hon Harvey E. Schlesinger
United States District Judge
Post Office Box 1740
Jacksonville, Florida 32201-1740

Re: UFAP Defendants

Dear Harvey:

In response to your inquiry of October 27, 1992, my investigation has revealed that the questions you posed may generally be answered as follows:

(1) Defendants released to state custody do not routinely have access to appointed counsel. The state district judges find that appointment of counsel is not necessary and are supported in their position by an Attorney General's opinion which reaches the conclusion that state funds should not be used for this purpose; and

(2) Defendants being held on fugitive warrants have a hearing before the nearest district judge within seventy-two hours of their release into state custody as a general rule (Mobile judges see the defendants within 48 hours).

The magistrate judges in Alabama basically ensure that fugitive warrants exist from the charging states and that officials in the state of arrest are willing to take the defendant into custody. In every UFAP case that I or any other Magistrate Judge with whom I talked have supervised, the United States Attorney has always advised the court that the federal charge will be dismissed once custody is transferred and that no indictment would be sought. Although we continue to advise the defendants of the rights they possess if the federal case continues, that eventuality has never become a reality. UFAP defendants have always been released into state custody and the complaint eventually dismissed.

While I am on this topic, there does appear to be two points of view regarding whether the magistrate judge in the arresting district may authorize voluntary dismissal of the complaint on motion of the United States Attorney. My position would be that he or she does. In talking with my brethren to the north, however, some think that the rules could be clearer as to which court's leave must be obtained prior to the filing of a dismissal of UFAP complaints. See Rule 48(a), Federal Rules of Criminal Procedure.

Hon Harvey E. Schlesinger
December 1, 1992

If you are in need of additional information, please don't hesitate to call. Gina and I send our regards to your family and hope that you experience a happy and festive Christmas Season.

Sincerely,

William E. Cassady

WEC:mja

United States District Court
Southern District of Alabama
113 St. Joseph Street
John Archibald Campbell
United States Courthouse
Mobile, Alabama 36602

William E. Cassady
United States Magistrate Judge

Telephone:
(205) 690-2345

December 4, 1992

Hon Harvey E. Schlesinger
United States District Judge
Post Office Box 1740
Jacksonville, Florida 32201-1740

Re: UFAP Defendants

Dear Harvey:

Following up on my letter of December 1, 1992, I have obtained a copy of the Attorney General's opinion alluded to. A copy is enclosed for your information.

Sincerely,

William E. Cassady

WEC:mja

# OFFICE OF THE ATTORNEY GENERAL

**91-00347**

JIMMY EVANS
ATTORNEY GENERAL
STATE OF ALABAMA

AUG 2 1991

[illegible]
[illegible]
MONTGOMERY, ALABAMA 36130
AREA 205/242-7300

Honorable Jim Guin
District Judge
Tuscaloosa County
620 County Courthouse
Tuscaloosa, Alabama 35401

Warrants - Arrest - Detention

A fugitive from justice is not entitled to appointment of counsel in an extradition proceeding.

Dear Judge Guin:

This opinion is issued in response to your request for an opinion from the Attorney General.

QUESTION

Whether a person arrested upon a warrant issued pursuant to Code of Alabama, 1975, §§15-9-35 or 15-9-40, is entitled to court appointed counsel if he satisfies the court that he is indigent, and if so, is that court appointed attorney entitled to compensation for his time and expenses in accordance with Code of Alabama, 1975, §15-12-21.

FACTS AND ANALYSIS

Code of Alabama, 1975, §15-9-38 states that prior to delivery of a fugitive to the demanding state he (the fugitive) must be informed of:

(1) the demand made for his surrender;

(2) the crime with which he is charged, and;

(3) that he has the right to demand legal counsel.

In the case of Sullivan v. State, 43 Ala. App. 133, 181 So.2d 518 (1965), the Alabama Court of Criminal Appeals held that Tit. 15, Sec. 57, Code of Alabama, 1940 (now §15-9-39), gives a person under arrest for rendition to another state the right to be represented by legal counsel in a habeas corpus proceeding. The Court went on to say that this statute does not, however, expressly require that such person be represented by court appointed counsel if he is unable to employ counsel. The court concluded by saying that the petitioner had no constitutional right to counsel as Act No. 526, Acts of Alabama 1963 (which provides for the appointment of counsel for indigent defendants at state expense) does not apply to extradition.

Other states have held consistently with the Alabama court when presented with this issue. E.g., Judd v. Vose, 813 F.2d 494 (1st Cir. 1987); Utt v. State, 443 A.2d 582 (Md. 1982). In Judd v. Vose, the First Circuit stated that an extradition hearing has a "modest function" not involving the question of guilt or innocence and is not a "criminal proceeding" within the meaning of the Sixth Amendment. Likewise, in McGuigan v. Sheriff, Washoe County, 669 F. Supp. 1037 (D. Nev. 1987), the court stated that extradition is not a critical stage of the criminal proceedings and there is no constitutional right to an attorney. The court did note that while Nevada law does allow counsel to be present, it does not impose upon the state the burden of supplying the prisoner with counsel at state expense.

From the above, it must be concluded that a fugitive from justice is not constitutionally or statutorily required to have counsel at an extradition proceeding. It is also clear that pursuant to §15-12-1 and §15-12-42 a public defender's office is not entitled to be reimbursed at state expense for their representation of a fugitive at an extradition proceeding. An indigent defendant is defined in §15-12-1 as a person involved in a criminal or juvenile proceeding in the trial or appellate courts of Alabama for which proceeding representation by counsel is constitutionally required and who under oath or affirmation states that he is unable to pay for his defense and who is found by the court to be financially unable to pay for his defense. Powers of a public defender are limited by §15-12-42 to representing indigent defendants in the trial courts and, with permission, the municipal and appellate courts. Extradition proceedings are not included within this section. Thus, it must be concluded that public defenders who represent indigent fugitives from justice cannot be compensated at state expense.

## CONCLUSION

A fugitive from justice is not statutorily or constitutionally entitled to counsel at an extradition proceeding. Code of Alabama, 1975, §15-9-38 only requires that a fugitive be informed that he has the right to demand counsel. It does not require the state to appoint and pay for counsel.

Sincerely,

JIMMY EVANS
ATTORNEY GENERAL
BY:

JAMES R. SOLOMON, JR.
CHIEF, OPINIONS DIVISION

JE/GIH/thm

United States District Court
Middle District of Florida
United States Courthouse
311 West Monroe Street
Post Office Box 1740
Jacksonville, Florida 32201-1740

Chambers of
Harvey E. Schlesinger
United States District Judge

(904) 232-2931

February 25, 1993

Honorable D. Lowell Jensen
United States District Judge
Post Office Box 36060
San Francisco, CA 94102

Dear Lowell:

I have received Roger's letter of February 19 transmitting Ms. Spearings' memorandum of February 17.

My understanding is that prior to any UFAP warrant being issued there must be an underlying state warrant already in existence before the FBI agents file their complaints. At that time, whether or not there is to be a federal prosecution should be known. It would seem to me that an NCIC entry could be made indicating that such persons are to be prosecuted locally rather than federally. In such a scenario, whether the arrest is made by a state agent or a federal agent should not matter, they should be arresting on the basis of the underlying state warrant and not on the UFAP warrant. Under those circumstances, what would prevent the arresting officer from delivering the prisoner to state officials completely bypassing the federal judiciary? In that way, the legal fiction would no longer exist but would be a reality.

Perhaps this is a question that needs to be re-routed through the Department of Justice. I would hate to think we are involved in this entire undertaking because federal agents do not get "credit" for making an arrest on a state warrant.

Sincerely yours,

C:

Honorable B. Waugh Crigler
United States Magistrate Judge
United States Courthouse
255 West Main Street, Room 328
Charlottesville, VA 22901

Tom Karas, Esquire
Tom Karas, Ltd.
101 North First Avenue, Suite 2470
Phoenix, AZ 85003

Roger Pauley, Esquire
Director, Office of Legislation
U. S. Department of Justice
Criminal Division, Room 2244
Washington, DC 20530

Prof. David A. Schlueter
St. Mary's University of San Antonio
School of Law
One Camino Santa Maria
San Antonio, TX 78248

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF VIRGINIA
Room 328
255 WEST MAIN STREET
CHARLOTTESVILLE, VIRGINIA 22901

B. WAUGH CRIGLER
U.S. MAGISTRATE JUDGE

PHONE 804-296-7779

January 28, 1993

Hon. D. Lowell Jensen
United States District Judge
North District of California
P. O. Box 36060
San Francisco, CA 94102

Dear Judge Jensen:

Thank you for the detailed analysis on UFAP provided in your letter of January 13, 1993. Because of your efforts, I feel we have a great deal of information which actually supports our diverse concerns that led us in the first instance to believe current UFAP practices might need to be revisited with an eye toward reform. Your footnote observation that technology may have altered the continued need for UFAP procedures is particularly insightful.

Over the past several months of our involvement with this problem, I have somewhat vacillated from my prior position opposing changes to any Rule that would eliminate federal court control over prisoners subject to federal process. What your letter points out is that there may be no easy solution to the problem short of both rule and statutory changes.

I, too, look forward to addressing this matter in full committee. It may be that we are making a proverbial mountain out of a molehill, but there certainly seems to be a need to reform this "animal" that was conceived at a time when federal involvement in the fugitive process was more needed than it may be today.

Sincerely,

B. Waugh Crigler
U. S. Magistrate Judge

BWC/jss

cc: Hon. William Terrell Hodges
Hon. Harvey E. Schlesinger
Tom Karas, Esq.
Edward F. Marek, Esq.
Roger Pauley, Esq.
Professor David A. Schlueter

LAW OFFICES
TOM KARAS, LTD.
2470 SECURITY PACIFIC BANK BUILDING
101 NORTH FIRST AVENUE
PHOENIX, ARIZONA 85003
(602) 271-0115

December 15, 1992

Honorable D. Lowell Jensen
United States District Judge
Post Office Box 36060
San Francisco, CA 94102

Dear Judge Jensen:

Pursuant to our conversation in Seattle, I have been in contact with Robert Spangenberg of the Spangenberg Group, and Mary Broderick, Director, Defender Services, National Legal Aid and Defender Association, in efforts to determine the availability of appointed counsel for state fugitives through state defender offices. Copies of correspondence are enclosed.

The information I believed would readily be available through these sources, was not. However, Mr. Spangenberg, who has for years worked closely with state defender offices throughout the country, notes in his letter that the unavailability of appointed counsel for fugitives, such as in Phoenix, is experienced elsewhere. He shares the concerns voiced in Seattle over Rule 5 not extending to UFAP arrests.

Statistics concerning appointment of federal defender offices in UFAP cases which might assist the committee have been requested from David Cook of the Administrative Office.

Sincerely,

Tom Karas
encls.

C:

Honorable William Terrell Hodges
United States District Judge
United States Courthouse, Suite 512
311 West Monroe Street
Jacksonville, Florida 32201

Honorable Harvey E. Schlesinger
United States District Judge
United States Courthouse
311 West Monroe Street
Jacksonville, Florida 32201

Honorable B. Waugh Crigler
United States Magistrate Judge
United States Courthouse
255 West Main Street, Room 328
Charlottesville, VA 22901

Roger Pauley, Esquire
Director, Office of Legislation
U.S. Department of Justice
Criminal Division, Room 2244
Washington, D.C. 20530

Prof. David A. Schlueter
St. Mary's University of San Antonio
School of Law
One Camino Santa Maria
San Antonio, TX 78248

NATIONAL LEGAL
AID & DEFENDER
ASSOCIATION

1625 K STREET, N.W.
EIGHTH FLOOR
WASH., D.C. 20006
(202) 452-0620



December 15, 1992

Tom Karas
2470 Security Pacific Bank Building
101 North First Avenue
Phoenix, AZ 85003

Dear Tom:

I'm writing in response to your December 7 letter, asking if we have or are aware of any surveys about the availability of appointed counsel for state fugitives at local, county or state levels following arrest.

NLADA does not have such information, nor am I aware of any other organization that has it.

One possibility is the National Conference of Commissioners on Uniform State Laws, since there is a Uniform Criminal Extradition Act. That act calls for the appointment of counsel for persons charged with being fugitives from other states, but I do not know how many states have adopted the act. The Commissioners should be able to tell you that.

Sorry we don't have the information you need. Please contact me if I can be of any further assistance.

Sincerely,

Mary Broderick
Director
Defender Division

THE SPANGENBERG GROUP

Robert L. Spangenberg
President

Patricia A. Smith
Vice President

Marbo F. Hansen
Financial Officer

Colleen Q. Brady
Senior Associate

Marea L. Beeman
Research Associate

Andrew H. Tarsy
Research Assistant



December 11, 1992

Mr. Tom Karas
2470 Security Pacific Bank Building
101 North First Avenue
Phoenix, Arizona 85003

Dear Mr. Karas:

I received your letter of December 7, 1992 inquiring about the existence of surveys or studies of the availability of appointed counsel for state fugitives at local, county or state levels following arrest.

You are correct in your assumption that the kind of inconsistency which exists in Arizona is not isolated. Unfortunately, there is no source for nationwide, or even regional data on the subject; however, in my extensive experience in working with appointed counsel programs throughout the country, I can say with confidence that the availability of counsel to state fugitives who have been arrested varies widely in the state, county and local jurisdictions around the country. As you point out in the case of Arizona, it often varies even between jurisdictions within the same state.

It concerns me that the Advisory Committee would consider adopting a proposal that would limit the application of Rule 5 without being fully cognizant of the impact such a move would have on the availability of counsel in UFAP cases. It would seem to me that the committee should have a clear understanding of how counsel will be provided in UFAP cases in the absence of the application of Rule 5, before moving to limit its application.

I would be happy to discuss this matter further with you. If there is any way which The Spangenberg Group may be of assistance to your subcommittee or the Advisory Committee, please do not hesitate to contact me again.

Sincerely,

Robert L. Spangenberg

1001 Watertown Street West Newton, MA 02165
Tel: (617) 969-3820
Fax: (617) 965-3966

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
75 SPRING STREET, S. W
ATLANTA, GEORGIA 30303

JOHN R STROTHER JR
UNITED STATES MAGISTRATE

November 4, 1992

Honorable Harvey E. Schlesinger
United States District Judge
311 West Monroe Street
P. O. Box 1740
Jacksonville, FL 32201-1740

Dear Harvey:

In response to yours of October 27, I have made inquiry of local prosecutors and have talked to my fellow magistrate judges and the AUSA who handles UFAPs. The time period for appearance before a state court varies in the Northern District of Georgia from twenty-four hours to seven days. Most are held the next day. Fulton County has the longest period since they have initial appearance hearings on every Wednesday; thus, there a prisoner could have to wait seven days for an initial appearance in the state court. In all instances defendants are given the opportunity in the state court to request assistance of counsel and, if they so indicate, counsel are appointed by the state judicial officer.

As to the manner in which we handle the UFAP appearances here, we have the federal defender talk with the prisoners upon their arrival. They are told that it is unlikely that the federal charges will be prosecuted. If they waive identity, the magistrate judge has an abbreviated Rule 5 hearing and explains to them that they have the opportunity to be surrendered to state custody. If they acquiesce in this, which most do, we allow them to sign their own bond on the federal charge and it becomes effective upon their surrender to state custody. I hope this is what you want but if you need any further details, please give me a call.

I am glad you are back in Jacksonville and hope that you and Lois are doing well. I continue to take pride in your accomplishments.

Sincerely,

John

**UNITED STATES DISTRICT COURT**
MIDDLE DISTRICT OF FLORIDA
UNITED STATES COURTHOUSE
POST OFFICE BOX 649
JACKSONVILLE, FLORIDA 32201-0649

**HOWARD T. SNYDER**
UNITED STATES MAGISTRATE JUDGE

November 12, 1992

The Hon. Harvey E. Schlesinger
United States District Judge
Middle District of Florida
5th Floor, United States Courthouse
311 West Monroe Street
Jacksonville, Florida 32202

Dear Judge Schlesinger:

In your recent letter regarding potential modifications to Federal Rule of Criminal Procedure 5 for UFAP arrests, you asked that a representative sampling of Magistrate Judges be polled to determine "short cuts" now being utilized in these proceedings. In that regard, I talked with your old friend Peter Palermo, Southern District of Florida, who sends his warm regards to you, and Bill Sherrill from the Northern District. Additionally, various of the Magistrate Judges in the Middle District have been contacted. Basically, we approached UFAPs in about the same way, but there are slight variations. Among the approaches:

1. One Magistrate Judge stated the current practice is generally not to conduct an initial appearance for or see individuals arrested on UFAP process. Once an individual is in federal custody, the U. S. Marshal communicates with the local authorities, normally the sheriff's office. A determination is then immediately made as to whether the local officials will take custody of the arrested individual. If so, that is done and the state extradition procedure is implemented. Once an affirmative reply is received by the U. S. Marshal's office, the U. S. Attorney's office is alerted and files a motion to dismiss (probably a motion to discharge) and the motion is granted. In this way, according to the Magistrate Judge, the individual does not appear in federal court unless there is some dispute or special problem or the above procedure is not followed.

2. Another, and slightly different, procedure which is followed involves delaying for a while the initial appearance to allow for notification of local authorities and assurance of their intention to take custody of the arrestee. Once done and after the U. S. Attorney contacts the charging district to ensure dismissal of the UFAP charge is forthcoming, an initial appearance is typically conducted by the Magistrate Judge. The individual is apprised of the basis upon which he/she has been taken into federal custody and his/her anticipated surrender to local authorities for extradition proceedings.

3. In the Southern District, an initial appearance is routinely conducted by the Magistrate Judge. At that hearing it is determined if the U. S. Attorney's Office intends to pursue the matter. The individual is advised of various rights and told he/she will be turned over as soon as possible to the local authorities. Usually, no attorney is appointed for the federal proceedings and the individual is instructed to ask for an attorney in the state proceedings. If the individual is not taken into custody by the local authorities within twenty-four hours, he/she is advised to inform the federal public defender and arrangements will be made to have him/her returned to court for an appearance before the Magistrate Judge.

4. Judge Dietrich advised that in Orlando an initial appearance before the Magistrate Judge is not conducted in every case, but only if the person remains in federal custody over night. If arrangements can be made to have the local authorities take custody on the day of arrest by federal authorities, the person is released to the state authorities without the need for an initial appearance. To facilitate the release of the individual into state custody, the U. S. Marshal will contact the local sheriff's office. Upon written representation that arrangements have been made for the local authorities to take custody and with the endorsement by the U. S. Attorney's office and further representation that evidence will not be offered at the removal hearing, the matter is closed via an order. See Exhibit A attached.

5. As for Jacksonville, at one time we had an enlightened U.S. Magistrate Judge who approved the procedure which is now in place. I've enclosed a copy of the procedure you helped finalize. See Exhibit B. (Sans enclosures. If you would like a copy, let me know.) As you will recall, the attendance of a state officer at the time an individual is arrested will permit that individual to be taken directly to the state system and vitiate the need for an initial appearance before the Magistrate Judge here in Jacksonville. If the federal warrant is executed without the presence of a state officer, typically an initial appearance is conducted and the defendant is advised of various rights under Rule 40 and also the expedient procedures attendant to an arrest under 18 U.S.C. § 1073, i.e., release to state custody. At the initial appearance the government usually announces it will elect not to present evidence at any subsequently scheduled removal hearing, and, if the local authorities are present in the courtroom, the Magistrate Judge discharges the defendant on the federal process. At that time he/she is simultaneously taken into state custody.

As to your other question concerning appointment of counsel in the state system and the time period between arrest and initial appearance, I have been informed that in Jacksonville all arrestees in the jail are taken before a judge at either 9:00 a.m. or 2:00 p.m., seven days a week (including weekends). At that time the court appoints counsel or allows the defendant to retain private counsel.

If there is any additional information I can provide, please let me know.

Sincerely,

Howard T. Snyder
United States Magistrate Judge

HTS:wb
Encs.

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

-vs- Magistrate Case No.

Defendant.
_____/

**ORDER RELEASING DEFENDANT TO CUSTODY OF STATE**

On the representation of the Marshal of this Court that he has been requested to assume the custody of the Defendant, _____, who has been apprehended and arrested in the Middle District of Florida on a federal warrant of arrest issued on a complaint filed in the _____ District of _____, charging the defendant with violation of Title 18, United States Code, §1073, Unlawful Flight to Avoid Prosecution or Confinement for felony crime(s) under the laws of the state from which he fled, and that the Sheriff of Orange County, Florida, is willing, in the alternative, to assume custody of the defendant for and pending state extradition proceedings on the prosecuting state's charge(s); the United States Attorney for this district having no objection to the release of the

EXHIBIT A

defendant from federal custody to state custody for such purpose, preferring not to present evidence in support of the removal of the defendant on the federal charge, pursuant to Rule 40, Federal Rules of Criminal Procedure, it is on consideration,

**ORDERED** that the United States Marshal forthwith release the defendant into the custody of the Sheriff of Orange County, Florida, without requiring undertaking by the defendant to answer the federal charge, and it is

**FURTHER ORDERED** that the Clerk of this Court transmit all the papers in this proceeding, including this Order, and any bail hereafter taken, to the Clerk of the District Court in which the prosecution is pending for the further disposition of this case.

**DONE AND ORDERED** at Orlando, Florida, this ____ day of _____, 199____.

_____
D.P. Dietrich
United States Magistrate Judge

Copies furnished to:

United States Attorney
United States Marshal (certified)
United States Pretrial Services

# Memorandum

| Subject | Date |
|---|---|
| UFAP Procedures | May 12, 1989 |

To: Jacksonville AUSAs

From: Curtis Fallgatter, Managing Assistant U. S. Attorney, Jacksonville, FL

## Introduction

Please find attached a copy of the U. S. Attorney's Manual ("USAM") section dealing with the Fugitive Felon Act, 18 U.S.C. § 1073. In addition, you will find attached multiple copies of a "UFAP Complaint Worksheet." This Worksheet has three purposes: (1) you can provide it to the state or federal agent seeking the warrant as a guide for them to provide you the information needed to prepare an affidavit for a UFAP complaint, (2) it provides you with a checklist of the probable cause components of a UFAP complaint and (3) it provides you with a checklist of those areas where UFAPs can not be authorized, including identifying the prerequisite state commitments.

Although UFAP warrants are normally handled by the UFAP AUSA, each of us will on occasion have need to assist in the preparation of a UFAP warrant. Since you will likely deal with them less frequently than the UFAP attorney, when such instances arise, please familiarize yourself with the unique aspects of UFAP warrants, as noted in the USAM. Hopefully the Worksheet attached will provide a quick reference for identifing the major concerns. In addition, a sample Affidavit is attached.

When presenting a UFAP complaint to the Magistrate, provide a certified copy of the Florida process (complaint, warrant, indictment or information), so that the Magistrate can send it to the U. S. Marshal, along with the UFAP warrant. The certified copy need not be an attachment to the affidavit, but, of course, your affidavit must allege the existence of such state process as an essential element of the probable cause.

## Arrests With State Participation

As to UFAP arrests that occur in the Middle District, the Magistrates are generally in agreement that, if a state officer

was present with the federal agent (usually the FBI) at the time of the defendant's apprehension on the UFAP warrant, since the state officer has concurrent authority to arrest the defendant on the outstanding state warrant that exists on the underlying substantive charges, the state officer can take the defendant into custody and commence processing him directly into the state system (extradition, etc.), without need for a Rule 40 removal hearing or an initial appearance in federal court. Thus, you should advise your agents to attempt to have a state officer present at the time of arrest who can execute the underlying state warrant, if possible. The FBI oftentimes asks the JSO Fugitive Section to accompany them on arrests.

Arrests Without State Participation

If it is purely a federal arrest on the UFAP, then the agents will need to bring the defendant to federal court for an initial appearance and to schedule a Rule 40 removal hearing. If the state agents are present in the courtroom at the time of the initial appearance to take custody of the defendant (which, if we have done our homework, they should be), the AUSA would announce that he does not intend to present any evidence at any subsequent removal hearing, the Magistrate would so note in his order, and would order the release of the defendant. The state agents would then take him into custody on the state fugitive warrant. The Magistrate would not dismiss any UFAP complaint issued from another district because he would be without authority to do so. You would request that the issuing district dismiss the UFAP complaint. USAM Section 9-69.431 (p. 75).

Paperwork at Time of Initial Appearance

Even if the Florida officers do not have a certified copy of the original out-of-state warrant at the time of the initial appearance, the Duval County officers have relied on NCIC entries and/or telephone calls/telexes to the originating state, to confirm the existence of the state warrant and a commitment to extradite. However, JSO will normally obtain confirmation of the NCIC entry of the out-of-state warrant by teletype to that state or a Fax copy of that warrant. Thus, absence of a certified copy of the state warrant should not create a need to proceed with the setting of a removal hearing. If a problem develops, you should request a brief delay of the initial appearance in order to permit the state officers time to get the necessary teletype/telefax confirmation of the NCIC entry.

Thus, you should never find yourself in a position where you would go forward with scheduling a removal hearing. If such

occurs, however, the Magistrate will set conditions of release (you would seek stringent conditions, per USAM Section 9-69.431, p. 75) and would set the matter down for a later removal hearing, allowing you some brief additional time to resolve the paperwork problem, before the Rule 40 removal hearing. You must undertake every effort to avoid having to conduct a Rule 40 removal hearing, since removal proceedings cannot be instituted without the written approval of the Assistant AG, Criminal Division. USAM Section 9-69.450 (p. 77).

Enclosures:
1. USAM Section re UFAPs (1984 & 1988)
2. UFAP Complaint Worksheets
3. UFAP Affidavit Outline
4. Sample Warrant
5. Sample Complaint with Affidavit
6. Sample NCIC Records Check by State
7. Sample State Arrest Warrant/Affidavit
8. Sample Letter from State Attorney Requesting UFAP

cc:
Robert W. Genzman, United States Attorney, Tampa
Gregory W. Kehoe, First Assistant United States Attorney, Tampa
Terry A. Zitek, Chief, Criminal Division, Tampa
(for whatever dissemination you deem appropriate)
Robert Moreno, Managing Asst. U. S. Attorney, Orlando Division
(for whatever dissemination you deem appropriate)
William Fluharty, III, Supervisor, FBI, Jacksonville
U.S. Marshals Service, Jacksonville

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
173 UNITED STATES COURTHOUSE
600 GRANBY STREET
NORFOLK, VIRGINIA 23510

(804) 441-3544

CHAMBERS OF
TOMMY E. MILLER
UNITED STATES MAGISTRATE JUDGE

FTS 827-3544

November 9, 1992

The Honorable Harvey E. Schlesinger
United States District Judge
United States District Court for the
Middle District of Florida
Post Office Box 1740
Jacksonville, Florida 32201-1740

Dear Harvey:

I am happy to answer your letter of October 27, 1992 regarding a proposal from the Department of Justice to amend Rule 5 for defendants charged with unlawful flight to avoid prosecution.

Defendants charged in another state who are taken into state custody in Virginia are immediately brought before a state magistrate. The defendant is advised of the charge against him and a bond is set if appropriate. The defendant appears before a General District Court judge the first court day after his arrest. At that time, the defendant is advised of his right to counsel and his rights under the extradition laws. If the defendant desires counsel, the matter is continued for three days and referred to a Circuit Court judge. The defendant, with counsel, then advises the court whether he wishes to waive extradition or contest the extradition.

I estimate that 95% of the fugitive defendants waive extradition within a week of their arrest and are returned to the charging jurisdiction. With rare exceptions, the remaining defendants are extradited pursuant to the provisions of the Uniform Extradition Act.

In view of the prompt proceedings that occur in Virginia, I would have no hesitancy in agreeing with the Justice Department's recommendation to allow these arrestees to be immediately transferred to state or local custody to avoid an initial appearance and Rule 40 proceedings. It seems to me that every judicial act that a Magistrate Judge does with a person arrested on a UFAP charge is a waste of time both for the federal judiciary and for the defendant. A UFAP defendant is rarely removed to the charging district pursuant to Rule 40, and usually when that is done it is because somebody made a mistake and forgot that it was against the general policy of the Department of Justice to ask for removal of UFAP defendants to the charging district.

You have asked me to apprise you of various shortcut methods that Magistrate Judges have devised to handle UFAP problems. Every Magistrate Judge to whom I have talked does not think a UFAP defendant is a major problem for the court. The only shortcut that I take in dealing with UFAP's is to delay the initial appearance for several hours so that a state law enforcement officer may obtain a state warrant and be available in court to receive the defendant when I release the defendant from federal custody to the state officer. This frankly is a waste of time for the FBI agents, the Assistant U.S. Attorney, the Pretrial Services Officer, my court staff, and myself in scheduling and conducting such a hearing since the defendant is immediately turned over to the custody of the state officer. It is also a waste of time for the defendant since he usually has his proceedings in the state system delayed by at least one day because of the Rule 5 requirement of the initial appearance before a U.S. Magistrate Judge.

Thank you very much for soliciting my opinion on this amendment to Rule 5. I hope you have found your elevation to Article III status at least as good as trip to Disney World.

Sincerely yours,

Tommy

Tommy E. Miller
United States Magistrate Judge

TEM:plc

UNITED STATES MAGISTRATE JUDGE
520 U. S. COURTHOUSE
501 WEST 10TH STREET
FORT WORTH, TEXAS 76102
November 4, 1992

Honorable Harvey E. Schlesinger
United States District Judge
United States Courthouse
311 West Monroe Street
Post Office Box 1740
Jacksonville, Florida 32201-1740

Dear Judge Schlesinger:

A sampling of Texas Federal magistrate judges discloses a common pattern for the commencement of a UFAP initial appearance. The defendant is produced by Special Agents of the Federal Bureau of Investigation for a Rule 5 initial appearance. An Assistant United States Attorney is present in cities having a staffed United States Attorney's office.

A sampling of the remaining proceedings with minor variations is as follows:

1. N/D Texas - Fort Worth

In seventeen years, the Government has prosecuted one UFAP defendant. After the Rule 5 advice, the AUSA by oral motion advises that the government does not intent to present any evidence or papers to secure removal of this defendant.

A Deputy Sheriff of Tarrant County is always present. The court inquires whether the State has the necessary paperwork to assume custody of the prisoner if he is released from federal custody, and upon an affirmative answer by the State officer, the defendant is ordered released from federal custody, pursuant to attached Order of Court on Rule 40 Proceeding.

If the defendant arrives at the Tarrant County Jail prior to 1:00 p.m., he is seen by a State magistrate that same day; otherwise, the prisoner is seen the next working day. If the former UFAP defendant does not waive extradition at his first appearance before the state magistrate, counsel is appointed. The extradition hearings are generally within one to four weeks.

Source: Magistrate Judge Alex H. McGlinchey
Deputy Sheriff John Burruss

2. N/D Texas - Wichita Falls

The magistrate judge sets conditions of release and sets the Rule 40 hearing for three-four days away. Counsel is appointed for this Rule 40 hearing.

There is no resident AUSA so all communication is telephonic.

Prior to the day of the Rule 40 hearing, the Assistant United States Attorney advised the court that the original complaint has been dismissed and the defendant is released to the state without a second appearance.

The former UFAP defendant is taken before a local justice of the peace within 24 hours of arriving at the Wichita County Jail. Unless the defendant waives extradition at his first appearance, the defendant is advised how to request counsel and supplied with the requisite form. The court appointed attorney normally makes initial contact in 3 to 5 days after the defendant first sees the justice of the peace.

Source: Magistrate Judge Kerry Roach
Assistant Federal Public Defender, Peter Fleury
(formerly an assistant state public defender for Wichita County)

3. S/D Texas - Houston

The magistrate judge determines the UFAP defendant should be released on his own personal recognizance. At this point the defendant is released to local authorities.

The UFAP defendant will appear before a State district judge within 24 hours (rare occasions 48 hours). If the UFAP defendant does not waive extradition at this first appearance, an attorney from the private bar is appointed.

Source: Magistrate Judge Calvin Botley

4. W/D Texas - El Paso

An Assistant United States Attorney is present and files a motion for detention requesting a three-day continuance. The detention hearing and the Rule 40 hearing are set, and an Assistant Federal Public Defender is appointed.

Prior to the day of the hearing, the Assistant United States Attorney or Special Agents of the FBI advised the court that the original complaint has been dismissed and the defendant is released to the state without a second appearance.

Upon arrival of the former UFAP defendant at the El Paso County Jail he is almost immediately taken before a state magistrate. If the defendant does not waive extradition at his first appearance before the State magistrate, an assistant state public defender is appointed to represent him with contact within 24 hours.

Source: Magistrate Judge Phil Cole

My formula for "short cutting: the Rule 40 problem has been in use for more than sixteen years - my secretary came to work about sixteen years ago, and this form was already in place. I probably stole it from you at our first magistrate training in November 1975; albeit regrettable, I no longer know whether this is something I devised or if I stole it from one of my colleagues who was obviously headed for success. It has worked well, saves time, and achieves substantial justice.

Thanks for calling on me. I enjoyed my visits with Calvin, Phil, Kerry and the other folks.

Calvin Botley is likely to become an Article II early next year.

Sincerely,

Alex H. McGlinchey

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

| | | |
|---|---|---|
| UNITED STATES OF AMERICA | ) | N/D of Texas DOCKET NO. _____ |
| | ) | |
| V. | ) | DOCKET NO. AND DISTRICT |
| | ) | WHERE CAUSE IS PENDING _____ |
| | ) | _____ DISTRICT OF _____ |

ORDER OF COURT ON RULE 40 PROCEEDINGS

The above named defendant is charged by _____ in the district identified herein above with the offense of _____ After having been arrested in this district on a warrant issued on that charge, he has appeared before me for proceedings under Rule 40 of the Federal Rules of Criminal Procedure. The following action, as indicated, was taken:

( ) After hearing the evidence, I find:

( ) that a certified copy of the information or complaint has been produced and that there is probable cause to believe that the defendant is guilty of the offense charged.

( ) that the person before me is not the defendant named in the indictment or complaint.

( ) that there is not probable cause to believe that the defendant is guilty of the offense charged.

( ) At the beginning of the proceedings, the United States Attorney stated that the government did not intend to present any evidence or papers to secure removal of this defendant, and I thereupon terminate the proceedings.

---

TO: THE UNITED STATES MARSHAL

( ) You are hereby commanded to remove the above named defendant forthwith to the district in which he is charged and there deliver him to the United States Marshal for that district or to some other officer authorized to receive him.

( ) It is ordered that this defendant be discharged from custody.

DATE

UNITED STATES MAGISTRATE

U.S. Department of Justice

Washington, D.C. 20530

AUG 26 1992

MEMORANDUM

TO: Honorable William Terrell Hodges

FROM: Roger A. Pauley
RAP

SUBJECT: Rule 5/UFAP Arrestees

Per our conversation enclosed is a copy of the Justice Department memorandum Judge Crigler seems inadvertently to have omitted in his letter to you, as well as draft DOJ (not necessarily endorsed by Judge Crigler) amendatory language for Rule 5.

Hopefully, this will facilitate placing this matter on the Committee's agenda for October.

cc: Honorable B. Waugh Crigler
Professor David A. Schlueter

Rule 5(a) of the Federal Rules of Criminal Procedure is amended by adding after the first sentence the following:

"Notwithstanding the foregoing sentence, an officer making an arrest under a warrant issued upon a complaint charging solely a violation of 18 U.S.C. §1073 may without unnecessary delay transfer the arrested person to the custody of appropriate State or local authorities in the district of arrest; Provided that, in such a case, an attorney for the government shall move promptly thereafter in the district in which the warrant was issued to dismiss the complaint.".

U. S. Department of Justice

*Criminal Division*

*Washington, D.C. 20530*

MEMORANDUM

TO: Mary C. Spearing, Chief
General Litigation and
Legal Advice Section
Criminal Division

FROM: Jeffrey I. Fogel, Attorney
General Litigation and
Legal Advice Section
Criminal Division

SUBJECT: Southern District of Illinois Inquiry Regarding Unlawful Flight to Avoid Prosecution (UFAP) Post-Arrest Procedures

Assistant United States Attorney Joel V. Merkel, United States Attorney's Office for the Southern District of Illinois, has asked the Section to review legal authorities and policies controlling certain Unlawful Flight to Avoid Prosecution[1] (UFAP) post-arrest procedures. Of particular concern to his office is the timing of UFAP complaint dismissals following arrests made by the Federal Bureau of Investigation (FBI) of persons wanted for state criminal charges in other states, for which state rather than federal prosecution is expected to result.[2]

---

[1] 18 U.S.C. § 1073.

[2] Although procedures vary somewhat, a UFAP complaint and warrant are most often secured by the FBI in a district in which local law enforcement personnel have sought federal assistance in locating a fugitive who is believed to have fled the state. Most often, the FBI advises FBI field offices in areas to which the fugitive is believed likely to flee. If an FBI office in another state arrests the fugitive, the prisoner is taken to the U.S. Marshals Service office for processing and is then taken before a federal magistrate in that district. The federal magistrate normally authorizes the release of the arrestee to local police in the local jurisdiction in which that federal magistrate is located. Those local authorities proceed with state extradition processes to return the arrestee to the local jurisdiction in which the complaint was filed and the warrant was issued.

AUSA Merkel has advised that, for a variety of reasons, his office has endeavored to secure the dismissal of UFAP complaints immediately after federal UFAP arrests have been made in the Southern District of Illinois. This practice is intended to avoid the need for a first appearance before a federal magistrate in that district. According to Mr. Merkel, FBI agents in his district recently have insisted upon an appearance before a federal magistrate prior to dismissal of a federal UFAP complaint.[3]

The Southern District of Illinois inquiry is consistent with a recent pattern of UFAP and other post-arrest procedure issues reaching the Section. It appears that modern technology (particularly facsimile transmission equipment), criminal justice resource conservation efforts, changing standards of what constitutes "unreasonable delay" in criminal proceedings, and increased sensitivity to civil liability exposure are exerting conflicting demands upon various post-arrest procedures. The apparent requirement that UFAP arrestees be afforded a first appearance before a federal magistrate -- even when it is known that no federal prosecution will result and that substantial time and resources will be consumed in the process -- justifies a review of alternatives permitted by existing authorities.

Practical Considerations: There are several important practical advantages to the prompt dismissal of a UFAP complaint upon the federal arrest of a state fugitive, assuming that no federal prosecution is expected to result.[4] An initial court appearance which is intended to permit the defendant's federal release on a recognizance bond may require the participation of a pre-trial services officer, clerk, court reporter, Assistant United States Attorney, and arresting agent, in addition to the federal magistrate. The United States Marshals Service and the court clerk's office must also handle fingerprinting, photographing, and other arrest and bond administrative procedures if the federal proceedings advance to the stage of release on bond.

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[3] While the United States Attorney's Office would seem to have discretion in seeking the dismissal of a UFAP complaint, the FBI field office can exert practical control through the timing of its notification (to the United States Attorney's Office in the district of arrest and to the FBI field office in the district of the complaint) of a UFAP apprehension.

[4] Federal prosecution of UFAP charges is extremely rare, because the charge usually is used merely as a device to allow federal investigators to locate and apprehend a state fugitive. The charge is almost always dismissed following the apprehension of a state fugitive, either before or after preliminary proceedings conducted by a federal magistrate or other authorized state or local judicial officer.

The Southern District of Illinois also has identified practical geographic concerns which favor prompt dismissal of a UFAP complaint.[5] Defendants arrested in one of the 27 counties handled by that district's Benton division often must be kept in a county jail overnight, awaiting an appearance before a federal magistrate on the following day. An Assistant United States Attorney may be instructed to travel 100 miles to attend such a first appearance, as may other court officers if the personnel assigned to the Benton division are not available.[6] Since the Illinois state extradition process reportedly requires state extradition from the county of initial arrest, state authorities may then be required to transport the defendant as much as 150 miles from the Benton division, to the county in which he or she was apprehended by federal agents.[7]

The prompt dismissal of a UFAP complaint also assures that the United States Attorneys Office will not be determined to be "instituting" a removal proceeding without the approval of the Attorney General, Assistant Attorney General, or other designated officials; written approval is required by the statute.[8]

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[5] It is likely that the same administrative concerns exist in other districts, particularly rural districts in which significant travel distances and inadequate criminal justice staffing contribute to the inconvenience of federal first appearances for defendants who will not be prosecuted in the federal system.

[6] It is not known whether two other options exist in such Southern District of Illinois situations: 1) Taking the arrestee before a federal magistrate in another district if that magistrate is the "nearest available federal magistrate" (Rule 40); or, 2) Taking the arrestee before a state or local officer because the federal magistrate is "not reasonably available" (Rule 5) in view of the burden of transporting the arrestee to that federal magistrate.

[7] The Middle District of Georgia previously reported a similar problem. Upon dismissal of a federal UFAP complaint and warrant by a federal magistrate in Macon, Georgia: local authorities in the county of initial arrest refused to travel to Macon to take custody of the defendant; Macon authorities refused to transport the defendant to the county of initial arrest; and, federal agents apparently lacked authority to transport the prisoner anywhere due to the federal magistrate's dismissal of the federal complaint.

[8] In the Southern District of Illinois, the public defender and at least one magistrate reportedly have concluded that even the recommendation of bond pending a removal hearing constitutes "instituting" removal proceedings, and thus requires the prior authorization of the Attorney General or other designated official pursuant to 18 U.S.C. § 1073. Although we disagree with that view,

Legal Authorities:

Title 18 U.S.C. § 1073: The Fugitive Felon Act provides in pertinent part:

> "Whoever moves or travels in interstate or foreign commerce with intent...to avoid prosecution, or custody or confinement after conviction, under the laws of the place from which he flees...shall be fined not more than $5000 or imprisoned not more than five years, or both."

The Act further provides:

> "Violations of this section may be prosecuted... only upon formal approval in writing by the Attorney General, the Deputy Attorney General, the Associate Attorney General, or an Assistant Attorney General of the United States, which function of approving prosecutions may not be delegated."

Section 1073 is primarily intended to provide federal assistance to state criminal justice authorities in efforts to apprehend state fugitives.[9] It consistently has been understood that actual federal prosecutions under the act will be rare, since the purpose of the act is fulfilled when a state fugitive is apprehended and returned for local prosecution pursuant to state extradition processes. The 1961 insertion of the requirement of written approval from designated senior Department of Justice officials prior to federal prosecution for a violation of the act reflected Department practice and the expectation that actual federal prosecutions for violation of Section 1073 would be infrequent.

Rule 5, Federal Rules of Criminal Procedure: The provisions of Rule 5 (Initial Appearance Before the Magistrate) apply to §1073, since neither the rule nor the statute provide an exception. Although §1073 is unusual because there is rarely an intention to initiate a federal prosecution against someone charged with violating its terms, Rule 5 applies to anyone charged with violating that statute and in federal custody. The only

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other magistrates may reach the same conclusion. The United States Marshals Service has advised us that several magistrates in other districts have ordered federal removal of arrestees, despite the lack of the required written Justice approval and despite the objections of Assistant United States Attorneys, thus presenting the opposite problem.

[9] H.R. Rep. No. 827, 87th Cong., 1st Sess., reprinted in 1961 U.S. Code Cong. and Ad. News 3242, 3243.

flexibility provided in the following Rule 5 text appears to be the "without unnecessary delay" language and the "state or local judicial officer" option:

> "An officer making an arrest under a warrant issued upon a complaint or any person making an arrest without a warrant shall take the arrested person without unnecessary delay before the nearest available federal magistrate or, in the event that a federal magistrate is not reasonably available, before a state or local judicial officer authorized by 18 U.S.C. §3041."

United States v. McCord, 695 F.2d 823 (5th Cir.), cert. denied, 460 U.S. 1073 (1983): In McCord, the Court distinguished cases in which 18 U.S.C. §1073 served as "merely a tool used to detain the accused so that he could be returned [to face local charges]" from cases in which there was an intention to prosecute in federal court. In defending the use of a Rule 40 (Commitment to Another District) removal proceeding in McCord, in which federal prosecution was the intent, the court recognized that such a proceeding is not always necessary when federal prosecution is not anticipated. One such case distinguished by the court was United States v. Love, 425 F.Supp. 1248 (S.D.N.Y. 1977), in which the defendant sought but was refused Rule 40 removal proceedings because the defendant was facing eventual local, rather than federal, prosecution.

Department of Justice Policy:

October 1988 United States Attorneys' Manual Provisions: USAM 9-69.460 cites the 1961 amendments to the act, requiring the written approval of the Attorney General or designated subordinates, including an Assistant Attorney General, before initiation of federal prosecution for unlawful flight to avoid prosecution. The United States Attorneys' Manual interprets this language as prohibiting the filing of an information, seeking of an indictment, or initiation of federal removal proceedings without such written approval. The General Litigation and Legal Advice Section is identified as being responsible for the review of requests for Assistant Attorney General approval, though the actual authorization to prosecute in federal court for this federal offense must be granted by at least an Assistant Attorney General (since delegation of that authority to anyone below the level of an Assistant Attorney General is expressly prohibited in the statute). The timing of UFAP complaint dismissals is not discussed in that policy statement.

Federal Bureau of Investigation Policy:

February 1980 FBI Manual Provisions: Part I, Section 88 of the FBI policy manual advises at 88-5.1 that the primary purpose of the UFAP Act is to assist states in securing "the return of

heir fugitives for trial or reconfinement." The text recognizes that federal prosecution will occur only in rare instances, upon the formal approval in writing by the Attorney General or an Assistant Attorney General. The manual makes clear at 88-5.2(1) that "[i]t is not the purpose of this act to supersede state rendition procedures when interstate rendition can be accomplished without the assistance of the Federal Government." Accordingly, agents have been told that the Federal Government will generally not use its "removal machinery" for state fugitives.

March 1983 FBI Manual Provisions: Part I, Section 88 ("Unlawful Flight to Avoid Prosecution, Custody, Confinement, and Giving Testimony") of the FBI policy manual advises agents at 88-5.3 that "the Federal process should be dismissed" after the fugitive is apprehended and either is extradited by state authorities or is not extradited because state authorities are unwilling to institute extradition proceedings. It also is suggested that state authorities may request that the United States Attorney "institute action under the Fugitive Felon Act" to prosecute the person apprehended for a federal UFAP violation. That provision recognizes that the United States Attorney must obtain authorization from the Department of Justice before proceeding.

At 88-5.2 (2), FBI agents are advised to "immediately" notify he "wanting state authorities" of the fugitive's arrest and elated information. Immediate notification to the appropriate United States Attorney's Office is not expressly mandated.

December 1986 and August 1990 FBI Airtel Memoranda: The FBI transmitted memoranda from the FBI Director to the Jacksonville Senior Agent in Charge on December 24, 1986, and to all Senior Agents in Charge on August 24, 1990, regarding UFAP federal magistrate first appearance policy. Those memoranda expressed concern regarding agents' failure to "execute" federal UFAP warrants before defendants were transferred to local authorities for state extradition. The latter memorandum acknowledged that the practice was permissible when local authorities were present at and made the actual arrest, and the defendant was thus never in federal custody. However, Rule 5 of the Federal Rules of Criminal Procedure was cited as mandating that the defendant be taken without unnecessary delay to the nearest available federal magistrate for an initial appearance if the defendant was taken into federal custody. Those memoranda stress that "administrative inconvenience" does not constitute a permissible basis for failing to comply with that Rule 5 mandate.

The August 1990 memorandum was expressly based upon the conclusion that Rule 5 applies to all federal arrests, "regardless of the offense alleged." In addition to that legal basis, it xpressed a policy concern that "returning Unlawful Flight warrants o U.S. Magistrates unexecuted might, over a period of time, be

perceived as an abuse of the court system." All field offices were instructed to provide a justification to FBI Headquarters for any UFAP apprehension in which the federal warrant was "unexecuted."

The memoranda of 1986 and 1990 did not address the issue of the timing of dismissal of UFAP complaints following federal arrest, or the apparent loss of jurisdiction to conduct a first appearance before a magistrate after such complaint dismissals have been accomplished.

General Litigation and Legal Advice Section Policy: In response to an inquiry from the Middle District of Georgia, the Section[10] advised that district that the requirement of Assistant Attorney General approval before removal proceedings are "instituted" does not bar an appearance before a federal magistrate for the purpose of advice of rights, setting of bail, and arrangement of counsel. Rather, the Section advised that written permission is required before requesting the magistrate to order removal.

That response also advised the United States Attorney that the Section was aware of "no legal reason why a state fugitive arrested on an unlawful flight warrant needs to be brought before a magistrate before being turned over to state authorities for extradition." The response explained that an appearance before a judicial officer would be required if there would be undue delay in placing the person in state custody, though even then the judicial officer could be a state magistrate or similar state or local judicial officer if the federal magistrate was not immediately available. That conclusion was based in part upon the recognition that Rule 5 is intended to inform a defendant of his rights in defending himself against federal criminal charges; the legal protection to which a state fugitive facing only state prosecution is entitled is provided by state extradition law instead. That memorandum concluded that while the federal authorities always have the option of taking a state fugitive before a judicial officer before placing the fugitive in state custody for the purpose of state extradition, such an appearance is only necessary when there is an unreasonable delay in that transfer to state custody.

It does not appear that FBI headquarters considered that Criminal Division opinion, though it is assumed that the United States Attorney's Office provided the Section's position to the affected FBI field office.

Recently, the Section conducted a legal analysis of the merits of prosecuting violations of 18 U.S.C. §1073 under a blanket

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[10] John Bannon wrote the November 1990 legal memorandum and cover letter responding to the May 1990 inquiry of the United States Attorney Office for the Middle District of Georgia.

approval process as a means of enhancing the Department's violent crime initiative.[11] The Section adopted the position that a blanket approval policy for §1073 federal prosecutions would be inconsistent with the nondelegable formal approval process required by statute. Federal prosecutions falling within the U.S. Attorneys' Manual standard of cases in which "the interests of justice would be frustrated by a failure to prosecute" were recommended, consistent with the existing approval process.

This Section's most recent evaluation of Rule 40 is just being completed in response to an inquiry from the General Counsel of the United States Marshals Service.[12] The Section is expected to concur with the Marshals Service position that the requirement of an appearance before "the nearest available federal magistrate" is met when an arrestee is taken before a federal magistrate in another district (even if it is in another state) if that magistrate is closer to the arrest site than are available magistrates in the same district. That position is based upon the unambiguous language of Rule 40, as well as a recognition that the resulting practice accomplishes the intent of Rule 40 -- informing a defendant of a federal criminal prosecution of his rights.

Caveats: The topic of appropriate post-arrest procedures in UFAP matters is extremely complex, in large part because the recognized intent of this unusual statutory offense is to provide a basis for federal participation in the apprehension of fugitives sought for local prosecution, rather than to lead to federal prosecutions.

There is potential civil liability exposure as well as a risk of procedural error regardless of which post-arrest practices are followed. Prompt dismissal of UFAP complaints should avoid unnecessarily exposing the defendant to extended federal custody, federal custodial transport, and various federal proceedings after it is recognized that the defendant will not be prosecuted in federal court. In fact, an argument could be made that transporting a defendant 150 miles and detaining him overnight solely for federal proceedings which all parties know will not lead to federal prosecution is abusive. However, a pattern of prompt dismissals of UFAP complaints prior to appearance before a federal magistrate could be seen by some magistrates as an abuse of federal process, particularly if there is a perception that even minimal delays have been permitted in anticipation of UFAP complaint dismissal. Prompt complaint dismissal in situations which would otherwise require extended federal custody seems to be the less objectionable practice overall, since the statute unquestionably is

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[11] Art Norton prepared the memorandum for this Section.

[12] John Bannon drafted the proposed Section position, which is currently under review by affected offices.

intended to provide law enforcement assistance in the apprehension of local fugitives for local prosecution, and since subsequent state extradition procedures should meet all due process demands.[13]

Prompt dismissal of UFAP complaints does have a potential for various forms of abuse. The FBI position that there is neither an "administrative inconvenience" nor a Title 18 U.S.C. §1073 exception in the language of Rule 5 is correct. We must therefore expressly advise United States Attorneys offices that mere anticipation of dismissal is not an adequate basis for delaying a first appearance before a federal magistrate. Clearly, there will be a temptation to delay first appearances if UFAP complaint dismissal before a magistrate appearance becomes common, but that reaction must be avoided.

Dismissal of a UFAP complaint prior to appearance before a judicial officer requires an arresting agent to exercise a substantially greater level of discretion than is required if UFAP arrestees are always taken to the closest federal magistrate in the district of arrest. That discretion inherently represents an increased risk of civil liability or tainting of the resulting prosecution because mistakes may result. The increased complexity of determining whether a federal magistrate in another district is actually closer, whether logistical barriers make the use of a state or local judicial officer permissible, how an arrestee can be placed in local custody before federal jurisdiction is lost through complaint dismissal, and which of the complaint dismissal procedures is most appropriate makes these more flexible interpretations of existing authorities much less attractive to liability-conscious federal law enforcement officers. In contrast, routinely taking an arrestee before a federal magistrate in the same district probably shifts all responsibility for post-arrest procedures to the magistrate while fulfilling the apparent requirements of the applicable federal rules, thus relieving the federal officer of numerous concerns.

Additional due process and liability exposure concerns are caused by the termination of federal authority to detain a defendant at the time of the federal complaint dismissal, even if the local police are not present or prepared to take-immediate

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[13] A scenario in which prompt UFAP complaint dismissal seemingly would be far superior to proceeding with a first appearance is the arrest on a UFAP warrant where the nearest available magistrate is across state lines, in the state in which the UFAP complaint originated. In that scenario, if the arrestee is taken to that federal magistrate, the state extradition process will become unnecessary (since federal officers will take the arrestee across the state line), yet it is not clear that the appearance before the federal magistrate will offer the same protection to the arrestee.

custody of the defendant upon dismissal of the federal complaint (at which time the defendant's release from federal custody becomes mandatory).

A complex related issue not raised in any of the inquiries received to date by the Section is the extent to which federal law enforcement agents can address gaps in federal authority by acting pursuant to state-granted peace officer or common-law powers in apprehending fugitives named in a state arrest warrant. Some states may extend peace officer or similar authority to federal officers, which state authority could be the basis for arrest or detention even without federal process. This authority may also raise its own liability problems. Such peace officer or police officer powers exist to a varying degree in many local jurisdictions. In some jurisdictions a federal officer has no powers beyond his federal authority and his status as a lawfully armed civilian. In other jurisdictions, a federal officer has a wide range of state police or peace officer powers based upon the inclusion of federal officers in the state statutory definition of persons vested with such powers.

With rare exceptions, federal officers do not rely upon common-law civilian powers or state-granted peace officer powers in the performance of their federal mission. While those powers represent a potential source of authority for arrests by federal officers to avoid federal processes or to avoid the impact of a lack of federal jurisdiction upon dismissal of a UFAP complaint, that is an unattractive and unreliable alternative.

Conclusions: The bringing of a defendant before a magistrate (or other judicial officer) is required by Rule 5. That requirement seemingly lapses with the dismissal of the underlying federal complaint. There is no due process, Department of Justice Policy, Rule 5, Rule 40, or statutory prohibition against the prompt dismissal of a UFAP complaint following the arrest of a defendant sought for state prosecution. In view of the history of the federal UFAP process, such prompt dismissal does not seem to constitute abuse of federal process, since both the legislative history and judicial interpretations of 18 U.S.C. §1073 recognize an intent that the vast majority of §1073 defendants not be prosecuted in federal court. As discussed above, prompt UFAP complaint dismissals will often spare both the Federal Government and the defendant unnecessary delay, the burden of custodial transport, federal processing, and other preliminary federal procedures. The federal procedures are neither required for state extradition nor helpful in protecting the defendant's rights in the state proceedings.

Despite the Section's previous endorsement of the practice of transferring a UFAP arrestee to local custody prior to an appearance before a federal magistrate, provided that such a procedure does not involve an unnecessary delay in bringing a

person in federal custody before a magistrate, there are practical and legal disadvantages to avoiding an appearance before a federal magistrate. One disadvantage is the exercise of increased discretion, discussed above, required of the arresting federal agent. Using local judicial officers may create problems as well, both in securing those judicial officers' consent to performing that function and in assuring that they fulfill the magistrate role as established by the federal rule. Attempting to use local police to arrest a fugitive may create logistical problems and conflict with existing federal agent performance evaluation systems.

**MEMO TO:** **Advisory Committee on Criminal Rules**

**FROM:** **Dave Schlueter, Reporter**

**RE:** **Rules 10 and 43: Proposal from Bureau of Prisons to Permit In Absentia Arraignments, Etc, by Use of Video Equipment**

**DATE:** **March 15, 1993**

At its Spring 1992 meeting, the Committee heard a proposal from then Director of the Bureau of Prisons, J. Michael Quinlan, that Rules 10 and 43 be amended to permit *in absentia* pretrial proceedings through use of video technology. After the matter was more fully addressed by the Committee at its October 1992 meeting in Seattle, Judge Hodges appointed a subcommittee to consider the issue of experimental teleconferencing where the defendant has consented to such: Judge Keenan (Chair), Judge Crow, Mr. Doar, Mr. Marek, and Professor Saltzburg.

Attached are materials relating to the proposal: Correspondance from Mr. Quinlan with attached statistical data from various jurisdictions and proposed language for changes to both Rules 10 and 43.

It should be noted that at its March 1993 meeting, the Judicial Conference will be considering a report from the Committee on Court Administration and Case Management which recommends that a pilot program be established in the Eastern District of North Carolina for use of video technology to conduct competency hearings. (That report will appear in the agenda materials in conjunction with a proposal to permit filing by facsimile).

The Conference's action on the proposed pilot program may provide assistance in determining what, if any, further action should be taken on the proposed amendments to Rules 10 and 43 vis a vis a pilot program for arraignments, etc.

**U.S. Department of Justice**

Federal Bureau of Prisons

*Office of the Director*

*Washington, DC 20534*

October 26, 1992

Honorable William Terrell Hodges
Chairman, Advisory Committee on Criminal Rules
P. O. Box 1620
Jacksonville, Florida 32201-1620

Dear Judge Hodges:

Thank you for including proposed changes to Rules 10 and 43 of the Federal Rules of Criminal Procedure on the agenda of the recent meeting of the Advisory Committee on Criminal Rules. While the committee did not endorse the changes as proposed, it was encouraging to note the level of interest in the concept and the willingness of the subcommittee to consider an alternate proposal. Recognizing that any changes to the Rules of Criminal Procedure should be taken only after full discussion and careful deliberation, I appreciate your decision to appoint a subcommittee to further review the issue. I, along with other members of the law enforcement community, remain interested in exploring the concept of using video technology for certain pre-trial court proceedings.

The Bureau is, of course, available to provide any assistance that you deem appropriate to the sub-committee that will be further studying the issue of video court proceedings.

Once again, thank you for your assistance and consideration regarding this matter.

Sincerely,

Thomas R. Kane for

J. Michael Quinlan
Director

U.S. Department of Justice

Federal Bureau of Prisons

*Office of the Director* *Washington, DC 20534*

Honorable William Terrell Hodges
Chairman, Advisory Committee on Criminal Rules
P.O. Box 1620
Jacksonville, Florida 32201-1620

Dear Judge Hodges:

As we have discussed previously, I strongly support the initiative to modify the Federal Rules of Criminal Procedure to allow for the use of video technology in pre-trial court functions, such as arraignment. I greatly appreciated the opportunity to come before the Committee on Criminal Rules at its April meeting to underscore the importance of this issue to the Department of Justice and look forward to your additional consideration of this topic at the October meeting of the Committee in Seattle.

Following the decision in Valenzuela-Gonzalez v. United States District Court for the District of Arizona, 915 F.2d 1276 (9th Cir. 1990), some doubt was cast on the use of video technology in pre-trial proceedings. In that case, the Court held that arraignment by closed circuit television would violate the Federal Rules of Criminal Procedure because the defendant was not physically present in court at the arraignment. At present, Rule 10 mandates that arraignment be conducted in "open court" with the defendant being called on to plead. In addition, Rule 43 states that the "defendant shall be present at the arraignment..." Attached are proposed amendments to Rules 10 and 43 that would allow for the use of video technology in connection with pre-trial court proceedings.

It is important to note that the Valenzuela decision did not find that the use of video arraignment was prohibited by the Constitution, but rather by Rules 10 and 43. The Court stated that the "protection of these rules is broader than the Constitution provides." Id. at 1280. It may also be useful to note that Judge Beezer, who wrote the opinion in Valenzuela, subsequently wrote to Chief Judge Goodwin of the Ninth Circuit supporting an amendment to the Rules of Criminal Procedure that would allow for video arraignment programs such as had been carried out in Arizona.

Judges around the country have been extremely supportive of efforts to utilize video technology for pre-trial proceedings. In

the attached surveys given to 9th and 11th Circuit Judges on this issue, the overwhelming response was in favor of considering the use of video technology. In addition, the Bureau of Prisons has received favorable reactions from Judges in the 1st, 2nd and 11th Circuits regarding the possible use of this technology for court to institution linkages in their respective Circuits. A broad coalition of law enforcement officials also supports the use of such technology. Data further suggests that defendants may prefer the use of video proceedings to the time consuming and uncomfortable procedures necessary for an in person court appearance (see attached survey).

The cumbersome process of bringing individuals to court for pre-trial proceedings is not only taxing on defendants, but on the entire criminal justice system as well. Video technology provides an efficient alternative for our courts, whose resources are severely stretched by a rapidly increasing number of cases. The attached statistics obtained from the Administrative Office of the United States Courts shows that there is an opportunity to use this technology in many thousands of cases, thereby decreasing the burdens faced by courts. The United States Marshals Service also would benefit and thereby be able to focus more of it's efforts on court security and other high priority projects.

The benefits to be obtained by the use of this technology would also flow in several ways to society at large. There would be an immediate benefit to overall public safety. Thousands of defendants would not have to be transported to and from courts. The risks attendant with such transportation are evident to anyone who follows the news headlines. These benefits would also extend to law enforcement and judicial personnel, who come into direct contact with defendants. Security and safety benefits would also affect the Bureau of Prisons, as an opportunity for large amounts of contraband materials to enter Bureau institutions would be averted. The public would also receive a benefit due to the significant costs savings that jurisdictions using video technology have reported. In this period of financial uncertainty, this would be a welcome corollary benefit of using video technology.

Amending the Federal Rules of Criminal Procedure would not make the use of video technology mandatory for any jurisdiction. Rather, this amendment would merely give Judges the discretion to use this technology if they deemed it appropriate for their courts. This is the same decision that has been made affirmatively by numerous state and local courts around the nation (see attached list). The Bureau of Prisons would be able to provide assistance in technologically facilitating the application of these procedures at the federal level. Video linkages between courts and institutions would include telephone and facsimile capabilities. Attorneys would be able to effectively have confidential communications with their clients through the use of privacy switches on phone lines. Due to these safeguards, defendants would in no way be harmed by lack of access to their attorneys during pre-trial proceedings.

The use of video technology for pre-trial proceedings preserves the rights and dignity of defendants while allowing the criminal justice system and society to benefit. I and others throughout the criminal justice community feel certain that this technology can be used to significantly increase the safety and efficiency related to managing the burgeoning pre-trial detention population.

With your approval, I would very much like to be present during the discussion of this issue at your Committee's meeting and contribute in any manner that you feel appropriate. I am certainly willing to offer a statement or presentation of our position supporting the use of video technology for pre-trial proceedings. I have attached a packet of materials relating to this matter that may be helpful to members of your committee. I would ask your approval to forward these materials to members of the Advisory Committee for their review.

Thank you for your assistance on this issue. I look forward to any response you may have to these matters and to speaking with you again in the near future.

Sincerely,

Thomas R. Kane for

J. Michael Quinlan
Director

Enclosure

# VIDEO CONFERENCING FOR SOME PRE-TRIAL PROCEEDINGS

The increasing sophistication of video conferencing technology offers a unique and compelling opportunity for all post-arrest components of the criminal justice system. Currently in use in over 50 state and local systems (Attachment A), use of this technology to conduct some non-trial court functions provides for increased efficiency, savings of tax dollars, and increased public safety while enhancing respect for human dignity and protecting important rights of the defendant. Further, surveys conducted with the courts, attorneys, defendants and detention and transporting officials indicate wide acceptance of the use of video conferencing for pre-trial court functions.

## ENHANCED EFFICIENCY

Efficiency is enhanced through improved and more precise court docketing procedures and more timely proceedings. When video conferencing is available for pre-trial proceedings, court staff can more effectively determine which defendants are available for proceedings and schedule them for hearings on much shorter notice, as transportation from the point of detention to the court room is not required.

For the detaining agency, processing the defendant out of the facility, along with all other individuals scheduled for appearances that day, and then processing him back in at the completion of all hearings is eliminated. The defendant simply moves from one part of the facility to the video court room within the facility shortly before his scheduled appearance. In addition, if the court orders release, that release can be effected much more quickly, as the defendant does not have to wait for the appearances of all others scheduled that day, return to the detaining facility, and then be processed out.

For the transporting agency, the number of individuals to be transported is substantially reduced, requiring fewer vehicles and staff escorts. To give some sense of scope, according to the Administrative

Offices for the U.S. Courts, during the twelve month period prior to June 30, 1991, U.S. Magistrate Judges disposed of 51,745 initial appearances, 35,699 arraignments, and 8,246 bail reviews (Attachment B).

With the burgeoning court caseloads and the increasing number of individuals detained in pre-trial status, efficiency in providing for initial appearances, detention hearings, and arraignments is essential to the criminal justice system. With projections for substantial increases in this population, greater efficiency in providing for these pre-trial functions without compromise of the rights of the defendant is essential to prevent gridlock of the entire federal criminal justice system.

## SAVINGS OF TAX DOLLARS

With substantial reductions in the number of individuals who must be physically transported to court, transporting agencies, particularly the U.S. Marshal Service, can expect to conserve valuable staff and fiscal resources. Similarly, detention agencies should realize some savings resulting from the reduced number of individuals who must be processed into and out of the facility each day. As indicated in a 1991 report by the Chairman of the County Wide Criminal Justice Coordination Committee in Los Angeles, that jurisdiction saved over $1 million per year on transportation costs alone using video conferencing for some pre-trial court functions. In a much smaller jurisdiction, Ada, Iowa, over $75,000 were saved through the use of video conferencing for pre-trial proceedings. This conservation of tax dollars represents good public stewardship.

## ENHANCED PUBLIC SAFETY

The most compelling reason for implementation of video conferencing for pre-trial court functions at the federal level is the resulting increase in safety to the escorting officials, officers of the court, and the general

public. Each time an individual is physically removed from the secure perimeter of a detention facility, the risks of escape and assault are dramatically increased. The risks involved in transporting individuals in pre-trial status are even greater, in that the detention facility and the transporting officials typically have little background information about the individual with which to assess potential threats. As a result, the level of security afforded during transportation may not be adequate, because of some factor unknown to the transporting agency that could dramatically increase the potential threat to transporting officials, court officials, or the general public. In addition, institution security is enhanced when video conferencing is used, as one potential source for the introduction of contraband into the facility is effectively eliminated. One of the tasks of the criminal justice system is to protect the public, and this mission can be greatly enhanced by maintaining offenders in a secure setting rather than transporting them.

## ACCEPTANCE BY COURTS AND DEFENDANTS

Surveys conducted with state and local inmates regarding the use of video conferencing for pre-trial functions indicates that the vast majority of those who appeared in court electronically rather than in person felt that the electronic appearance was just as effective as would have been an in person appearance (Attachment C). When given the option of appearing electronically or in person, the majority chose to use video conferencing rather than endure the grueling process of processing out of the facility along with a number of others scheduled for appearances, appearing in front of family and friends in handcuffs, and spending the entire day waiting while others completed their appearances. Defendants like to appear in court using video conferencing, as this procedure entails far less discomfort, affords all of the rights and attention of the court that in person appearances receive, and does not require them to appear in public under the security that in person appearances mandate.

Similar surveys with the courts (Attachments D and E) show clear

support for the use of video conferencing for pre-trial court functions. At the federal level, when asked "In order to preclude the necessity of moving an inmate to court from prison, would you consider the use of interactive video technologies useful for the conduct of some pre-trial court functions," the vast majority of judges surveyed indicated support. At a Sentencing Workshop for the 9th Circuit, 77% of the District Judges and 71% of the Circuit Judges indicated support of such a proposal. At a Sentencing Institute for the 11th Circuit, 73% of the District Judges and 100% of the Circuit Judges indicated support.

## PROPOSED MODIFICATIONS TO RULES

Video conferencing for pre-trial court functions was briefly piloted at the federal level in three cities. However, in Valenzuela-Gonzalez v. United States District Court of Arizona, 915 F.2d 1276 (9th Cir. 1990) the Court ruled that the use of video conferencing for pre-trial appearances violated rules ten and forty-three of the Federal Rules of Criminal Procedure. Indicating that there are no clear Constitutional issues, the court did find that until the rules of criminal procedure requiring appearance in open court of the defendant were modified to allow for appearance through video conferencing, such procedures could not be effected in that circuit. The proposed changes to rules 10 and 43 (Attachment F) simply add language indicating that for the purposes of these rules, the use of video teleconferencing technology is consistent with the presence requirement.

## SUMMARY

With approval of the proposed modifications to rules 10 and 43, the courts will have options available that can be exercised in a variety of ways. Procedures for the use of video conferencing can be established as the court desires, allowing those judges who wish to use the technology to do so without requiring its use by those judges who elect not to use the technology. Further, the changes will allow a judge to mandate the use of video conferencing when a clear and

compelling threat to the safety of the defendant, the court, or the general public exists.

In summary, we believe that the proposed changes in rules 10 and 43 provide the flexibility to the courts, the transporting and detaining agencies, and the defendants that is essential if the federal criminal justice system is to continue to operate in the face of rapidly increasing demands. Experience at the state and local levels indicates that this technology can be implemented with advantages to all involved and result in substantial savings of tax dollars. Further, the use of video conferencing for pre-trial court functions can be implemented in such a manner as to enhance the personal dignity of the defendant and preserve all of the rights required for these proceedings.

# VIDEO TECHNOLOGY APPLICATIONS IN THE COURTS

18th Judicial District, Kansas
Colorado Springs, Municipal Court, Colorado
Prince George Circuit, Maryland
Jackson Circuit Court, Florida
12th Judicial Circuit, Florida
Pima County Superior Court, (Tucson) Arizona
North County Municipal Court, California
Oregon Administrative Office of the Courts
9th Judicial Circuit, Florida
32nd Judicial District, Pennsylvania
Denver County Court, Colorado
San Bernardino County, California
Pierce County District Court, Washington
Alaska Court System
Baton Rouge City Court, Louisiana
Stanislaus County Municipal and Superior Courts, California
Los Angeles Municipal court, California
Howard County, Maryland
Washoe County, (Reno) Nevada
Harris County, (Houston) Texas
Ada County, Idaho
Las Vegas Municipal Court, Nevada
Phoenix, Arizona
Potter County, Texas
7th Judicial District, Utah
State of Utah, Salt Lake City, Utah
Scott County, Iowa
Kent County, Michigan
Genesee County, Michigan
Riverside County, California
Macomb County, Michigan
Los Angeles County, Long Beach Municipal Court, California
Los Angeles County, Criminal Courts (Felony), California
Los Angeles County, Avalon, Catalina Island, California
Spokane County, Washington
Contra Costa County, California
San Bernardino County, California
Moreno Valley, California
Kitsap County, Washington
Mesa County, Colorado
Los Angeles County, Glendale, California
District Court of Hawaii
Los Angeles County, Torrance, California
Santa Barbara County, California
State of Utah, District Court, Price, Utah
Ventura County Municipal Court, California
Scott County District Court, Iowa
15th Judicial Circuit, Michigan
7th Judicial Circuit, (Flint) Michigan
6th Judicial Circuit, Michigan
Wayne County Circuit, Michigan
Dade County (Miami), Florida

Attachment A

Table M-3 U.S. DISTRICT COURTS.
MATTERS DISPOSED OF BY U.S. MAGISTRATE JUDGES
PURSUANT TO TITLE 28 U.S.C. SECTION 636(A)
DURING THE TWELVE MONTH PERIOD ENDED JUNE 30, 1991

| CIRCUIT AND DISTRICT | TOTAL | SEARCH WARRANTS | ARREST WARRANTS | SUMMONSES | INITIAL APPEARANCES | PRELIMINARY EXAMINATIONS | BAIL REVIEWS | GRAND JURY SESSIONS | ARRAIGNMENTS | OTHER |
|---|---|---|---|---|---|---|---|---|---|---|
| Total | 178,789 | 23,887 | 17,896 | 2,048 | 51,745 | 8,116 | 8,246 | 4,992 | 35,699 | 24,160 |
| DC- | 3,467 | 329 | 216 | 8 | 1,141 | 681 | 114 | 132 | 138 | 708 |
| 1st... ME- | 487 | 53 | 13 | 0 | 138 | 24 | 43 | 15 | 135 | 66 |
| MA- | 2,460 | 211 | 307 | 59 | 562 | 71 | 81 | 175 | 480 | 514 |
| NH- | 287 | 24 | 20 | 0 | 89 | 0 | 7 | 17 | 115 | 15 |
| RI- | 2,288 | 85 | 136 | 5 | 656 | 163 | 139 | 50 | 611 | 443 |
| PR- | 698 | 99 | 52 | 30 | 78 | 59 | 7 | 28 | 154 | 191 |
| 2nd... CT- | 1,442 | 395 | 120 | 2 | 255 | 35 | 134 | 93 | 178 | 230 |
| NYN | 1,424 | 141 | 187 | 7 | 395 | 9 | 158 | 81 | 268 | 178 |
| NYE | 4,869 | 606 | 656 | 1 | 1,736 | 43 | 227 | 313 | 339 | 948 |
| NYS | 5,142 | 1,187 | 748 | 6 | 1,896 | 0 | 106 | 156 | 178 | 865 |
| NYW | 1,031 | 271 | 76 | 4 | 285 | 8 | 26 | 75 | 251 | 35 |
| VT- | 378 | 37 | 38 | 0 | 74 | 15 | 10 | 29 | 129 | 46 |
| 3rd... DE- | 425 | 69 | 32 | 0 | 124 | 7 | 4 | 17 | 131 | 41 |
| NJ- | 2,080 | 377 | 265 | 4 | 737 | 13 | 149 | 256 | 42 | 237 |
| PAE | 4,317 | 544 | 943 | 2 | 884 | 289 | 62 | 168 | 847 | 578 |
| PAM | 516 | 70 | 71 | 3 | 256 | 17 | 6 | 1 | 1 | 91 |
| PAW | 1,294 | 231 | 110 | 68 | 217 | 70 | 18 | 144 | 292 | 144 |
| VI- | 864 | 55 | 82 | 0 | 214 | 86 | 75 | 34 | 208 | 110 |
| 4th... MD- | 2,305 | 526 | 299 | 3 | 552 | 41 | 128 | 51 | 342 | 363 |
| NCE | 997 | 111 | 85 | 0 | 457 | 68 | 28 | 78 | 1 | 169 |
| NCM | 1,021 | 63 | 150 | 0 | 362 | 79 | 34 | 11 | 96 | 226 |
| NCW | 1,970 | 172 | 229 | 7 | 854 | 39 | 112 | 25 | 248 | 284 |
| SC- | 2,406 | 307 | 466 | 13 | 368 | 35 | 163 | 114 | 832 | 108 |
| VAE | 2,877 | 505 | 429 | 23 | 803 | 323 | 62 | 55 | 154 | 523 |
| VAW | 769 | 103 | 104 | 1 | 319 | 34 | 39 | 12 | 38 | 127 |
| WVN | 442 | 102 | 46 | 29 | 75 | 24 | 8 | 1 | 131 | 26 |
| WVS | 1,246 | 54 | 214 | 5 | 292 | 86 | 65 | 45 | 362 | 123 |
| 5th... LAE | 2,512 | 170 | 158 | 7 | 809 | 10 | 162 | 88 | 722 | 386 |
| LAM | 287 | 5 | 18 | 0 | 79 | 22 | 8 | 0 | 47 | 28 |
| LAW | 1,856 | 67 | 108 | 81 | 253 | 29 | 99 | 28 | 210 | 181 |
| MSN | 572 | 52 | 30 | 0 | 183 | 28 | 28 | 11 | 194 | 54 |
| MSS | 912 | 121 | 77 | 0 | 252 | 41 | 35 | 21 | 253 | 112 |
| TXN | 3,009 | 464 | 318 | 47 | 1,196 | 169 | 120 | 18 | 177 | 308 |
| TXE | 1,029 | 58 | 75 | 18 | 382 | 26 | 39 | 31 | 267 | 221 |
| TXS | 12,124 | 1,219 | 1,878 | 582 | 3,432 | 819 | 528 | 139 | 2,825 | 1,890 |
| TXW | 6,433 | 592 | 1,092 | 155 | 2,313 | 467 | 370 | 122 | 416 | 906 |
| 6th... KYE | 677 | 98 | 83 | 18 | 99 | 50 | 25 | 24 | 177 | 111 |
| KYW | 828 | 117 | 88 | 1 | 158 | 42 | 9 | 38 | 248 | 135 |
| MIE | 4,449 | 837 | 652 | 8 | 1,366 | 73 | 43 | 161 | 971 | 338 |
| MIW | 823 | 84 | 148 | 0 | 200 | 17 | 20 | 45 | 248 | 61 |
| OHN | 1,876 | 352 | 325 | 37 | 276 | 148 | 28 | 41 | 412 | 265 |
| OHS | 1,695 | 248 | 267 | 8 | 458 | 196 | 69 | 67 | 116 | 274 |
| TNE | 1,864 | 138 | 110 | 1 | 317 | 35 | 12 | 38 | 306 | 187 |
| TNM | 953 | 136 | 65 | 0 | 440 | 63 | 32 | 12 | 74 | 131 |
| TNW | 1,823 | 63 | 19 | 0 | 773 | 160 | 31 | 12 | 508 | 257 |

Attachment B

Table M-3 U.S. DISTRICT COURTS.
MATTERS DISPOSED OF BY U.S. MAGISTRATE JUDGES
PURSUANT TO TITLE 28 U.S.C. SECTION 636(A)
DURING THE TWELVE MONTH PERIOD ENDED JUNE 30, 1991

| CIRCUIT AND DISTRICT | TOTAL | SEARCH WARRANTS | ARREST WARRANTS | SUMMONSES | INITIAL APPEARANCES | PRELIMINARY EXAMINATIONS | BAIL REVIEWS | GRAND JURY SESSIONS | ARRAIGNMENTS | OTHER |
|---|---|---|---|---|---|---|---|---|---|---|
| 7th... ILN | 2,700 | 501 | 155 | 7 | 839 | 300 | 134 | 14 | 255 | 495 |
| ILC | 906 | 97 | 79 | 10 | 212 | 24 | 21 | 4 | 285 | 178 |
| ILS | 669 | 76 | 55 | 0 | 168 | 23 | 3 | 21 | 217 | 106 |
| INN | 766 | 158 | 43 | 4 | 286 | 17 | 14 | 34 | 92 | 118 |
| INS | 677 | 132 | 91 | 0 | 309 | 12 | 17 | 14 | 2 | 100 |
| WIE | 1,403 | 190 | 92 | 0 | 465 | 47 | 38 | 49 | 363 | 159 |
| WIW | 416 | 24 | 62 | 0 | 125 | 13 | 19 | 16 | 110 | 47 |
| 8th... ARE | 716 | 145 | 40 | 0 | 154 | 3 | 41 | 13 | 232 | 88 |
| ARW | 395 | 165 | 64 | 0 | 38 | 3 | 9 | 2 | 79 | 35 |
| IAN | 398 | 58 | 32 | 36 | 48 | 7 | 8 | 30 | 137 | 42 |
| IAS | 683 | 140 | 51 | 1 | 106 | 38 | 18 | 74 | 148 | 115 |
| MOE- | 2,362 | 444 | 260 | 7 | 571 | 228 | 39 | 18 | 501 | 294 |
| MOE | 1,515 | 366 | 164 | 3 | 397 | 77 | 15 | 1 | 251 | 241 |
| MOW | 1,816 | 273 | 129 | 0 | 613 | 95 | 71 | 37 | 433 | 165 |
| NE- | 631 | 135 | 45 | 1 | 100 | 5 | 66 | 19 | 164 | 96 |
| ND- | 450 | 24 | 47 | 0 | 119 | 40 | 21 | 1 | 137 | 61 |
| SD- | 765 | 8 | 20 | 0 | 335 | 14 | 4 | 8 | 250 | 126 |
| 9th... AK- | 597 | 131 | 26 | 5 | 68 | 44 | 75 | 15 | 158 | 75 |
| AZ- | 7,139 | 935 | 392 | 41 | 2,015 | 258 | 552 | 125 | 1,436 | 1,385 |
| CAN | 3,184 | 435 | 361 | 79 | 927 | 13 | 283 | 12 | 698 | 376 |
| CAE | 2,180 | 225 | 125 | 6 | 503 | 20 | 113 | 59 | 700 | 419 |
| CAC | 6,822 | 1,225 | 539 | 71 | 1,902 | 121 | 126 | 170 | 1,655 | 1,014 |
| CAS | 6,389 | 486 | 235 | 7 | 2,609 | 85 | 701 | 15 | 1,481 | 770 |
| HI- | 1,461 | 778 | 21 | 0 | 221 | 86 | 3 | 75 | 183 | 94 |
| ID- | 343 | 28 | 35 | 1 | 76 | 17 | 1 | 6 | 117 | 62 |
| MT- | 697 | 97 | 82 | 1 | 143 | 39 | 26 | 0 | 239 | 70 |
| NV- | 2,962 | 379 | 461 | 188 | 983 | 10 | 86 | 76 | 546 | 313 |
| OR- | 2,586 | 377 | 160 | 66 | 562 | 235 | 22 | 51 | 637 | 470 |
| WAE | 1,211 | 128 | 120 | 0 | 237 | 69 | 77 | 16 | 431 | 133 |
| WAW | 2,132 | 249 | 121 | 21 | 560 | 179 | 93 | 0 | 495 | 414 |
| 10th.. CO- | 2,371 | 280 | 371 | 12 | 690 | 116 | 45 | 73 | 466 | 316 |
| KS- | 1,898 | 139 | 18 | 0 | 415 | 18 | 22 | 2 | 348 | 136 |
| NM- | 2,834 | 216 | 114 | 27 | 704 | 317 | 81 | 15 | 784 | 576 |
| OKN | 554 | 42 | 27 | 0 | 164 | 19 | 22 | 1 | 223 | 56 |
| OKE | 221 | 41 | 5 | 0 | 36 | 8 | 4 | 3 | 77 | 47 |
| OKW | 1,137 | 241 | 158 | 3 | 213 | 86 | 31 | 7 | 157 | 241 |
| UT- | 1,453 | 74 | 274 | 0 | 241 | 57 | 30 | 10 | 516 | 251 |
| WY- | 298 | 24 | 52 | 20 | 140 | 22 | 5 | 0 | 10 | 25 |
| 11th.. ALN | 838 | 166 | 68 | 2 | 174 | 24 | 49 | 11 | 263 | 81 |
| ALM | 434 | 120 | 35 | 1 | 138 | 12 | 11 | 7 | 25 | 65 |
| ALS | 675 | 34 | 35 | 8 | 172 | 11 | 23 | 17 | 299 | 84 |
| FLM | 1,818 | 188 | 93 | 6 | 442 | 17 | 31 | 15 | 153 | 153 |
| FLN | 5,597 | 596 | 499 | 51 | 1,423 | 224 | 265 | 207 | 1,602 | 730 |
| FLS | 11,872 | 1,109 | 811 | 256 | 3,101 | 316 | 1,873 | 465 | 2,478 | 1,463 |
| GAM | 2,841 | 375 | 235 | 46 | 717 | 243 | 141 | 189 | 683 | 372 |
| GAN | 839 | 59 | 56 | 8 | 368 | 28 | 33 | 8 | 219 | 100 |
| GAS | 1,000 | 306 | 116 | 10 | 191 | 52 | 65 | 19 | 192 | 49 |

Defendant's Perspective of the court video system

| Questionnaire Item | N | Yes % | No % | Unsure % |
|---|---|---|---|---|
| 1. I think that using TV limited ability to argue my case | 345 | 31.6 | **64.3** | 4.1 |
| 2. There were questions I wanted to ask but didn't because I was on TV | 338 | 20.1 | **78.4** | 1.9 |
| 3. I acted or spoke differently because I was on TV | 349 | 18.9 | **79.1** | 2.1 |
| 4. The use of TV Made me nervous | 342 | 29.2 | **70.2** | 6 |
| 5. I feel that the use of TV violated my legal rights | 342 | 15.2 | **79.5** | 5.3 |
| 6. If I wasn't on TV I would have pled differently | 338 | 10.7 | **85.5** | 3.8 |
| 7. I think that using TV for court appearances is a good idea | 348 | **72.1** | 20.4 | 7.5 |
| 8. I was happy with my televised court appearance | 344 | **78.5** | 19.5 | 2.0 |
| 9. I feel that the use of TV made my case go faster | 340 | **84.4** | 12.1 | 3.5 |

Source: Media Technology and the Courts: The Case of Closed Circuit Video Arraignments in Miami, Florida, W. Clinton Terry, III and Ray Surette, Department of Criminal Justice, Florida International University, North Miami, Florida 33181 (1986).

**Attachment C**

**In order to preclude the necessity of moving an inmate to court from prison, would you consider the use of interactive video technologies useful for the conduct of some pre-trial court function?**

9th Circuit

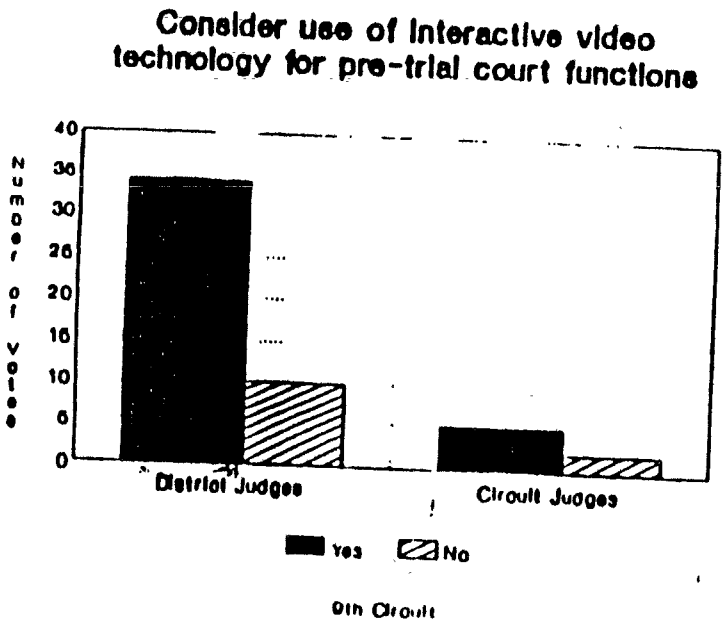
| | District Judge | Circuit Judge |
|---|---|---|
| NUMBER OF VOTES | 44 | 7 |
| Yes | 34 (77.3%) | 5 (71.4%) |
| No | 10 (22.7%) | 2 (28.6%) |

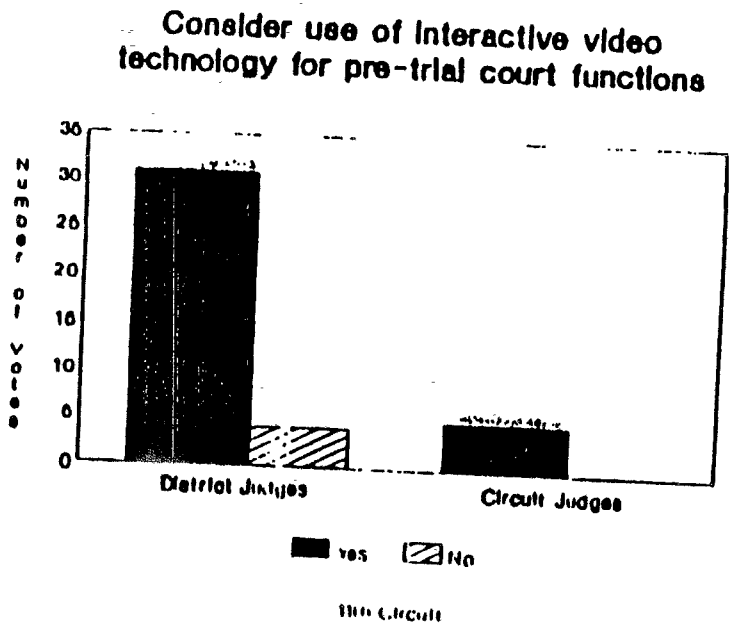
11th Circuit

| | District Judge | Circuit Judge |
|---|---|---|
| NUMBER OF VOTES | 35 | 5 |
| Yes | 31 (73.8%) | 5 (83.3%) |
| No | 4 (9.5%) | 0 (0.0%) |

Attachment D

Attachment E



# Amendments to Federal Rules of Criminal Procedure

Rule 10 of the Federal Rules of Criminal Procedure shall be amended to read as follows:

Arraignment shall be conducted in open court and shall consist of reading the indictment or information to the defendant or stating to the defendant the substance of the charge and calling on the defendant to plead thereto. The defendant shall be given a copy of the indictment or information before being called upon to plead. The use of video teleconferencing technology, where the defendant is not physically present in court, is consistent with the requirements of this rule.

Rule 43(a) of the Federal Rules of Criminal Procedure shall be amended to read as follows:

(a) Presence Required. The defendant shall be present at the arraignment, at the time of the plea, at every stage of the trial including the impaneling of the jury and the return of the verdict, and at the imposition of sentence, except as otherwise provided by this rule. During pre-trial proceedings, the use of video teleconferencing technology, where the defendant is not physically present in court, is consistent with the presence requirement of this rule.

Attachment F

AGENDA II-C-3
Washington, DC
April 22-23, 1993

**MEMO TO:** **Advisory Committee on Criminal Rules**

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

**RE:** **Rule 12(b); Proposal from Judge M. Real to Amend Rule to Cover Entrapment Defense**

**DATE:** **March 15, 1993**

Judge Manuel L. Real has proposed in the attached materials that Rule 12(b) be amended to reflect that the entrapment defense should be raised as a pretrial motion. If the Committee is interested in pursuing this proposal, I can draft the appropriate language for consideration at Fall 1993 meeting.

UNITED STATES DISTRICT COURT
CHAMBERS OF
JUDGE JOHN F. KEENAN
UNITED STATES COURTHOUSE
FOLEY SQUARE
NEW YORK, N.Y. 10007

December 15, 1992

The Honorable William Terrell Hodges
United States District Judge
Middle District of Florida
United States Courthouse
611 North Florida Avenue
Suite 108
Tampa, Florida 33602-4511

Dear Terry:

Chief Judge Manuel L. Real of the Central District of California has raised an interesting issue which he has asked me to take up with the Committee. It has been his view for several years that the matter of entrapment, and whether it properly should be in the case or not, is something to be decided by the trial judge, not the jury. Judge Real suggests that the subject should be raised by way of a pretrial defense motion. This would require an amendment to Fed. R. Cr. P. 12(b). Following the filing of the motion an evidentiary hearing would be held by the trial judge at the end of which it would be decided whether the Government had improperly entrapped the defendant. If the decision were yes, the indictment presumably would be dismissed. If the answer were no, the case would be tried before the jury without reference to the issue of entrapment.

Judge Real analogizes this to a pretrial motion to suppress physical evidence or statements, which the judge rules on before trial. He has supplied me with a memorandum on the subject written by his former law clerk which I am enclosing. I believe that he hopes the committee could place this matter on its agenda for our Spring, 1993 Meeting.

Have a wonderful Christmas and a Happy New Year!

Sincerely,

John

John F. Keenan

JFK:maq
Enclosure

cc: Chief Judge Manuel L. Real

MEMORANDUM
RE: ENTRAPMENT AS AN ISSUE TO BE DECIDED BY THE COURT
TO: JUDGE REAL
FROM: JOSEPH JACONI
DATE: DECEMBER 16, 1969

The constitutionally-guaranteed rights of those accused of committing crimes have come into sharp focus in recent years due to the many noteworthy decisions that have emanated from the United States Supreme Court. Although these rights have been characterized as being "ancient", Miranda vs. Arizona, 384 U.S. 436, 458, 16 L.Ed.2d 694, 86 S.Ct. 1602 (1966), and eventually as having been canonized as constitutional precepts, Ibid., 384 U.S. at 459, it was not until the 1960's that the citizenry of this country generally became aware of the existence of those rights, and only then because "obviously guilty" men were being set free.

Fortunately, enlightened members of the Bar realized the effect of the Supreme Court decisions, and recognized and endorsed the goals of the Court. These goals were enunciated early in this century by eminent jurists. Justice Holmes, in Olmstead vs. United States, 277 U.S. 438, 470, 72 L.Ed. 944, 48 S.Ct. 564 (1928), delivering a special opinion, stated that "It is desirable that criminals should be detected, and to that end that all available evidence should be used. It also is desirable that the government should not itself foster and pay for other crimes, when they are the means by which the evidence is to be obtained....We have to choose, and for my part

I think it a less evil that some criminals should escape than that the government should play an ignoble part." Also in Olmstead vs. United States, 277 U.S. at 485, Justice Brandeis in his dissent stated "If the government becomes a lawbreaker, it breeds contempt for the law; it invites every man to become a law unto himself; it invites anarchy. To declare that in the administration of the criminal law the end justifies the means-- to declare that the government may commit crimes in order to secure the conviction of a private criminal-- would bring terrible retribution. Against that pernicious doctrine this court should resolutely set its face."

And more recently, Justice Stewart in speaking of the exclusionary rule, stated for the majority that "The rule is calculated to prevent, not to repair. Its purpose is to deter-- to compel respect for the constitutional guaranty in the only effectively available way-- by removing the incentive to disregard it." Elkins vs. United States, 364 U.S. 206, 217, 4 L.Ed.2d 1669, 80 S.Ct. 1437 (1960). Justice Clark, speaking for the majority in Mapp vs. Ohio, 367 U.S. 643, 659, 6 L.Ed.2d 1081, 81 S.Ct. 1684 (1961), stated that "Nothing can destroy a government more quickly than its failure to observe its own laws, or worse, its disregard of the charter of its own existence."

The courts themselves have thus been called upon by the Supreme Court to preserve the integrity of the administration of justice. If the evidence employed to convict an accused person has been illegally obtained, it is the courts and the

integrity of those courts which necessarily must suffer. Therefore, the duty to preserve this integrity is placed in the hands of the trial judge. The courts have been thrust into a protective role in order to safeguard the conduct of the proceedings before them and to thereupon guarantee that the constitutional rights of the accused have not been transgressed.

One particular mode of police conduct, however, has heretofore escaped categorization as a possible infringement on the constitutional rights of the accused and has been left to regulation by laymen. The defense of entrapment has been decided by the Supreme Court to be an issue best left to the province of the jury, and its existence has been explained as being a product of statutory interpretation. Sorrells vs. United States, 287 U.S. 435, 77 L.Ed. 413, 53 S.Ct. 210 (1932); Sherman vs. United States, 356 U.S. 369, 2 L.Ed.2d 848, 78 S.Ct. 819 (1958); Masciale vs. United States, 356 U.S. 386, 2 L.Ed.2d 859, 78 S.Ct. 827, reh. den. 357 U.S. 933, 2 L.Ed.2d 1375, 78 S.Ct. 1367 (1958). The Court in Sorrells held that it was not the intention of Congress to punish otherwise innocent persons for the commission of acts instigated by government officials, notwithstanding the fact that the acts performed by the defendant constituted a crime. 287 U.S. at 448. The Court in Sherman commented that this holding in Sorrells "firmly recognized the defense of entrapment in the federal courts." 356 U.S. at 372.

It is thought here that the rationale embodied in the major-

ity opinions in the Sorrells, Sherman and Masciale Cases clearly overlooks the reasoning of the Court in its dealings with the exclusionary rule and with the supervisory power. It is readily apparent that the type of police conduct which is proscribed in Escobedo, Miranda, Wade, Mapp, Elkins or in any of the other leading decisions in this area is analogous to that conduct which is found to be opprobrious when entrapment is successful as a defense. Yet the Court in Sorrells, Sherman and Masciale rejected the contentions of the minority, led variously by Justices Roberts and Frankfurter, and left entrapment as an issue to be decided by the jury. But again it is readily apparent that the proper party on which to place the responsibility of protecting the integrity of the administration of justice is the trial judge and not the jury.

> As Mr. Justice Roberts convincingly urged in the Sorrells Case, such a judgment, aimed at blocking off areas of impermissible police conduct, is appropriate for the court and not the jury. 'The protection of its own functions and the preservation of the purity of its own temple belongs only to the court. It is the province of the court and of the court alone to protect itself and the government from such prostitution of the criminal law. The violation of the principles of justice by the entrapment of the unwary into crime should be dealt with by the court no matter by whom or at what stage of the proceedings the facts are brought to its attention.' 287 U.S. at 457 (separate opinion). Equally important is the consideration that a jury verdict, although it may settle the issue of entrapment in the particular case, cannot give significant guidance for official conduct for the future. Only the court, through the gradual evolution of explicit standards in accumulated precedents, can do this with the degree of certainty that the wise administration of criminal justice demands.

Sherman vs. United States, supra, 356 U.S. at 385 (dissenting

opinion of Justice Frankfurter). See also McNabb vs. United States, 318 U.S. 332, 340, 87 L.Ed. 819, 63 S.Ct. 608 (1943); Mallory vs. United States, 354 U.S. 449, 1 L.Ed.2d 1479, 77 S.Ct. 1356 (1957); and Rules 5(a) and 41(e), Federal Rules of Criminal Procedure.

This responsibility would more adequately be borne by the trial judge rather than by the jury since the judge, drawing from his expertise and experience, would be less apt to be swayed in his judgment of the police conduct, than would the jury, by the introduction of evidence of the defendant's character or of his prior convictions. In his dissent in the Sherman Case, Justice Frankfurter commented on the prejudice that would result to the defendant with prior convictions who raises the defense of entrapment.

> The defendant must either forego the claim of entrapment or run the substantial risk that, in spite of instructions, the jury will allow a criminal record or bad reputation to weigh in its determination of guilt of the specific offense of which he stands charged. Furthermore, a test that looks to the character and predisposition of the defendant rather than the conduct of the police loses sight of the underlying reasons for the defense of entrapment.

356 U.S. at 382. And in speaking of the federal supervisory power, the Court in Nardone vs. United States, 308 U.S. 338, 342, 84 L.Ed. 307, 60 S.Ct. 266 (1939) stated that

> The civilized conduct of criminal trials cannot be confined within mechanical rules. It necessarily demands the authority of limited discretion entrusted to the judge presiding in federal trials, including a well-established range of judicial discretion, subject to appropriate review on appeal, in ruling upon preliminary questions of fact. Such a system as ours must, within the limits here

indicated, rely on the learning, good sense, fairness and courage of federal trial judges.

What would therefore result if the issue of entrapment is kept from the province of the jury would be a more perceptive examination of police conduct ~~that~~ which has allegedly exceeded reasonable limits. What would also result would be the formulation of standards, emanating from the trial courts, by which the police could gauge and limit their conduct. This process of gauging and limitation would be compelled to be effective, since the prosecution would no longer be guaranteed of reaching the jury and of having those twelve persons determine if the police acted unreasonably-- a determination frequently colored by evidence that the defendant erred previously, and a determination that is urged to draw the conclusion from that evidence that he has erred once again.

It is submitted that the constitutional basis for the defense of entrapment lies with the Due Process Clause of the Fifth and Fourteenth Amendments. The conduct of the police, when exceeding those limits which serve merely to afford an opportunity to commit a crime to one predisposed to commit that crime, and which thus tends to initiate the commission of that crime in the mind of the innocent, violates that sense of decency and fair play which the Due Process Clause guarantees. Bolling vs. Sharpe, 347 U.S. 497, 98 L.Ed. 884, 74 S.Ct. 693 (1954); Howard vs. United States, 372 F.2d 294 (9th Cir., 1967). See also Rochin vs. California, 342 U.S. 165, 96 L.Ed. 183, 72 S.Ct. 205 (1952); Lorraine vs. United States, 396 F.2d 335, 339

(9th Cir., 1968); Nolen vs. Wilson, 372 F.2d 15, 17 (9th Cir., 1967). In the Rochin Case the Court stated that

> Regard for the requirements of the Due Process Clause 'inescapably imposes upon this Court an exercise of judgment upon the whole course of the proceedings (resulting in a conviction) in order to ascertain whether they offend those canons of decency and fairness which express the notions of justice of English-speaking peoples even toward those charged with the most heinous offenses.' Malinski vs. New York, 324 U.S. at 416, 417, 89 L.Ed. 1039, 65 S.Ct. 781. These standards of justice are not formulated anywhere as though they were specifics. Due process of law is a summarized constitutional guarantee of respect for those personal immunities which, as Mr. Justice Cardozo twice wrote for the Court, are 'so rooted in the traditions and conscience of our people as to be ranked as fundamental', Snyder vs. Massachusetts, 291 U.S. 97, 105, 78 L.Ed. 674, 677, 54 S.Ct. 330, 90 A.L.R. 575, or are 'implicit in the concept of ordered liberty.' Palko vs. Connecticut, 302 U.S. 319, 325, 82 L.Ed. 288, 292, 58 S.Ct. 149.

342 U.S. at 169. And in the same case the Court further stated that "It has long ceased to be true that due process of law is heedless of the means by which otherwise relevant and credible evidence is obtained." 342 U.S. at 172. It therefore follows that the trial judge and not the jury should be called upon to safeguard the constitutional right of the accused to be free from being "trapped" into the commission of a crime actually planned and initiated by the police.

In conclusion, comment is directed to the role that the jury will play now that the issue of entrapment has been taken from their hands. This role remains important only in those cases where entrapment is found not to have existed as a matter of law, for this is the only situation in which the case will

reach the jury. In the usual case, entrapment is raised as one of several defenses of the defendant who has pleaded not guilty to the offense charged. (See Sorrells vs. United States, supra, 287 U.S. 435, 452). If the trial judge finds no entrapment to have existed, the case thereupon proceeds before the jury with one less issue being contested. In the unusual case, where entrapment is raised as the sole defense, the jury would be called upon to determine whether or not the defendant committed the acts which constituted the crime--acts which he necessarily admitted performing by raising the defense of entrapment. This apparent paradox, however, finds a direct analogy with those cases in which the admissability of an allegedly coerced confession is in issue: if the trial judge finds as a matter of law that the confession was not coerced, the jury is then called upon to determine if the defendant committed the acts which constitute the crime, and of course, the confession is admissable as evidence against him. See Culombe vs. Connecticut, 367 U.S. 568, 6 L.Ed.2d 1037, 81 S.Ct. 1860 (1961); Miranda vs. Arizona, 384 U.S. 436, 16 L.Ed.2d 694, 86 S.Ct. 1602 (1966).

**MEMO TO:** **Advisory Committee on Criminal Rules**

**FROM:** **Dave Schlueter, Reporter**

**RE:** **Rule 16(a)(1); Proposed Addition of Provision Governing Disclosure of Government Witnesses**

**DATE:** **March 15, 1993**

At its meeting in October 1992, the Committee discussed again the issue of amending Rule 16 to require the Government to disclose to the defense the names of its witnesses (Minutes, pp. 6-7). Following discussion of the issue, Professor Saltzburg and Mr. Bill Wilson agreed to work on suggested language to accomplish that change.

Attached is a copy of their cooperative efforts. Please note that I have taken the liberty of changing the new paragraph from (E) to (F). The Supreme Court is currently considering a proposed amendment to Rule 16 -- the addition of Rule 16(a)(1)(A) which deals with disclosure of experts, etc.

This item will be on the agenda for the April meeting.

**GEORGE WASHINGTON UNIVERSITY**
**NATIONAL LAW CENTER**
**720 20th St., N.W.**
**Washington, D.C. 20052**



February 10, 1993

The Honorable Terrell Hodges
United States District Judge
U.S. Courthouse
Suite 512
311 West Monroe Street
Jacksonville, FL 32202

Re: Agenda for Criminal Rules Committee

Dear Judge Hodges:

As I agreed to do at the last meeting of the Criminal Rules Committee, I served as the drafter for Bill Wilson, as he worked to propose an amendment to Fed. R. Crim. P. 16. He is now satisfied with the draft that we have. Thus, at his request, I forward his proposal to you with the request that we make this an important issue on the agenda in April. For what it is worth, I think that the proposal is workable and makes an important first step toward discovery reform without compromising any legitimate prosecutorial interest.

I trust that you are well, and I look forward to seeing you in just two months.

Sincerely,

Stephen A. Saltzburg
Howrey Professor of Trial Advocacy,
Litigation and Professional Responsibility

cc: Wm. Wilson

Proposed Amendment to Fed. R. Crim. P. 16 (a) (1)

**ADD THE FOLLOWING SUBSECTION:**

(F)(E) STATEMENTS OF WITNESSES. Upon request of the defendant, made no later than four (4) weeks prior to trial, the government, no later than one (1) week before trial, (i) must disclose to the defendant the names of prospective government witnesses and make available for copying any statements of these witnesses as defined in Rule 26.2 (f), and (ii) with respect to any statements which the government intends to offer pursuant to Fed. R. Evid. 801 (d)(2)(E), must disclose to the defendant and make available for copying statements as defined in Rule 26.2 and a summary of the substance of any other such statements, provided that the information covered by this subdivision is within the possession, custody, or control of the government, the existence of which is known, or by the exercise of due diligence may become known, to the attorney for the government. In the event, however, that the government has a good faith belief that pretrial disclosure of some or all of this information will pose a threat to the safety of witnesses or of obstruction of justice, the attorney for the government may submit to the Court ex parte and under seal all names, statements and summaries covered by this subdivision with a statement setting forth the reasons why the government believes in good faith that the evidence cannot be safely disclosed prior to trial. The Court must keep any ex parte submission by the government under seal until the conclusion of the trial at which time the Court must make the portions of the submission that are

relevant to the testimony of any government witness or to statements admitted pursuant to Fed. R. Evid. 801 (d)(2)(E) a part of the public record. The Court may review whether the government failed to comply with this subdivision by failing either to disclose names, statements or summaries to the defendant or to submit them to the Court ex parte and under seal, but the Court may not review the sufficiency of the reasons provided in an ex parte submission by the government under seal.

**AMEND SUBSECTION (a) (2) AS FOLLOWS:**

(2) Information Not Subject to Disclosure. Except as provided in paragraphs (A), (B), [and] (D), ~~and~~ (E) and (F) of subdivision (a)(1), this rule does not authorize the discovery of inspection of reports, memoranda, or other internal government documents made by the attorney for the government or other government agents in connection with the investigation or prosecution of the case[,]. [or of statements made by government witnesses or prospective government witnesses excepts as provided in 18 u.S.C. }3500.]

**Advisory Committee's Note**

No subject has engendered more controversy in the Advisory Committee over many years than discovery. In 1974, the Supreme Court approved an amendment to Rule 16 that would have provided a defendant with names of witnesses, subject to the government's right to seek a protective order. But, Congress refused to approve the rule in the face of massive opposition by United States Attorneys throughout the country. In recent years, proposals have been made to the Advisory Committee to reconsider the rule approved by the Supreme Court. The opposition of the Department of Justice has remained constant, however, as it argued to the Committee that the threats of harm to witnesses and obstruction of justice have increased over the years as the penalties have risen for narcotics offenses, continuing criminal enterprises and other crimes.

The Advisory Committee shares this concern for the safety of witnesses. It also is concerned, however, with the practical

hardships defendants face in attempting to prepare for trial without adequate discovery. The Committee notes that the Federal Rules of Criminal Procedure already recognize the importance of discovery in situations in which the government might be unfairly surprised or disadvantaged without it -- e.g., Rule 12.1, Notice of Alibi; Rule 12.2, Notice of Insanity Defense or Expert Testimony of Defendant's Mental Condition; and Rule 12.3, Notice of Defense Based Upon Public Authority. The arguments against similar discovery for defendants are unpersuasive and ignore the fact that the defendant is presumed innocent and therefore is presumptively as much in need of information adequate to avoid surprise as is the government. The fact that the government bears the burden of proving all elements beyond a reasonable doubt is not an argument for denying a defendant adequate means for responding to government evidence in order to show that a reasonable doubt exists.

The Advisory Committee considered several different approaches to discovery on behalf of a defendant. In the end, it adopted a middle ground between complete disclosure and the existing Rule 16. Essentially, the Committee proposes that the government must disclose names of witnesses and their statements as well as recorded statements or a summary in lieu thereof of statements by alleged coconspirators unless the government submits, ex parte and under seal, to the Court written reasons why some or all of this evidence cannot safely be disclosed. This approach adopts an approach of presumptive disclosure that is used in a number of United States Attorneys offices. It recognizes the importance of discovery in all cases, but protects witnesses and evidence when the government has a good faith basis for fearing for the safety of either.

The requirement that the defendant request discovery under this subdivision at least four weeks prior to trial assures that the government will have sufficient time to respond to a defense request for discovery and that last minute discovery requests, which can serve to delay trials or disrupt the government's preparation for trial, will be foreclosed. The provision that the government need not provide the discovery required by the amendment until one week before trial should eliminate some concern about the safety of witnesses and some fears about possible obstruction of justice. But, this provision effectively makes reciprocal discovery impossible. A defendant cannot reasonably be expected to provide names of witnesses or statements until the defense has an opportunity to examine the names of witnesses, their statements and the summaries of coconspirator statements which the government will provide. Since the government need not disclose until one week before trial, the defense will need the week to prepare for the government's case and cannot reasonably be expected to announce the names of witnesses or to disclose their statements before the trial begins. Although the absence of reciprocity may appear at first blush to lack symmetry, the Advisory Committee believes that the amendment in fact will promote symmetry in the rules. The

government already receives notification pursuant to Rules 12.1, 12.2 and 12.3 with respect to the defenses that would otherwise pose a risk of surprise, and the government has the exclusive right to offer statements under Fed. R. Evid. 801 (d)(2)(E). In providing for enhanced discovery for the defense, the Advisory Committee believes that the danger of unfair surprise to the defense will be reduced in many cases and that trials in these cases will be fairer.

The Advisory Committee regards this amendment to Rule 16 as a reasonable step forward and as a rule which must be carefully monitored. The Advisory Committee does not preclude a further amendment to Rule 16 to deal with problems that might arise or to recognize the invalidity of one or more of the four assumptions upon which the amendment rests. The four assumptions are the following: (1) the government will act in good faith, and there will be cases in which the government will have a good faith belief as to danger without "hard" evidence to prove the actual existence of danger; (2) in many cases judges will not be in a better position than the government to gauge potential danger to witnesses; (3) post-trial litigation as to the sufficiency of government reasons in every case of an ex parte submission under seal would result in an unacceptable drain on judicial resources; and (4) post-trial disclosure of the relevant portions of the government's submission will permit defense lawyers and the judiciary to assess the extent to which the government is avoiding discovery and the legitimacy of the reasons proffered by the government.

In requiring that relevant portions of an ex parte submission by the government be kept under seal only until a trial ends and then made public, the Advisory Committee intends to provide a mechanism for scrutiny by the judiciary, defendants and their counsel, and the public of the number and type of instances in which the government professes to be concerned for the safety of witnesses or evidence. The Advisory Committee provides in its amended rule that the Court may not review the sufficiency of the reasons provided by the government in any given case; it may only review whether the government either provided the defendant with the required discovery or made the required submission. The Committee's intent is to assure that in camera submissions under seal do not become a subject of satellite litigation in every case in which they are made. It is true that the amendment provides an opportunity for the government to keep secret the information covered by subdivision (E) even though it lacks a good reason for doing so in an individual case. The Advisory Committee recognizes this possibility but is not prepared to believe that government bad faith is certain to be a problem. The Committee is certain, however, that it would require an investment of vast judicial resources to permit post-trial review of all submissions. Thus, the amendment provides for no review of government submissions in individual cases. No defendant will be worse off under the amended

rule than under the current version of Rule 16, since the current version of Rule 16 allows the government to keep secret the information covered by the amended rule whether or not it has a good faith reason for doing so in any individual case. Moreover, this Note establishes that the Advisory Committee has not precluded a further amendment to Rule 16 to deal with future problems.

AGENDA II-C-5
Washington, DC
April 22-23, 1993

**MEMO TO: Advisory Committee on Criminal Rules**

**FROM: Dave Schlueter, Reporter**

**RE: Rule 24(b); Proposal to Save Court Costs by Reducing the Number of Peremptory Challenges**

**DATE: March 12, 1993**

For your information, I am attaching letters concerning a proposal to save court expense by reducing the number of peremptory challenges under Rule 24(b). The Advisory Committee's proposal to do so was unanimously rejected by the Standing Committee at its February 1991 meeting -- after publication and public comment. If any member is interested in reviewing the large amount of materials generated by that proposal in 1990-1991, I will be happy to make copies available.

On a related matter, the attached letters also indicate that Senator Heflin will again introduce his bills limiting judge-conducted voir dire in federal courts.

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



December 21, 1992

Honorable Maurice M. Paul
United States District Court
United States Courthouse
110 East Park Avenue
Tallahassee, Florida 32301

Dear Judge Paul:

I have received a copy of your response to the request of the Executive Committee's chairman, Chief Judge John F. Gerry, for suggested cost-saving measures. Among your suggestions, you recommend that the number of peremptory challenges authorized under Rule 24(b) of the Federal Rules of Criminal Procedure be reduced.

I have forwarded your letter to the chairman of the Advisory Committee on Criminal Rules for the committee's consideration.

We appreciate your interest in the rulemaking process.

Sincerely,

Peter G. McCabe
Secretary

cc: Honorable Robert E. Keeton
Honorable William Terrell Hodges
Professor David Schlueter
William Wilson

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



December 21, 1992

James R. Rosenbaum, Clerk
United States District Court
200 U.S. Courthouse
107 E. Walnut Street
Des Moines, Iowa 50309-2084

Dear Mr. Rosenbaum:

I have received a copy of your letter to Director L. Ralph Mecham on suggested cost-saving measures for the judiciary. Among your suggestions, you recommend that the number of peremptory challenges authorized under Rule 24(b) of the Federal Rules of Criminal Procedure be reduced.

I have forwarded your letter to the chairman of the Advisory Committee on Criminal Rules for the committee's consideration.

We appreciate your interest in the rulemaking process.

Sincerely,

Peter G. McCabe
Secretary

cc: Honorable Robert E. Keeton
Honorable William Terrell Hodges
Professor David Schlueter
William Wilson

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

ROBERT E. KEETON
CHAIRMAN

PETER G. McCABE
SECRETARY

CHAIRMEN OF ADVISORY COMMITTEES
KENNETH F. RIPPLE
APPELLATE RULES

SAM C. POINTER, JR.
CIVIL RULES

WILLIAM TERRELL HODGES
CRIMINAL RULES

EDWARD LEAVY
BANKRUPTCY RULES

January 5, 1993

Mr. Robert E. Feidler
Office of Legislative & Public Affairs
Administrative Office of the
United States Courts
Washington, DC 20544

Dear Mr. Feidler:

The Advisory Committee on the Federal Rules of Criminal Procedure has, from time to time, considered suggested amendments to Rule 24(b) of the Federal Rules of Criminal Procedure reducing and equalizing the number of peremptory challenges available to the parties in selecting a jury in a criminal case. Because of renewed suggestions from some members of the judiciary, this subject will be on the Advisory Committee's agenda and will be debated again at our spring meeting.

Inevitably, any discussion of a possible amendment to Rule 24(b) also turns the attention of the debaters to Rule 24(a) and the question of how the voir dire examination is conducted, i.e., should the lawyers be given a right to participate directly in such examination. I am aware, of course, that this issue has been the subject of legislation proposed from time to time during the last several sessions of Congress by Senator Heflin. As April approaches, I would appreciate any information you might supply concerning current congressional activity on that score in order that I might inform the members of the Advisory Committee when we reach the matter of Rule 24(b).

Thank you in advance for your consideration and attention.

Very truly yours,

Wm. Terrell Hodges

c: Mr. David N. Adair, Jr.
Professor David A. Schlueter

L. RALPH MECHAM
DIRECTOR

JAMES E. MACKLIN, JR.
DEPUTY DIRECTOR

ADMINISTRATIVE OFFICE OF THE
UNITED STATES COURTS

WASHINGTON, D.C. 20544

ROBERT E. FEIDLER
LEGISLATIVE AND PUBLIC
AFFAIRS OFFICER

February 1, 1993

Honorable William Terrell Hodges
United States District Court
Suite 108
Tampa, Florida 33602-4511

Dear Judge Hodges:

Bob Feidler asked me to respond to your letter of January 5, regarding the prospects in the 103rd Congress for legislation dealing with the way voir dire is conducted. As you noted Senator Heflin has been the proponent of such legislation in the past.

I spoke with Matt Pappas, Counsel to Senator Heflin on the Committee on Courts and Administrative Practice, yesterday and he indicated that Senator Heflin would reintroduce his two voir dire bills sometime in the 103rd Congress. It did not sound like the bills would be introduced immediately. As soon as they are introduced I will let you know.

Please feel free to call me if you have any questions regarding the prospects for this legislation.

Sincerely,

Arthur E. White
Deputy Legislative and
Public Affairs Officer

cc: Mr. Robert Feidler
Mr. David Adair, Jr.
Professor A. Schlueter

AGENDA II-C-6
Washington, DC
April 22-23, 1993

**MEMO TO: Advisory Committee on Criminal Rules**

**FROM: Dave Schlueter, Reporter**

**RE: DOJ Proposal to Amend Rule 43(b) to Permit Court to Sentence an Absent Defendant**

**DATE: March 12, 1993**

Attached are materials relating to a proposal from the Department of Justice suggesting an amendment to Rule 43(b). The amendment would provide for *in absentia* sentencing. The initial proposal was included in a July 1992 letter from Mr. Robert S. Mueller, III to Judge Hodges which is attached.

The Committee discussed the proposal at its Seattle meeting last Octboer but deferred action pending the outcome of several cases before the Supreme Court: *Crosby v. United States* and *Ortega-Rodriguez v. United States*. Those cases have now been decided (the latter case on March 8th) and the Justice Department has asked the Committee to again consider an amendment.

Copies of the two opinions () and correspondence concerning the amendment are attached. Please note that Mr. Roger Pauley included proposed language for an amendment in his letter of March 3, 1993 to Judge Hodges.

U. S. Department of Justice

*Criminal Division*

*Washington, D.C. 20530*

March 3, 1993

Honorable William Terrell Hodges
Chairman
Advisory Committee on Criminal Rules
P.O. Box 1620
Jacksonville, Florida 32201-1620

Dear Judge Hodges:

I am writing in regard to the agenda for the upcoming April meeting of the Advisory Committee on Criminal Rules and in particular the Department's prior proposal to amend Rule 43 to permit sentencing of a fugitive defendant. As you may recall, after some discussion at the last meeting the Committee determined to defer consideration of this proposal until after the Supreme Court rules on a pending case (Ortega-Rodriguez v. United States, No. 91-7749), which involves the question whether a court of appeals has authority to dismiss the appeal of a defendant who flees following his conviction.

As of this date, the Court has not decided Ortega-Rodriguez. However, since the case was argued on December 7, 1992, there is a reasonable chance the Court could render a decision before the Committee's April meeting. Because I recognize that the written agenda and materials for the April meeting must be prepared and disseminated significantly in advance thereof, I request that you include in it the Rule 43 issue, contingent upon the Supreme Court's having issued an opinion in Ortega-Rodriguez. Given the length of time involved in the Rule-making process, I am reluctant to postpone the Rule 43 matter to the next meeting, assuming the Court were to decide Ortega-Rodriguez a week or two before the April meeting date. All the Committee members (except the new ones) are already familiar with the proposal (and it is in any event not unusually complicated) so placing it on the agenda on a contingency basis should not pose an undue burden.

With respect to the proposal itself, Judge Jensen at the last meeting expressed the view that the amendment as then drafted by the Department might be subject to the unintended interpretation that it would only apply to a defendant who

absented himself during trial and not to one who was present throughout the trial and only became a fugitive after verdict.

To remedy this potential flaw, I have redrafted the amendment. The new formulation, which hopefully accomplishes the original goal in an unambiguous manner, is as follows: [1]

(b) Continued Presence Not Required. The further progress of the trial to and including the return of the verdict, and the imposition of sentence, shall not be prevented and the defendant shall be considered to have waived the right to be present whenever a defendant, initially present at trial,

(1) [same except "or" at the end is deleted]

(2) in a non-capital case, is voluntarily absent at the imposition of sentence, or

(3) [same as existing (2)].

Sincerely,

Roger A. Pauley

Roger A. Pauley, Director
Office of Legislation

cc: Professor David Schlueter

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[1] On a separate, quasi-technical note, in looking again at Rule 43 I observed that subdivision (c) states that a "corporation" may appear for all purposes through counsel. Presumably, the word "corporation", should be broadened to include any entity, i.e., an "organization" as defined in 18 U.S.C. 18. The Committee recently adopted a similar amendment to Rule 16(a), which is pending.

U. S. Department of Justice

*Criminal Division*

*Washington, D.C. 20530*

March 9, 1993

Honorable William Terrell Hodges
Chairman
Advisory Committee on Criminal Rules
P.O. Box 1620
Jacksonville, Florida 32201-1620

Dear Judge Hodges:

After seeing you yesterday at the Judges Working Group meeting, I returned to my office to find that the Supreme Court had, that day, decided Ortega-Rodriguez v. United States (No. 91-7749), the case for which the Advisory Committee postponed consideration of the Department of Justice's proposal to amend Rule 43, F.R. Crim.P., to allow sentencing of fugitive defendants at the last meeting. Accordingly, it is now appropriate to include the Rule 43 matter on the April 22, 1993, agenda of the Committee.

To the extent that Ortega-Rodriguez is relevant to the merits of the Department's proposal, it clearly supports the suggested change. The Court held, 5-4, that a defendant who flees before invoking the appellate process can not automatically be subject to a rule causing that defendant to forfeit his appellate right. However, the Court majority noted circumstances in which, even in these circumstances, the defendant's flight could result in his loss of the right to appeal. Moreover, the majority reaffirmed prior holdings that a defendant who flees after having taken an appeal does permanently lose the right to have his appeal considered.[1] The dissenting justices would have applied that rule also to the situation at bar, where the defendant fled before an appeal was filed. Interestingly, the facts in Ortega-Rodriguez involved an initial sentencing of the defendant in absentia after his flight, a factor which the Court noted but of whose propriety it expressed no view. See footnote 9.

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[1]Our proposal, of course, only concerns the right to be present at sentencing; under Ortega-Rodriguez, it might be permissible to go further and deny a fugitive defendant even the opportunity through counsel to participate in the sentencing process.

I am enclosing a copy of the opinion for your convenience and look forward to seeing you and the other Committee members on April 22.

Sincerely,

Roger A. Pauley, Director
Office of Legislation
Criminal Division

Enclosure

cc: Professor David Schlueter

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Lumber Co.*, 200 U. S. 321, 337.

# SUPREME COURT OF THE UNITED STATES

Syllabus

## ORTEGA-RODRIGUEZ *v.* UNITED STATES

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 91–7749. Argued December 7, 1992—Decided March 8, 1993

In *United States* v. *Holmes*, 680 F. 2d 1372, 1373, the Court of Appeals held that "a defendant who flees after conviction, but before sentencing, waives his right to appeal from the conviction unless he can establish that his absence was due to matters completely beyond his control." Relying on that authority, and without further explanation, the court issued a *per curiam* order dismissing the appeal of petitioner, who failed to appear for sentencing following his conviction on federal narcotics charges, but was recaptured before he filed his appeal.

*Held:* When a defendant's flight and recapture occur before appeal, the defendant's former fugitive status may well lack the kind of connection to the appellate process that would justify an appellate sanction of dismissal. Pp. 5–18.

(a) This Court's settled rule that dismissal is an appropriate sanction when a convicted defendant is a fugitive during "the ongoing appellate process," see *Estelle* v. *Dorrough*, 420 U. S. 534, 542, n. 11, is amply supported by a number of justifications, including concerns about the enforceability of the appellate court's judgment against the fugitive, see, *e.g.*, *Smith* v. *United States*, 94 U. S. 97; the belief that flight disentitles the fugitive to relief, see *Molinaro* v. *New Jersey*, 396 U. S. 365, 366; the desire to promote the "efficient . . . operation" of the appellate process and to protect the "digni[ty]" of the appellate court, see *Estelle*, 420 U. S., at 537; and the view that the threat of dismissal deters escapes, see *ibid.* Pp. 5–8.

(b) The foregoing rationales do not support a rule of dismissal for all appeals filed by former fugitives who are returned to custody before they invoke the jurisdiction of the appellate tribunal. These justifications all assume some connection between the defendant's

Syllabus

fugitive status and the appellate process, sufficient to make an appellate sanction a reasonable response. When both flight and recapture occur while a case is pending before the district court, the justifications are necessarily attenuated and often will not apply. Pp. 8–15.

(c) This Court does not hold that a court of appeals is entirely without authority to dismiss an appeal because of fugitive status predating the appeal, since it is possible that some actions by a defendant, though they occur while his case is before the district court, might have an impact on the appellate process sufficient to warrant an appellate sanction. As this case reaches the Court, however, there is no indication in the record that the Court of Appeals made such a judgment under the standard here announced. Application of the *Holmes* rule, as formulated by the lower court thus far, does not require the kind of connection between fugitivity and the appellate process that is necessary; instead it may rest on nothing more than the faulty premise that any act of judicial defiance, whether or not it affects the appellate process, is punishable by appellate dismissal. Pp. 15–18.

Vacated and remanded.

STEVENS, J., delivered the opinion of the Court, in which BLACKMUN, SCALIA, KENNEDY, and SOUTER, JJ., joined. REHNQUIST, C. J., filed a dissenting opinion, in which WHITE, O'CONNOR, and THOMAS, JJ., joined.

# SUPREME COURT OF THE UNITED STATES

No. 91–7749

## JOSE ANTONIO ORTEGA-RODRIGUEZ, PETITIONER *v.* UNITED STATES

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

[March 8, 1993]

JUSTICE STEVENS delivered the opinion of the Court.

In *United States* v. *Holmes*, 680 F. 2d 1372, 1373 (1982), cert. denied, 460 U. S. 1015 (1983), the Court of Appeals for the Eleventh Circuit held that "a defendant who flees after conviction, but before sentencing, waives his right to appeal from the conviction unless he can establish that his absence was due to matters completely beyond his control." Relying on that authority, and without further explanation, the court dismissed petitioner's appeal.[1] Because we have not previously considered whether a defendant may be deemed to forfeit his right to appeal by fleeing while his case is pending in the district court, though he is recaptured before sentencing and appeal, we granted certiorari. 504 U. S. ___ (1992).

I

In the early evening of November 7, 1988, a Customs

[1]The Court of Appeals order merely stated that the Government's "motion to dismiss is GRANTED," without actually citing *Holmes*. App. 78. Because the Government's motion to dismiss, *id.*, at 68–71, relied entirely on *Holmes* and on *United States* v. *London*, 723 F. 2d 1538 (CA 11), cert. denied, 467 U. S. 1228 (1984), which followed *Holmes*, we construe the Court of Appeals order as a routine application of the *Holmes* rule.

Service pilot was patrolling the Cay Sal Bank area, located midway between Cuba and the Florida Keys. Approximately 30 miles southwest of Cay Sal, the pilot observed a low-flying aircraft circling over a white boat and dropping bales. The boat, described by the pilot as 40 to 50 feet in length, was circling with the plane and retrieving the bales from the water as they dropped. Because the Customs Service plane was flying at an altitude of 2,500 feet, and visibility was less than optimal, the pilot was unable to identify the name of the boat. *United States* v. *Mieres-Borges*, 919 F. 2d 652, 654–655 (CA11 1990), cert. denied, 499 U. S. ___ (1991); Report and Recommendation in *United States* v. *Ortega-Rodriguez*, No. 88–10035–CR-KING (SD Fla., Feb. 23, 1989).

The following morning, another Customs Service pilot found the *Wilfred*, a boat resembling the one spotted approximately 12 hours earlier. This boat, located just off the beach of Cay Sal, was described as a 30– to 40–foot sport-fishing vessel. Upon making this discovery, the pilot first flew to the drop point identified the night before, 30 miles away, and found no activity. Returning to Cay Sal, he found a number of bales stacked on the beach, and the *Wilfred* underway and headed toward Cuba.

The pilot alerted the captain of a Coast Guard cutter, who intercepted, boarded, and searched the Wilfred. He found no narcotics, weapons, or other incriminating evidence on the boat. Nevertheless, the three members of the crew failed to convince the Coast Guard that they were fishing for dolphin, although a large number of similar vessels frequently do so in the area. *Mieres-Borges*, 919 F. 2d, at 655–657, 659–660.

Petitioner is one of the three crew members arrested, tried, and convicted of possession with intent to distribute, and conspiring to possess with intent to distribute, over five kilograms of cocaine. After the trial, the District Court set June 15, 1989, as the date for sentencing. Petitioner did not appear and was sentenced *in absentia*

to a prison term of 19 years and 7 months, to be followed by 5 years of supervised release.[2] Though petitioner's codefendants appealed their convictions and sentences, no appeal from the judgment was filed on petitioner's behalf.

The District Court issued a warrant for petitioner's arrest, and 11 months later, on May 24, 1990, he was apprehended. Petitioner was indicted and found guilty of contempt of court[3] and failure to appear.[4] Pursuant to

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[2]No. 88–10035–CR-KING (SD Fla., June 23, 1989).

[3]Title 18 U. S. C. § 401(3) provides: "A court of the United States shall have power to punish by fine or imprisonment, at its discretion, such contempt of its authority, and none other, as . . . [d]isobedience or resistance to its lawful writ, process, order, rule, decree, or command."

[4]Title 18 U. S. C. § 3146 provides, in relevant part:

"(a) OFFENSE.—Whoever, having been released under this chapter knowingly—

"(1) fails to appear before a court as required by the conditions of release; or

"(2) fails to surrender for service of sentence pursuant to a court order; shall be punished as provided in subsection (b) of this section.

"(b) Punishment.—(1) The punishment for an offense under this section is—

"(A) if the person was released in connection with a charge of, or while awaiting sentence, surrender for service of sentence, or appeal or certiorari after conviction for—

"(i) an offense punishable by death, life imprisonment, or imprisonment for a term of 15 years or more, a fine under this title or imprisonment for not more than ten years, or both;

"(ii) an offense punishable by imprisonment for a term of five years or more, a fine under this title or imprisonment for not more than five years, or both;

"(iii) any other felony, a fine under this title or imprisonment for not more than two years, or both; or

"(iv) a misdemeanor, a fine under this chapter or imprisonment for not more than one year, or both; and

"(B) if the person was released for appearance as a material witness, a fine under this chapter or imprisonment for not more than one year, or both.

"(2) A term of imprisonment imposed under this section shall be consecutive to the sentence of imprisonment for any other offense.

the Sentencing Reform Act of 1984, 18 U. S. C. §3551 *et seq.*, the District Court imposed a prison sentence of 21 months, to be served after the completion of the sentence on the cocaine offenses and to be followed by a 3-year term of supervised release.[5]

While petitioner was under indictment after his arrest, the Court of Appeals disposed of his two codefendants' appeals. The court affirmed one conviction, but reversed the other because the evidence was insufficient to establish guilt beyond a reasonable doubt.[6] Also after petitioner was taken into custody, his attorney filed a "motion to vacate sentence and for resentencing," as well as a motion for judgment of acquittal. The District Court denied the latter but granted the former, vacating the judgment previously entered on the cocaine convictions.[7] The District Court then resentenced petitioner to a prison term of 15 years and 8 months, to be followed by a 5-year period of supervised release.[8] Petitioner filed a timely

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"(c) AFFIRMATIVE DEFENSE.—It is an affirmative defense to a prosecution under this section that uncontrollable circumstances prevented the person from appearing or surrendering, and that the person did not contribute to the creation of such circumstances in reckless disregard of the requirement to appear or surrender, and that the person appeared or surrendered as soon as such circumstances ceased to exist."

[5] App. 58–63.

[6] *United States* v. *Mieres-Borges*, 919 F. 2d 652 (CA 11 1990), cert. denied, 499 U. S. ___ (1991). The difference in dispositions is explained by a post-arrest statement admitted against only one defendant, 919 F. 2d., at 660–661, though the dissenting judge viewed the evidence as insufficient as to both appealing defendants, *id.*, at 663–664. Petitioner represents that he is situated identically to the codefendant whose conviction was reversed, with nothing in the record that would support a distinction between their cases. The Government does not take issue with that representation, but maintains that the evidence is sufficient to support all three convictions. Brief for United States 28, n. 7.

[7] App. 10.

[8] *Id.*, at 51–56.

appeal from that final judgment.[9]

On appeal, petitioner argued that the same insufficiency of the evidence rationale underlying reversal of his codefendant's conviction should apply in his case, because precisely the same evidence was admitted against the two defendants. Without addressing the merits of this contention, the Government moved to dismiss the appeal. The Government's motion was based entirely on the fact that petitioner had become a fugitive after his conviction and before his initial sentencing, so that "[u]nder the holding in *Holmes*, he cannot now challenge his 1989 conviction for conspiracy and possession with intent to distribute cocaine."[10] In a *per curiam* order, the Court of Appeals granted the motion to dismiss.

## II

It has been settled for well over a century that an appellate court may dismiss the appeal of a defendant who is a fugitive from justice during the pendency of his appeal. The Supreme Court applied this rule for the first time in *Smith* v. *United States*, 94 U. S. 97 (1876), to an escaped defendant who remained at large when his petition arose before the Court. Under these circumstances, the Court explained, there could be no assurance that any judgment it issued would prove enforceable. The Court concluded that it is "clearly within our discretion

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[9] *Id.*, at 57. This sequence of events makes petitioner's case somewhat unusual. Had the District Court denied petitioner's motion for resentencing, petitioner would have been barred by applicable time limits from appealing his initial sentence and judgment. Petitioner was able to file a timely appeal only because the District Court granted his motion to resentence. Entry of the second sentence and judgment, from which petitioner noticed his appeal, is treated as the relevant "sentencing" for purposes of this opinion. We have no occasion here to comment on the propriety of either the District Court's initial decision to sentence *in absentia*, or its subsequent decision to resentence.

[10] *Id.*, at 70–71.

to refuse to hear a criminal case in error, unless the convicted party, suing out the writ, is where he can be made to respond to any judgment we may render." *Ibid.* On two subsequent occasions, we gave the same rationale for dismissals based on the fugitive status of defendants while their cases were pending before our Court. *Bohanan* v. *Nebraska*, 125 U. S. 692 (1887); *Eisler* v. *United States*, 338 U. S. 189 (1949).[11]

Enforceability is not, however, the only explanation we have offered for the fugitive dismissal rule. In *Molinaro* v. *New Jersey*, 396 U. S. 365, 366 (1970), we identified an additional justification for dismissal of an escaped prisoner's pending appeal:

> "No persuasive reason exists why this Court should proceed to adjudicate the merits of a criminal case after the convicted defendant who has sought review escapes from the restraints placed upon him pursuant to the conviction. While such an escape does not strip the case of its character as an adjudicable case or controversy, we believe it disentitles the defendant to call upon the resources of the Court for determination of his claims."

As applied by this Court, then, the rule allowing dismissal of fugitives' appeals has rested in part on enforceability concerns, and in part on a "disentitlement" theory that construes a defendant's flight during the pendency of his appeal as tantamount to waiver or abandonment.

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[11] The dissenting Justices in *Eisler*, noting that the case was not rendered moot by Eisler's escape, believed that the Court should have exercised its discretion to decide the merits in light of the importance of the issue presented. See 338 U. S., at 194 (Murphy, J., dissenting); *id.*, at 195 (Jackson, J., dissenting). In *United States* v. *Sharpe*, 470 U. S. 675 (1985), despite the respondent's fugitive status, the Court declined to remand the case to the Court of Appeals with directions to dismiss, and proceeded to decide the merits. *Id.*, at 681, n. 2. See also *id.*, at 688 (BLACKMUN, J., concurring); *id.*, at 721–723 (STEVENS, J., dissenting).

That ensuring enforceability is not the sole rationale for fugitive dismissals is also evident from our review of state provisions regarding escaped prisoners' pending appeals. In *Allen* v. *Georgia*, 166 U. S. 138 (1897), we upheld not only a state court's dismissal of a fugitive's appeal, but also its refusal to reinstate the appeal after the defendant's recapture, when enforceability would no longer be at issue. We followed *Allen* in *Estelle* v. *Dorrough*, 420 U. S. 534 (1975), upholding the constitutionality of a Texas statute providing for automatic appellate dismissal when a defendant escapes during the pendency of his appeal, unless the defendant voluntarily returns within 10 days. Although the defendant in *Estelle* had been recaptured before his appeal was considered and dismissed, resolving any enforceability problems, there were, we held, other reasons for dismissal. Referring to our own dismissal in *Molinaro*, *supra*, we found that the state statute served "similar ends . . . . It discourages the felony of escape and encourages voluntary surrenders. It promotes the efficient, dignified operation of the Texas Court of Criminal Appeals." 420 U. S., at 537 (footnotes omitted).

*Estelle* went on to consider whether the Texas statute was irrational because it applied only to prisoners with appeals pending when they fled custody. Citing the "peculiar problems posed by escape of a prisoner during the ongoing appellate process," *id.*, at 542, n. 11, we concluded that it was not. The distinct concerns implicated by an escape pending appeal justified a special rule for such appeals:

> "Texas was free to deal more severely with those who simultaneously invoked the appellate process and escaped from its custody than with those who first escaped from its custody, returned, and then invoked the appellate process within the time permitted by law. While each class of prisoners sought to escape, the first did so in the very midst of their invocation of the appellate process, while the latter did so before

> returning to custody and commencing that process. If Texas is free to adopt a policy which deters escapes by prisoners, as all of our cases make clear that it is, it is likewise free to impose more severe sanctions on those whose escape is reasonably calculated to disrupt the very appellate process which they themselves have set in motion." *Id.*, at 541–542.

Thus, our cases consistently and unequivocally approve dismissal as an appropriate sanction when a prisoner is a fugitive during "the ongoing appellate process." Moreover, this rule is amply supported by a number of justifications. In addition to addressing the enforceability concerns identified in *Smith* v. *United States*, 94 U. S. 97 (1876), and *Bohanan* v. *Nebraska*, 125 U. S. 692 (1887), dismissal by an appellate court after a defendant has fled its jurisdiction serves an important deterrent function and advances an interest in efficient, dignified appellate practice. *Estelle*, 420 U. S., at 537. What remains for our consideration is whether the same rationales support a rule mandating dismissal of an appeal of a defendant who flees the jurisdiction of a district court, and is recaptured before he invokes the jurisdiction of the appellate tribunal.

## III

In 1982, the Government persuaded the Eleventh Circuit that our reasoning in *Molinaro* should be extended to the appeal of a "former fugitive," returned to custody prior to sentencing and notice of appeal.[12] The Court of

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[12] For present purposes, the time of sentencing and the time of appeal may be treated together, as the two dates normally must occur within 10 days of one another. See Fed. Rule App. Proc. 4(b); see also n. 9, *supra*; *Torres* v. *Oakland Scavenger Co.*, 487 U. S. 312, 314–315 (1988) (discussing mandatory nature of Rule 4 time limits). Cases in which a defendant flees during that 10–day interval will be resolved easily: if the defendant fails to file a timely appeal, his case concludes; if the defendant's attorney files an appeal for him in his absence, the appeal will be subject to

Appeals recognized in *Holmes* that all of the cases on which the Government relied were distinguishable, "because each involved a defendant who fled *after* filing a notice of appeal." 680 F. 2d, at 1373 (emphasis added). The court was satisfied, however, that the disentitlement rationale of *Molinaro* "is equally forceful whether the defendant flees before or after sentencing." 680 F. 2d, at 1374. The Eleventh Circuit also expressed concern that absent dismissal, the Government might be prejudiced by delays in proceedings resulting from presentencing escapes.[13]

The rule of *Holmes* differs from that applied in *Molinaro* in three key respects. First, of course, the *Holmes* rule reaches defendants who flee while their cases are before district courts, as well as those who flee while their appeals are pending. Second, the *Holmes* rule, unlike the rule of *Molinaro*, will not mandate dismissal of an entire appeal whenever it is invoked. As the Eleventh Circuit explained, because flight cannot fairly be construed as a waiver of appeal from errors occurring after recapture, defendants who flee presentencing retain their right to appeal *sentencing* errors, though they lose the right to appeal their *convictions*. 680 F. 2d, at 1373.[14] Finally,

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dismissal under straightforward application of *Smith* and *Molinaro*. Should a defendant flee after sentencing but return before appeal—in other words, should his period of fugitivity begin after sentencing and end less than 10 days later—then a timely filed appeal would be subject to the principles we apply today.

[13]The court reasoned that the right of appeal, purely a creature of statute, may be waived by failure to file a timely notice of appeal "or by abandonment through flight which may postpone filing the notice of appeal for years after conviction." *Holmes*, 680 F. 2d, at 1373–1374. The court then explained: "Such untimeliness would make a meaningful appeal impossible in many cases. In case of a reversal, the government would obviously be prejudiced in locating witnesses and retrying the case." *Id.*, at 1374.

[14]"We hold that a defendant who flees after conviction, but before

as announced in *Holmes* and applied in this case, the Eleventh Circuit rule appears to call for automatic dismissal, rather than an exercise of discretion. See n. 11, *supra*.

In our view, the rationales that supported dismissal in cases like *Molinaro* and *Estelle* should not be extended as far as the Eleventh Circuit has taken them. Our review of rules adopted by the courts of appeals in their supervisory capacity is limited in scope, but it does demand that such rules represent reasoned exercises of the courts' authority. See *Thomas* v. *Arn*, 474 U. S. 140, 146–148 (1985). Accordingly, the justifications we have advanced for allowing appellate courts to dismiss pending fugitive appeals all assume some connection between a defendant's fugitive status and the appellate process, sufficient to make an appellate sanction a reasonable response.[15] These justifications are necessarily attenuated when applied to a case in which both flight and recapture occur while the case is pending before the district court, so that a defendant's fugitive status at no time coincides with his appeal.

There is, for instance, no question but that dismissal of a former fugitive's appeal cannot be justified by reference to the enforceability concerns that animated *Smith* v. *United States*, 94 U. S. 97 (1876), and the cases that followed. A defendant returned to custody before he invokes the appellate process presents no risk of unenforceability;

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sentencing, waives his right to appeal from the conviction unless he can establish that his absence was due to matters completely beyond his control. *Such a defendant does not waive his right to appeal from any alleged errors connected to his sentencing.*" *Id.*, at 1373 (emphasis added).

[15] The reasonableness standard of *Thomas* v. *Arn*, 474 U. S. 140 (1985), is not, however, the only reason we require some connection between the appellate process and an appellate sanction. As the dissent notes, *post*, at 3, n. 2, Federal Rule of Appellate Procedure 47, which authorizes the promulgation of rules by the courts of appeals, limits that authority to rules "governing [the] practice" before those courts.

he is within control of the appellate court throughout the period of appeal and issuance of judgment. Cf. *United States* v. *Gordon*, 538 F. 2d 914, 915 (CA1 1976) (dismissing pending appeal of fugitive because it is "unlikely that [the] convicted party will respond to an unfavorable decision").

Similarly, in many cases, the "efficient . . . operation" of the appellate process, identified as an independent concern in *Estelle*, 420 U. S., at 537, will not be advanced by dismissal of appeals filed after former fugitives are recaptured. It is true that an escape may give rise to a "flurry of extraneous matters," requiring that a court divert its attention from the merits of the case before it. *United States* v. *Puzzanghera*, 820 F. 2d 25, 26 (CA1), cert. denied, 484 U. S. 900 (1987). The court put to this "additional trouble," 820 F. 2d, at 26, however, at least in the usual course of events, will be the court before which the case is pending at the time of escape. When an appeal is filed after recapture, the "flurry," along with any concomitant delay, likely will exhaust itself well before the appellate tribunal enters the picture.[16]

Nor does dismissal of appeals filed after recapture

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[16] This case well illustrates the way in which preappeal flight may delay district court, but not appellate court, proceedings. Petitioner's sentencing was scheduled for June 1989. Because he fled, however, and because the District Court resentenced him upon his return to custody, his final sentence was not entered until January 1991. *Supra*, at 3–4. Accordingly, petitioner's 11–month period of fugitivity delayed culmination of the *District* Court proceedings by as much as 19 months.

In the appellate court, on the other hand, the timing of proceedings was unaffected by petitioner's flight. Had petitioner filed his notice of appeal before he fled, of course, then the Court of Appeals might have been required to reschedule an already docketed appeal, causing some delay. But here, petitioner filed his notice of appeal only after he was returned to custody, and the Court of Appeals was therefore free to docket his case pursuant to its regular schedule and at its convenience. In short, a lapse of time that precedes invocation of the appellate process does not translate, by itself, into delay borne by the appellate court.

operate to protect the "digni[ty]" of an appellate court. Cf. *Estelle*, 420 U. S., at 537. It is often said that a fugitive "flouts" the authority of the court by escaping, and that dismissal is an appropriate sanction for this act of disrespect. See, *e.g.*, *United States* v. *DeValle*, 894 F. 2d 133, 138 (CA5 1990); *United States* v. *Persico*, 853 F. 2d 134, 137–138 (CA2 1988); *Ali* v. *Sims*, 788 F. 2d 954, 958–959 (CA3 1986); *United States* v. *London*, 723 F. 2d 1538, 1539 (CA11), cert. denied, 467 U. S. 1228 (1984). Indeed, the premise of *Molinaro*'s disentitlement theory is that "the fugitive from justice has demonstrated such disrespect for the legal processes that he has no right to call upon the court to adjudicate his claim." *Ali* v. *Sims*, 788 F. 2d, at 959; see *Molinaro*, 396 U. S., at 366. We have no reason here to question the proposition that an appellate court may employ dismissal as a sanction when a defendant's flight operates as an affront to the dignity of the court's proceedings.

The problem in this case, of course, is that petitioner, who fled before sentencing and was recaptured before appeal, flouted the authority of the District Court, not the Court of Appeals. The contemptuous disrespect manifested by his flight was directed at the District Court, before which his case was pending during the entirety of his fugitive period. Therefore, under the reasoning of the cases cited above, it is the District Court that has the authority to defend its own dignity, by sanctioning an act of defiance that occurred solely within its domain. See *United States* v. *Anagnos*, 853 F. 2d 1, 2 (CA1 1988) (declining to follow *Holmes* because former fugitive's "misconduct was in the district court, and should affect consequences in that court, not in ours").

We cannot accept an expansion of this reasoning that would allow an appellate court to sanction by dismissal any conduct that exhibited disrespect for any aspect of the judicial system, even where such conduct has no connection to the course of appellate proceedings. See *supra*, at

10, and n. 15. Such a rule would sweep far too broadly, permitting, for instance, this Court to dismiss a petition solely because the petitioner absconded for a day during district court proceedings, or even because the petitioner once violated a condition of parole or probation. None of our cases calls for such a result, and we decline today to adopt such an approach.[17] Accordingly, to the extent that the *Holmes* rule rests on the premise that *Molinaro*'s disentitlement theory by itself justifies dismissal of an appeal filed after a former fugitive is returned to custody, see 680 F. 2d, at 1374, it cannot be sustained.

Finally, *Estelle*'s deterrence rationale, 420 U. S., at 537, offers little support for the Eleventh Circuit rule. Once jurisdiction has vested in the appellate court, as in *Estelle*, then any deterrent to escape must flow from appellate consequences, and dismissal may be an appropriate sanction by which to deter. Until that time, however, the district court is quite capable of defending its own jurisdiction. While a case is pending before the district court, flight can be deterred with the threat of a wide range of penalties available to the district court judge. See *Katz* v. *United States*, 920 F. 2d 610, 613 (CA9 1990) (when defendant is before district court, "disentitlement doctrine does not stand alone as a deterrence to escape").

Moreover, should this deterrent prove ineffective, and a defendant flee while his case is before a district court,

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[17] Even the Eleventh Circuit, we note, seems unprepared to take such an extreme position. If appellate dismissal were indeed an appropriate sanction for all acts of judicial defiance, then there would be no reason to exempt sentencing errors from the scope of the *Holmes* rule. See 680 F. 2d, at 1373; *supra*, at 9. Whether or not *Holmes'* distinction between appeals from sentencing errors and appeals from convictions is logically supportable, see *United States* v. *Anagnos*, 853 F. 2d 1, 2 (CA1 1988) (questioning logic of distinction), it reflects an acknowledgement by the Eleventh Circuit that the sanction of appellate dismissal should not be wielded indiscriminately as an all-purpose weapon against defendant misconduct.

the district court is well situated to impose an appropriate punishment. While an appellate court has access only to the blunderbuss of dismissal, the district court can tailor a more finely calibrated response. Most obviously, because flight is a separate offense punishable under the Criminal Code, see nn. 3–4, *supra*, the district court can impose a separate sentence that adequately vindicates the public interest in deterring escape and safeguards the dignity of the court. In this case, for instance, the District Court concluded that a term of imprisonment of 21 months, followed by three years of supervised release, would serve these purposes.[18] If we assume that there is merit to petitioner's appeal, then the Eleventh Circuit's dismissal is tantamount to an additional punishment of 15 years for the same offense of flight. Cf. *United States* v. *Snow*, 748 F. 2d 928 (CA4 1984).[19] Our reasoning in *Molinaro* surely does not compel that result.

Indeed, as Justice Stewart noted in his dissenting opinion in *Estelle* v. *Dorrough*, 420 U. S., at 544–545, punishment by appellate dismissal introduces an element of arbitrariness and irrationality into sentencing for escape.[20] Use of the dismissal sanction as, in practical

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[18] See *supra*, at 3–4.

[19] "The Court is not condoning [defendant's] flight from justice. However, it presumes his actions constitute an independent crime, *i.e.*, 'escape from custody.' We refrain from punishing [defendant] twice by dismissing his appeal." *United States* v. *Snow*, 748 F. 2d, at 930, n. 3.

[20] "[T]he statute imposes totally irrational punishments upon those subject to its application. If an escaped felon has been convicted in violation of law, the loss of his right to appeal results in his serving a sentence that under law was erroneously imposed. If, on the other hand, his trial was free of reversible error, the loss of his right to appeal results in no punishment at all. And those whose appeals would have been reversed if their appeals had not been dismissed serve totally disparate sentences, dependent not upon he circumstances of their escape, but upon whatever sentences may have been meted out under their invalid convictions." *Estelle*, 420 U. S., at 544.

effect, a second punishment for a defendant's flight is almost certain to produce the kind of disparity in sentencing that the Sentencing Reform Act of 1984[21] and the Sentencing Guidelines were intended to eliminate.[22]

Accordingly, we conclude that while dismissal of an appeal pending while the defendant is a fugitive may serve substantial interests, the same interests do not support a rule of dismissal for all appeals filed by former fugitives, returned to custody before invocation of the appellate system. Absent some connection between a defendant's fugitive status and his appeal, as provided when a defendant is at large during "the ongoing appellate process," *Estelle*, 420 U. S., at 542, n. 11, the justifications advanced for dismissal of fugitives' pending appeals generally will not apply.

We do not ignore the possibility that some actions by a defendant, though they occur while his case is before the district court, might have an impact on the appellate process sufficient to warrant an appellate sanction. For that reason, we do not hold that a court of appeals is entirely without authority to dismiss an appeal because of fugitive status predating the appeal. For example, the Eleventh Circuit, in formulating the *Holmes* rule, expressed concern that a long escape, even if ended before sentencing and appeal, may so delay the onset of appellate proceedings that the Government would be prejudiced in

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[21] 18 U. S. C. § 3551, *et seq.*, 28 U. S. C. §§ 991–998.

[22] See generally *Mistretta* v. *United States*, 488 U. S. 361 (1989) (discussing purpose of Sentencing Reform Act and Sentencing Guidelines).

The dissent relies heavily on the legitimate interests in avoiding the "spectre of inconsistent judgments," as well as in preserving "precious appellate resources." *Post*, at 4. It must be remembered, however, that the reason appellate resources are precious is that they serve the purpose of administering evenhanded justice. In this case, it is the dissent's proposed disposition that would produce inconsistent judgments, as petitioner served a 15–year sentence while his codefendant's conviction was reversed for insufficiency of evidence.

locating witnesses and presenting evidence at retrial after a successful appeal. *Holmes*, 680 F. 2d, at 1374; see also *United States* v. *Persico*, 853 F. 2d, at 137. We recognize that this problem might, in some instances, make dismissal an appropriate response. In the class of appeals premised on insufficiency of the evidence, however, in which petitioner's appeal falls, retrial is not permitted in the event of reversal, and this type of prejudice to the Government will not serve as a rationale for dismissal.

Similarly, a defendant's misconduct at the district court level might somehow make "meaningful appeal impossible," *Holmes*, 680 F. 2d, at 1374, or otherwise disrupt the appellate process so that an appellate sanction is reasonably imposed. The appellate courts retain the authority to deal with such cases, or classes of cases,[23] as necessary. Here, for instance, petitioner's flight prevented the Court of Appeals from consolidating his appeal with those of his codefendants, which we assume would be its normal practice. See *United States* v. *Mieres-Borges*, 919 F. 2d, at 654, n. 1 (noting that petitioner is absent and not party to appeal). If the Eleventh Circuit deems this consequence of petitioner's flight a significant interference with the operation of its appellate process, then, under the

[23] We cannot agree with petitioner that the courts may only consider whether to dismiss the appeal of a former fugitive on an individual, case-specific basis. Though dismissal of fugitive appeals is always discretionary, in the sense that fugitivity does not "strip the case of its character as an adjudicable case or controversy," *Molinaro* v. *New Jersey*, 396 U. S. 365, 366 (1970); see also n. 11, *supra*, appellate courts may exercise that discretion by developing generally applicable rules to cover specific, recurring situations. Indeed, this Court itself has formulated a general rule allowing for dismissal of petitions that come before it while the petitioner is at large. See *Smith* v. *United States*, 94 U. S. 97 (1876). The problem with the *Holmes* rule is not that the appeals it reaches are subject to automatic dismissal, but that it reaches too many appeals—including those of defendants whose former fugitive status in no way affects the appellate proce

reasoning we employ today, a dismissal rule could properly be applied.

As this case reaches us, however, there is no reason to believe that the Eleventh Circuit has made such a judgment. Application of the *Holmes* rule, as formulated by the Eleventh Circuit thus far, does not require the kind of connection between fugitivity and the appellate process that we hold necessary today; instead, it may rest on nothing more than the faulty premise that any act of judicial defiance, whether or not it affects the appellate process, is punishable by appellate dismissal. See *Holmes*, 680 F. 2d, at 1374; *supra*, at 13. Accordingly, that the Eleventh Circuit saw fit to dismiss this case under *Holmes* does not by itself reflect a determination that dismissal would be appropriate under the narrower circumstances we now define.

Nor is there any indication in the record below—either in the Government's motion to dismiss, or in the Eleventh Circuit's *per curiam* order—that petitioner's former fugitivity was deemed to present an obstacle to orderly appellate review. Thus, we have no reason to assume that the Eleventh Circuit would consider the duplication of resources involved in hearing petitioner's appeal separately from those of his codefendants—which can of course be minimized by reliance on the earlier panel decision in *United States* v. *Mieres-Borges*, *supra*, at 4, and n. 6—sufficiently disruptive of the appellate process that dismissal would be a reasonable response, on the facts of this case and under the standard we announce today. We leave that determination to the Court of Appeals on remand.[24]

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[24] Neither the reasonableness standard of *Thomas* v. *Arn*, 474 U. S. 140 (1985), nor Federal Rule of Appellate Procedure 47, mandates uniformity among the circuits in their approach to fugitive dismissal rules. See *Thomas*, 474 U. S., at 157 (STEVENS, J., dissenting). In other words, so long as all circuit rules meet the threshold reasonableness requirement,

In short, when a defendant's flight and recapture occur before appeal, the defendant's former fugitive status may well lack the kind of connection to the appellate process that would justify an appellate sanction of dismissal. In such cases, fugitivity while a case is pending before a district court, like other contempts of court, is best sanctioned by the district court itself. The contempt for the appellate process manifested by flight while a case is pending on appeal remains subject to the rule of *Molinaro*.

The judgment of the Court of Appeals is vacated, and the case is remanded for further proceedings consistent with this opinion.

*So ordered.*

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in that they mandate dismissal only when fugitivity has some connection to the appellate process, they may vary considerably in their operation. For this additional reason, we hesitate to decide as a general matter whether and under what circumstances preappeal flight that leads to severance of codefendants' appeals will warrant appellate dismissal, and instead leave that question to the various courts of appeals.

# SUPREME COURT OF THE UNITED STATES

No. 91–7749

JOSE ANTONIO ORTEGA-RODRIGUEZ, PETITIONER
*v.* UNITED STATES

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

[March 8, 1993]

CHIEF JUSTICE REHNQUIST, with whom JUSTICE WHITE, JUSTICE O'CONNOR, and JUSTICE THOMAS join, dissenting.

The Court holds that, in general, a court of appeals may not dismiss an appeal based on a defendant's fugitive status if that status does not coincide with the pendency of the appeal. We disagree. The only difference between a defendant who absconds preappeal and one who absconds postappeal is that the former has filed a notice of appeal while the latter has not. This "distinction" is not strong enough to support the Court's holding, for there is as much of a chance that flight will disrupt the proper functioning of the appellate process if it occurs before the court of appeals obtains jurisdiction as there is if it occurs after the court of appeals obtains jurisdiction. As a consequence, there is no reason why the authority to dismiss an appeal should be based on the timing of a defendant's escape. Although we agree with the Court that there must be some "connection" between escape and the appellate process, we disagree with the conclusion that recapture before appeal generally breaks the connection.[1]

[1]The Court erroneously strikes the *Holmes* rule on the basis that "it reaches too many appeals," *ante*, at 16, n. 23, because there is no overbreadth doctrine applicable in this context. See *Broadrick* v. *Oklahoma*, 413 U. S. 601, 610–611 (1973) (overbreadth doctrine is the

It is beyond dispute that the courts of appeals have supervisory power to create and enforce "procedural rules governing the management of litigation." *Thomas* v. *Arn*, 474 U. S. 140, 146 (1985). The only limit on this authority is that the rules may not violate the Constitution or a statute, and must be reasonable in light of the concerns they are designed to address. See *id.*, at 146–148. There can be no argument that the fugitive dismissal rule employed by the Eleventh Circuit violates the Constitution because a convicted criminal has no constitutional right to an appeal. *Abney* v. *United States*, 431 U. S. 651, 656 (1977). Nor is the rule inconsistent with 28 U. S. C. § 1291, which grants to criminal defendants the right of appeal, because that section does not set forth the procedural requirements for perfecting an appeal. Those requirements are set forth in the Federal Rules of Appellate Procedure and the local rules of the courts of appeals. Indeed, under Federal Rule of Appellate Procedure 47, each court of appeals has authority to make rules "governing its practice" either through rule-making or adjudication.

The fugitive dismissal rule is reasonable in light of the interests it is designed to protect. In *Molinaro* v. *New Jersey*, 396 U. S. 365 (1970), we declined to adjudicate a defendant's case because he fled after appealing his state conviction. We reasoned that by absconding, the defendant forfeited his right to "call upon the resources of the Court for determination of his claims." *Id.*, at 366. And in *Estelle* v. *Dorrough*, 420 U. S. 534 (1975), we upheld a Texas statute that mandated dismissal of an appeal if

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exception rather than the rule because "courts are not roving commissions assigned to pass judgment on the validity of the Nation's laws"). As long as the fugitive dismissal rule was applied legally to the facts of this case, the Eleventh Circuit's rule cannot be struck down. It is for this reason that we would affirm the Eleventh Circuit rather than vacating and remanding.

the defendant fled after invoking the jurisdiction of the appellate court. We recognized that Texas reasonably has an interest in discouraging felony escape, encouraging voluntary surrenders, and promoting the "efficient, dignified operation of the Texas Court of Criminal Appeals." *Id.*, at 537. Both *Molinaro* and *Estelle* are premised on the idea that a reviewing court may invoke procedural rules to protect its jurisdiction and to ensure the orderly and efficient use of its limited resources.

While we agree with the Court that there must be some connection between fugitivity and the appellate process in order to justify a rule providing for dismissal on that basis, we do not agree that flight generally does not have the required connection simply because it occurs before the defendant or his counsel files a notice of appeal.[2] It is fallacious to suggest that a defendant's actions in fleeing likely will have no effect upon the appellate process unless those actions occur while the court of appeals has jurisdiction over the case. Indeed, flight during the pendency of an appeal may have *less* of an effect on the appellate process, especially in cases where the defendant flees and is recaptured while the appeal is pending. Because there is no delay between conviction and invocation of the appellate process, dismissal in such a case is premised on the mere *threat* to the proper operation of the appellate process. Yet the Court concedes, as it must, that courts of appeals may dismiss an

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[2]The very wording of Rule 47, which gives the appellate courts authority to create local procedural rules, supports the connection requirement: "Each court of appeals by action of a majority of the circuit judges in regular active service may from time to time make and amend rules *governing its practice* not inconsistent with these rules. In all cases not provided for by rule, the courts of appeals may regulate their practice in any manner not inconsistent with these rules." Fed. Rule App. Proc. 47 (emphasis added).

appeal in this situation. *Ante*, at 7–8; see *Allen* v. *Georgia*, 166 U. S. 138 (1897).

If, as in the present case, the defendant eventually is recaptured and resentenced, he obtains a second chance to challenge his conviction and sentence, and consequently delays the appellate process by at least the amount of time he managed to elude law enforcement authorities. We are startled by the Court's assertion that "any concomitant delay . . . likely will exhaust itself well before the appellate tribunal enters the picture." *Ante*, at 11. If the defendant obtains an additional opportunity to file a timely notice of appeal, the court of appeals, in the absence of a fugitive dismissal rule or any jurisdictional defect, *must* entertain the appeal. At the very least, the result is an increase in the court's docket and a blow to docket organization and predictability. This disruption to the management of the court's docketing procedures is qualitatively different from delay caused by other factors like settlement by the parties. Unlike the fugitive's case, the settled case will not turn up as an additional and unexpected case on the court's docket some time down the road. And of course, the burden of delay increases exponentially with the number of defendants who abscond preappeal, but are recaptured and invoke the appellate court's jurisdiction in a timely manner. The Court fails to explain how this obvious delay somehow disappears when the defendant is recaptured before invoking the appellate court's jurisdiction.

As is demonstrated by the instant case, the delay caused by preappeal flight can thwart the administration of justice by forcing a severance, requiring duplication of precious appellate resources, and raising the spectre of inconsistent judgments. Here, the appellate process was delayed by approximately 19 months (counting both the period of fugitivity and the time used by the District Court to resentence petitioner). During this delay, the Eleventh Circuit heard and decided the appeals filed by

petitioner's codefendants. *United States* v. *Mieres-Borges*, 919 F. 2d 652 (1990), cert. denied, 499 U. S. ___ (1991). Because petitioner fled, the Eleventh Circuit was unable to consolidate petitioner's appeal with those filed by his codefendants and conserve judicial resources. In addition to forcing a severance, petitioner's flight created a real possibility of inconsistent judgments. Petitioner's flight "imposed exactly the same burden of duplication on the court of appeals that it would have if he had filed his notice of appeal before absconding." Brief for United States 21. Had petitioner's counsel filed a notice of appeal on petitioner's behalf while he remained at large, the Court of Appeals could have dismissed the appeal with prejudice. See *Molinaro*, 396 U. S., at 366. Since petitioner's flight had an adverse effect on the proper functioning of the Eleventh Circuit's process, there is no principled reason why that court should not be able to dismiss petitioner's appeal.

In addition to administration, the Eleventh Circuit's fugitive dismissal rule is supported by an interest in deterring flight and encouraging voluntary surrender. Due to the adverse effects that flight, whenever it occurs, can have on the proper functioning of the appellate process, courts of appeals have an obvious interest in deterring escape and encouraging voluntary surrender. Unfortunately, today's opinion only encourages flight and discourages surrender. To a defendant deciding whether to flee before or after filing a notice of appeal, today's decision makes the choice simple. If the defendant flees preappeal and happens to get caught after the time for filing a notice of appeal has expired, he still has the opportunity for appellate review if he can persuade a district judge to resentence him. If the district judge refuses, the defendant is at no more of a disadvantage than he would have been had he escaped after filing an appeal since flight after appeal can automatically extinguish the right to appellate review. See *Molinaro, supra.*

A rule permitting dismissal when a defendant's flight interrupts the appellate process protects respect for the judicial system. When a defendant escapes, whether before or after lodging an appeal, he flouts the authority of the *judicial process*, of which the court of appeals is an integral part. Surely the Court does not mean to argue that a defendant who escapes during district court proceedings intends only disrespect for that tribunal. Quite obviously, a fleeing defendant has no intention of returning, at least voluntarily. His flight therefore demonstrates an equal amount of disrespect for the authority of the court of appeals as it does for the district court. Viewed in this light, the "finely calibrated response" available to the district court, *ante*, at 14, does nothing to vindicate the affront to the appellate process. The Court's argument is not enhanced by the use of far-fetched hypotheticals, see *ante*, at 13, because the dignity rationale does not exist in a vacuum. As outlined above, a reviewing court may not dismiss an appeal in the absence of some effect on its orderly functioning.

While the Court recognizes that the reasoning underlying the opinion requires an exception for cases in which flight throws a wrench into the proper workings of the appellate process, *ante*, at 15–18, its rule is too narrow. The Court limits the exception to cases in which flight creates a "significant interference with the operation of [the] appellate process." *Ante*, at 16. Translated, the rule applies preappeal only when retrial is hampered, a "'meaningful appeal [is] impossible'", or the case involves multiple defendants, thereby causing a forced severance. *Ante*, at 16–18. This grudging concession is insufficient because it fails to include those cases where sheer delay caused by the fugitivity of the lone defendant has an adverse effect on the appellate process.

In sum, courts of appeals have supervisory authority, both inherent and under Rule 47, to create and enforce procedural rules designed to promote the management of

their docket. Fugitivity dismissal rules are no exception. In cases where fugitivity obstructs the orderly workings of the appellate process, this authority is properly exercised. Because petitioner's flight delayed the appellate process by approximately 19 months, and involved the burden of duplication and the risk of inconsistent judgments, we would hold that the Eleventh Circuit properly applied its fugitive dismissal rule in this case.

The CRIMINAL LAW REPORTER

Text No. 9

January 13, 1993 THE BUREAU OF NATIONAL AFFAIRS, INC. Volume 52, No. 14

# OPINION OF THE U.S. SUPREME COURT

## SUMMARY

**FEDERAL COURTS — The federal procedural rule concerning a criminal defendant's presence at trial, Fed.R.Crim.P. 43, prohibits the trial in absentia of a defendant who is not present at the commencement of the trial.** (Crosby v. U.S., No. 91-6194, 1/13/93).....2068

In a unanimous decision, the U.S. Supreme Court held January 13 that, for purposes of trial in absentia, a defendant who absconds prior to trial is to be treated differently from one who absconds after commencement of trial. The express language of Fed.R.Crim.P.43 clearly indicates that trial in absentia is permissible only when the defendant becomes absent after trial has begun, the court declared in an opinion by Justice Blackmun. Because its reading of the rule disposed of the case, the court did not express an opinion on the constitutional issues surrounding waiver of the right of presence.

The defendant, facing a joint trial with several co-defendants, attended more than one pre-trial conference in which he was advised of his trial date. However, he left town and could not be located when the trial was to start. The trial court put the case off for a few days but finally, at the government's behest, decided to go ahead, noting that to try the defendant separately would cause severe difficulties for everyone else. The defendant was convicted in absentia and was later captured and sentenced. The U.S. Court of Appeals for the Eighth Circuit held that the district court acted within its discretion by trying the defendant in absentia, 917 F2d 362, 48 CrL 1127 (1990).

"[T]he language and structure of the Rule could not be more clear," Justice Blackmun wrote. Rule 43 states that the defendant "shall be present . . . at every stage of the trial . . . except as otherwise provided by this rule." The rule goes on to provide for a finding of waiver if the defendant, "initially present, (1) is voluntarily absent after the trial has commenced . . . ." However, the list of situations in which trial may proceed without the defendant does not include that of a defendant who absconds before trial.

Contrary to the government's argument, that list was meant to be comprehensive, Blackmun made clear. Rule 43 is a restatement of the law as it existed at the time of enactment, he said. At that time, the right of presence generally was considered unwaivable in felony cases. "This cannon was premised on the notion that a fair trial could take place only if the jurors met the defendant face-to-face and only if those testifying against the defendant did so in his presence." In *Diaz v. U.S.*, 223 U.S. 442 (1912), the court authorized a limited exception to the right of presence when the defendant absconds after the commencement of trial. The drafters included this exception in Rule 43, but "[t]here is no reason to believe that the drafters intended the rule to go further."

Furthermore, the distinction between pre- and mid-trial flight is not "so farfetched as to convince us that Rule 43 cannot mean what it says," Blackmun said. The cost of suspending a trial not yet begun will not be as great as that of suspending a proceeding already underway, he noted. Another practical reason for limiting trial in absentia to situations in which the defendant flees during trial is that "the defendant's initial presence serves to assure that any waiver is indeed knowing." It is unlikely that a defendant would leave in the midst of trial and not know that the proceedings would continue without him.



0011-1341/93/$00.50

## FULL TEXT OF OPINION

No. 91–6194

MICHAEL CROSBY, PETITIONER *v.*
UNITED STATES

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Syllabus

No. 91–6194. Argued November 9, 1992—Decided January 13, 1993

Although petitioner Crosby attended various preliminary proceedings, he failed to appear at the beginning of his criminal trial. The Federal District Court permitted the proceedings to go forward in his absence, and he was convicted and subsequently arrested and sentenced. In affirming his convictions, the Court of Appeals rejected his argument that his trial was prohibited by Federal Rule of Criminal Procedure 43, which provides that a defendant must be present at every stage of trial "except as otherwise provided" by the Rule and which lists situations in which a right to be present may be waived, including when a defendant, initially present, "is voluntarily absent after the trial has commenced."

*Held:* Rule 43 prohibits the trial *in absentia* of a defendant who is not present at the beginning of trial. The Rule's express use of the limiting phrase "except as otherwise provided" clearly indicates that the list of situations in which the trial may proceed without the defendant is exclusive. Moreover, the Rule is a restatement of the law that existed at the time it was adopted in 1944. Its distinction between flight before and during trial also is rational, as it marks a point at which the costs of delaying a trial are likely to increase; helps to assure that any waiver is knowing and voluntary; and deprives the defendant of the option of terminating the trial if it seems that the verdict will go against him. Because Rule 43 is dispositive, Crosby's claim that the Constitution also prohibited his trial *in absentia* is not reached.

951 F. 2d 357, reversed and remanded.

BLACKMUN, J., delivered the opinion for a unanimous Court.

JUSTICE BLACKMUN delivered the opinion of the Court.

This case requires us to decide whether Federal Rule of Criminal Procedure 43 permits the trial *in absentia* of a defendant who absconds prior to trial and is absent at its beginning. We hold that it does not.

I

In April 1988, a federal grand jury in the District of Minnesota indicted petitioner Michael Crosby and others on a number of counts of mail fraud. The indictment alleged that Crosby and his codefendants had devised a fraudulent scheme to sell military-veteran commemorative medallions supposedly to fund construction of a theme park honoring veterans. Crosby appeared before a federal magistrate on June 15, 1988, and, upon his plea of not guilty, was conditionally released from detention after agreeing to post a $100,000 bond and remain in the State. Subsequently, he attended pretrial conferences and hearings with his attorney and was advised that the trial was scheduled to begin on October 12.

Crosby did not appear on October 12, however, nor could he be found. United States deputy marshals reported that his house looked as though it had been "cleaned out," and a neighbor reported that petitioner's car had been backed halfway into his garage the previous evening, as if he were packing its trunk. As the day wore on, the court remarked several times that the pool of 54 potential jurors was being kept waiting, and that the delay in the proceedings would interfere with the court's calendar. The prosecutor noted that Crosby's attorney and his three codefendants were present, and commented on the difficulty she would have in rescheduling the case, should Crosby later appear, because some of her many witnesses were elderly and had health problems.

When the District Court raised the subject of conducting the trial in Crosby's absence, Crosby's attorney objected. Nevertheless, after several days of delay and a fruitless search for Crosby, the court, upon a formal request from the Government, decided that trial would commence on October 17. The court ordered Crosby's $100,000 bond forfeited and stated for the record its findings that Crosby had been given adequate notice of the trial date, that his absence was knowing and deliberate, and that requiring the Government to try Crosby separately from his codefendants would present extreme difficulty for the Government, witnesses, counsel, and the court. It further concluded that Crosby voluntarily had waived his constitutional right to be present during the trial, and that the public interest in proceeding with the trial in his absence outweighed his interest in being present during the proceedings. Trial began on October 17, with petitioner's counsel actively participating, and continued in Crosby's absence until November 18, when the jury returned verdicts of guilty on charges against Crosby and two of his codefendants. See *United States* v. *Cheatham*, 899 F. 2d 747 (CA8 1990). One codefendant was acquitted.

Approximately six months later, Crosby was arrested in Florida and brought back to Minnesota, where he was sentenced to 20 years in prison followed by 5 years on probation with specified conditions. Crosby's convictions were upheld by the Court of Appeals, which rejected his argument that Federal Rule of Criminal Procedure 43 forbids the trial *in absentia* of a defendant who is not present at the beginning of trial. 917 F. 2d 362, 364–366 (CA8 1990). Noting that the other Courts of Appeals that considered the question had found trial *in absentia* permissible,* the court concluded that the District Court had acted within its discretion in electing to proceed. *Id.*, at 365–366. We granted certiorari. ___ U. S. ___ (1992).

II

Rule 43 provides in relevant part:

"(a) Presence Required. The defendant shall be present at the arraignment, at the time of the plea, at

*The court cited, among other authorities, *United States* v. *Peterson*, 524 F. 2d 167 (CA4 1975), cert. denied, 423 U. S. 1088 (1976); *Government of the Virgin Islands* v. *Brown*, 507 F. 2d 186, 189 (CA3 1975); and *United States* v. *Tortora*, 464 F. 2d 1202, 1208 (CA2), cert. denied *sub. nom. Santoro* v. *United States*, 409 U. S. 1063 (1972). See also Boreman, Sufficiency of Showing Defendant's "Voluntary Absence" From Trial for Purposes of Criminal Procedure Rule 43, Authorizing Continuance of Trial Notwithstanding Such Absence, 21 A.L.R. Fed. 906, 915–918 (1974 and 1991 Supp.), and cases cited there.

every stage of the trial including the impaneling of the jury and the return of the verdict, and at the imposition of sentence, except as otherwise provided by this rule.

"(b) Continued Presence Not Required. The further progress of the trial to and including the return of the verdict shall not be prevented and the defendant shall be considered to have waived the right to be present whenever a defendant, initially present,

"(1) is voluntarily absent after the trial has commenced . . . ."

The Government concedes that the Rule does not specifically authorize the trial *in absentia* of a defendant who was not present at the beginning of his trial. The Government argues, nonetheless, that "Rule 43 does not purport to contain a comprehensive listing of the circumstances under which the right to be present may be waived." Brief for United States 16. Accordingly, the Government contends, Crosby's position rests not on the express provisions of Rule 43, but solely on the maxim *expressio unius est exclusio alterius*. *Ibid.* We disagree. It is not necessary to invoke that maxim in order to conclude that Rule 43 does not allow full trials *in absentia*. The Rule declares explicitly: "The defendant shall be present . . . at every stage of the trial . . . *except as otherwise provided* by this rule" (emphasis added). The list of situations in which the trial may proceed without the defendant is marked as exclusive not by the "expression of one" circumstance, but rather by the express use of a limiting phrase. In that respect the language and structure of the Rule could not be more clear.

The Government, however, urges us to look for guidance at the existing law, which the Rule was meant to restate, at the time of its adoption in 1944. See Advisory Committee's Notes on Fed. Rule Crim. Proc. 43, 18 U. S. C. App., p. 821. That inquiry does not assist the Government. "It is well settled that . . . at common law the personal presence of the defendant is essential to a valid trial and conviction on a charge of felony. . . . If he is absent, . . . a conviction will be set aside." W. Mikell, Clark's Criminal Procedure 492 (2d ed. 1918); accord, Goldin, Presence of the Defendant at Rendition of the Verdict in Felony Cases, 16 Colum. L. Rev. 18, 20 (1916); F. Wharton, Criminal Pleading and Practice 388 (9th ed. 1889); 1 J. Bishop, New Criminal Procedure 178–179 (4th ed. 1895), and cases cited there. The right generally was considered unwaivable in felony cases. Mikell, at 492; Bishop, at 175 and 178. This canon was premised on the notion that a fair trial could take place only if the jurors met the defendant face-to-face and only if those testifying against the defendant did so in his presence. See Wharton, at 392; Bishop, at 178. It was thought "contrary to the dictates of humanity to let a prisoner 'waive that advantage which a view of his sad plight might give him by inclining the hearts of the jurors to listen to his defence with indulgence.'" *Ibid.*, quoting *Prine* v. *Commonwealth*, 18 Pa. 103, 104 (1851).

In *Diaz* v. *United States*, 223 U. S. 442 (1912), a case that concerned a defendant who had absented himself voluntarily on two occasions from his ongoing trial in the Philippines, this Court authorized a limited exception to the general rule, an exception that was codified eventually in Rule 43(b). Because it did "'not seem to us to be consonant with the dictates of common sense that an accused person, being at large upon bail, should be at liberty, whenever he pleased, to withdraw himself from the courts of his country and to break up a trial already commenced,'" 223 U. S., at 457, quoting *Falk* v. *United States*, 15 App. D.C. 446, 454 (1899), cert. denied, 181 U. S. 618 (1901), the Court held:

"[W]here the offense is not capital and the accused is not in custody, . . . if, *after the trial has begun in his presence*, he voluntarily absents himself, this does not nullify what has been done or prevent the completion of the trial, but, on the contrary, operates as a waiver of his right to be present and leaves the court free to proceed with the trial in like manner and with like effect as if he were present." 223 U. S., at 455 (emphasis added).

*Diaz* was cited by the Advisory Committee that drafted Rule 43. The Committee explained: "The second sentence of the rule is a restatement of existing law that, except in capital cases, the defendant may not defeat the proceedings by voluntarily absenting himself after the trial has been commenced in his presence." Advisory Committee's Notes on Fed. Rule Crim. Proc. 43, 18 U. S. C. App., p. 821. There is no reason to believe that the drafters intended the Rule to go further. Commenting on a preliminary version of the rule, Judge John B. Sanborn, a member of the Committee, stated:

"I think it would be inadvisable to conduct criminal trials in the absence of the defendant. That has never been the practice, and, whether the defendant wants to attend the trial or not, I think he should be compelled to be present. If, during the trial, he disappears, there is, of course, no reason why the trial should not proceed without him." 2 M. Wilken and N. Triffin, Drafting History of the Federal Rules of Criminal Procedure 236 (1991).

The Court of Appeals in the present case recognized that this Court in *Diaz* had not addressed the situation of the defendant who fails to appear for the commencement of trial. Nevertheless, the court concluded: "It would be anomalous to attach more significance to a defendant's absence at commencement than to absence during more important substantive portions of the trial." 917 F. 2d, at 365. While it may be true that there are no "talismanic properties which differentiate the commencement of a trial from later stages," *Government of the Virgin Islands* v. *Brown*, 507 F. 2d 186, 189 (CA3 1975), we do not find the distinction between pre- and midtrial flight so farfetched as to convince us that Rule 43 cannot mean what it says. As a general matter, the costs of suspending a proceeding already under way will be greater than the cost of postponing a trial not yet begun. If a clear line is to be drawn marking the point at which the costs of delay are likely to outweigh the interests of the defendant and society in having the defendant present, the commencement of trial is at least a plausible place at which to draw that line. See *Hopt* v. *Utah*, 110 U. S. 574, 579 (1884) (discussing the public's interest in strict enforcement of statutory requirement that defendant be present at trial).

There are additional practical reasons for distinguishing between flight before and flight during a trial. As did *Diaz*, the Rule treats midtrial flight as a knowing and voluntary waiver of the right to be present. Whether or not the right constitutionally may be waived in other circumstances — and we express no opinion here on that subject — the defendant's initial presence serves to assure

that any waiver is indeed knowing. "Since the notion that trial may be commenced in absentia still seems to shock most lawyers, it would hardly seem appropriate to impute knowledge that this will occur to their clients." Starkey, Trial in Absentia, 54 N.Y. St. B.J. 30, 34, n. 28 (1982). It is unlikely, on the other hand, "'that a defendant who flees from a courtroom in the midst of a trial — where judge, jury, witnesses and lawyers are present and ready to continue — would not know that as a consequence the trial could continue in his absence.'" *Taylor* v. *United States*, 414 U. S. 17, 20 (1973), quoting from Chief Judge Coffin's opinion, 478 F. 2d 689, 691 (CA1 1973), for the Court of Appeals in that case. Moreover, a rule that allows an ongoing trial to continue when a defendant disappears deprives the defendant of the option of gambling on an acquittal knowing that he can terminate the trial if it seems that the verdict will go against him — an option that might otherwise appear preferable to the costly, perhaps unnecessary, path of becoming a fugitive from the outset.

The language, history, and logic of Rule 43 support a straightforward interpretation that prohibits the trial *in absentia* of a defendant who is not present at the beginning of trial. Because we find Rule 43 dispositive, we do not reach Crosby's claim that his trial *in absentia* was also prohibited by the Constitution.

The judgment of the Court of Appeals is reversed and the case is remanded for further proceedings consistent with this opinion.

*It is so ordered.*

MARK D. NYVOLD, St. Paul, Minn., for petitioner; RICHARD H. SEAMON, Assistant to Solicitor General, (KENNETH W. STARR, Sol. Gen., ROBERT S. MUELLER III, Asst. Atty. Gen., WILLIAM C. BRYSON, Dpty. Sol. Gen., and MICHAEL E. O'NEILL, Dept. of Justice atty., on the briefs) for respondent.

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

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CHAIRMAN

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CRIMINAL RULES
EDWARD LEAVY
BANKRUPTCY RULES

October 15, 1992

Honorable Vincent L. Broderick, Chairman
Committee on Criminal Law and Probation
101 East Post Road
White Plains, NY 10601

Dear Judge Broderick:

The Department of Justice has proposed to the Advisory Committee on the Federal Rules of Criminal Procedure that Rule 43 be amended to permit the Court to sentence a fugitive defendant who flees following conviction and before imposition of sentence. In its present form Rule 43 permits a trial to continue in such circumstances but does not, in express terms, permit imposition of sentence in absentia.

The problem is not altogether insubstantial, and it is growing. The Department advises us that the number of defendants who become fugitives after commencement of trial but before sentencing rose from 737 as of June 30, 1989, to 853 as of June 30, 1991, an increase of more than 15%.

The Advisory Committee presently has the proposed amendment to Rule 43 under consideration and will take up the issue again at its meeting next April 22. In the meantime, we understand that the Probation Service does not begin to prepare (or complete), a presentence report when the defendant absconds before sentencing. The Government expresses concern that this enhances the likelihood of prejudice to it because the evidence may become stale and the Government may have difficulty in sustaining its burden of proof on disputed issues under the Sentencing Guidelines if a sentencing hearing is not conducted for many months or even years after the conviction. On the other hand, preparation of the presentence report (with or without imposition of sentence itself) would tend to establish the facts relevant to sentencing and facilitate the sentencing hearing even if it is not conducted until much later.

It was the sense of the Advisory Committee that I should correspond with you and suggest that your Committee might want to review this practice and recommend to Probation that presentence investigation reports be prepared even when the defendant has absconded.

Thank you for your consideration; and, if you wish, I would be happy to discuss this with you in more detail by telephone.

Very truly yours,

Wm. Terrell Hodges

c: Members of Criminal Rules Advisory Committee
Honorable Robert F. Keeton
Professor David A. Schlueter
Honorable Robert S. Mueller, III
Mr. Donald L. Chamlee

AGENDA II-C-7
Washington, DC
April 22-23, 1993

**MEMO TO:** **Advisory Committee on Criminal Rules**

**FROM:** **Dave Schlueter, Reporter**

**RE:** **Rule 53; Proposed Amendments to Permit Cameras, etc. in Courtrooms**

**DATE:** **March 15, 1993**

Mr. Timothy B. Dyk and Ms. Barbara McDowell, counsel for various news organizations, have filed a memorandum proposing that Rule 53 be amended to permit camera and audio coverage of criminal proceedings. As they note in their memo, the amendment would not affirmatively authorize such use, but would instead "provide the Judicial Conference with the flexibility to decide whether such coverage should be permitted in criminal as well as civil proceedings."

That memo, which is self-exmplanatory, and other materials relating to that proposal are attached. This matter will be on the agenda for the April meeting.

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



March 4, 1993

Mr. Peter G. McCabe, Secretary
Committee on Rules of Practice and Procedure
Administrative Office of the
United States Courts
Washington, DC 20544

Re: Proposed Amendments to Rule 53

Dear Peter:

This is in response to your memorandum of February 9, 1993 concerning proposed amendments to Rule 53 and the request of the proponent (Timothy B. Dyk of Jones, Day, Reavis & Pogue) for an opportunity to make an oral presentation at the April meeting of the Advisory Committee on Criminal Rules.

As you know from my memo of February 19, I polled the membership of the Committee on the question whether Mr. Dyk should be given some time on the agenda. The majority of those voting was negative.

Accordingly, would you please correspond with Mr. Dyk informing him of this result. You might wish to point out that the meeting will be public so that he is welcome to attend; that all of his supporting materials will be brought to the attention of the members of the Committee by inclusion in their respective agenda books; and that, if the proposed amendment is sent forward for publication and comment (after favorable consideration by the Advisory Committee and the Standing Committee), he and others will have full opportunity to be heard during that stage of the Rules Enabling Act process.

Very truly yours,

Wm. Terrell Hodges

c: Honorable Robert E. Keeton
Members of the Advisory Committee
on Criminal Rules
Professor David A. Schlueter
Mr. William R. Wilson
Mr. John K. Rabiej

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



February 19, 1993



TO: MEMBERS OF THE ADVISORY COMMITTEE ON THE CRIMINAL RULES

FROM: WM. TERRELL HODGES

We have received papers submitted by the American Society of Newspaper Editors and others, through counsel (Jones, Day, Reavis & Pogue) suggesting an amendment to Rule 53:

> The taking of photographs in the court room during the progress of judicial proceedings or radio broadcasting of judicial proceedings from the court room shall not be permitted by the court except as such activities may be authorized under guidelines promulgated by the Judicial Conference of the United States. (All underscored wording to be added to existing rule by the proposed amendment).

This proposal will be on the agenda for our April meeting and the papers submitted in support of it will be included in your agenda materials to be distributed in March.

The present question is this. Submitting Counsel, Mr. Timothy B. Dyk of Jones, Day specifically requests an opportunity "to make an oral presentation" at our April meeting. A decision needs to be made about this request; and, because our precedent is mixed, I seek your guidance.

I know that in most instances in the past, proponents of changes in the rules have been welcome to be present at the meetings - - indeed, our meetings are open to the public in general - - but requests to be heard have generally been disfavored and denied. One rationale for this approach is that the public comment period, if an amendment is sent forward, affords a full and more appropriate opportunity for proponents as well as opponents to appear and be heard if they wish. On the other hand, there have been exceptions. The most recent example was the appearance before us by the Director of the Bureau of Prisons urging an amendment of Rule 10.

I would appreciate it if you would telephone my secretary (Mrs. Barbara Wood - 904/232-1852) by the close of business on Friday, February 26, 1993 and communicate your vote, either yea or nay, on the question whether Mr. Dyk should be permitted a brief opportunity to address the Committee on the subject of Rule 53 when we reach that item on our agenda in April.

c: Honorable Robert E. Keeton
Mr. William R. Wilson
Professor David A. Schlueter
Mr. Peter G. McCabe
Mr. John K. Rabiej

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

ROBERT E. KEETON
CHAIRMAN

PETER G. McCABE
SECRETARY

CHAIRMEN OF ADVISORY COMMITTEES
KENNETH F. RIPPLE
APPELLATE RULES

SAM C. POINTER, JR.
CIVIL RULES

WILLIAM TERRELL HODGES
CRIMINAL RULES

EDWARD LEAVY
BANKRUPTCY RULES

February 9, 1993

Timothy B. Dyk, Esquire
Jones, Day, Reavis & Pogue
Metropolitan Square
1450 G Street, N.W.
Washington, D.C. 20005-2088

Dear Mr. Dyk:

Thank you for your memorandum of February 3, 1993 proposing amendments to Rule 53 of the Federal Rules of Criminal Procedure. A copy of your comments will be sent to the chairman and reporter of the Advisory Committee on Civil Rules for their consideration.

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

Sincerely,

Peter G. McCabe
Secretary

cc: Honorable Robert E. Keeton
Honorable William Terrell Hodges
William R. Wilson, Esquire
Professor David A. Schlueter

JONES, DAY, REAVIS & POGUE

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WRITER S DIRECT NUMBER

February 3, 1993

John Rabiej, Esq.
Attorney-Advisor
Office of the Assistant Director
for Judges Programs
Administrative Office of the
United States Courts
Washington, D.C. 20544

Re: Memorandum Concerning Proposed Revision to Rule 53 of the Federal Rules of Criminal Procedure

Dear Mr. Rabiej:

On October 9, 1992, various news organizations submitted a preliminary memorandum to the Criminal Rules Advisory Committee requesting consideration of a proposed amendment to Rule 53. We understand that the Committee has agreed to consider the proposal at its April 1993 meeting. Accordingly, we are now submitting the enclosed Memorandum of News Organizations Concerning Proposed Revision to Rule 53, which more extensively addresses the nature and purpose of the proposed amendment. We respectfully request that the Memorandum be circulated to the Committee and that we be afforded an opportunity to make an oral presentation at the April 1993 meeting.

Very truly yours,

Timothy B. Dyk

Enclosures

cc: Professor Stephen Saltzburg

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
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February 9, 1993

MEMORANDUM TO JUDGE WILLIAM TERRELL HODGES

SUBJECT: Proposed Amendments to Rule 53

The attached memorandum of February 3, 1993, proposes amendments on behalf of several news organizations to Rule 53 of the Federal Rules of Criminal Procedure that would allow camera and audio coverage of criminal proceedings "under guidelines promulgated by the Judicial Conference of the United States." The news organizations submitting this proposal argue that the issue is more appropriately an "administrative policy matter" rather than a "rules matter," and that it should be handled by the Conference. The same group raised this issue on a preliminary basis at the Committee's last meeting.

The news organizations request permission to make an oral presentation to the Committees at the April 1993 meeting. (See pages 17-18 of the memorandum.) We were provided 35 copies of the memorandum, which I will retain for insertion into the agenda for our next meeting.

Peter G. McCabe
Secretary

Attachment

cc: Honorable Robert E. Keeton
William R. Wilson, Esquire
Professor David A. Schlueter

**To: The Advisory Committee on Criminal Rules of the Judicial Conference of the United States**

# MEMORANDUM OF NEWS ORGANIZATIONS CONCERNING PROPOSED REVISION TO RULE 53 OF THE FEDERAL RULES OF CRIMINAL PROCEDURE

Timothy B. Dyk
Barbara McDowell
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1450 G Street, N.W.
Washington, D.C. 20005-2088
(202) 879-3939

Counsel for AMERICAN SOCIETY OF NEWSPAPER EDITORS, ASSOCIATED PRESS, CABLE NEWS NETWORK, INC., CAPITAL CITIES/ABC, INC., CBS INC., C-SPAN, GANNETT COMPANY, INC., NATIONAL ASSOCIATION OF BROADCASTERS, NATIONAL BROADCASTING COMPANY, INC., NATIONAL PRESS PHOTOGRAPHERS ASSOCIATION, NATIONAL PUBLIC RADIO, THE NEW YORK TIMES COMPANY, POST-NEWSWEEK STATIONS, INC., PUBLIC BROADCASTING SERVICE, RADIO-TELEVISION NEWS DIRECTORS ASSOCIATION, THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS, SOCIETY OF PROFESSIONAL JOURNALISTS and THE WASHINGTON POST

February 3, 1993

## INTRODUCTION AND SUMMARY

This memorandum is submitted by a group of broadcasters, publishers and other organizations in support of a non-substantive amendment to Federal Rule of Criminal Procedure 53, which currently prohibits camera or audio coverage of criminal proceedings in the federal courts.[1] Rule 53, with the proposed amendment shown by underscoring, would read as follows:

> The taking of photographs in the court room during the progress of judicial proceedings or radio broadcasting of judicial proceedings from the court room shall not be permitted by the court <u>except as such activities may be authorized under guidelines promulgated by the Judicial Conference of the United States</u>.

The proposed rule would not affirmatively authorize camera or audio coverage of criminal proceedings. The rule would merely conform Rule 53 to the revised Code of Conduct for United States Judges and provide the Judicial Conference with the flexibility to decide whether such coverage should be permitted in criminal as well as civil proceedings.

It has become increasingly clear in the nearly half-century since Rule 53 was promulgated that whether and to what extent

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[1] Most of these parties previously submitted joint comments to the Judicial Conference's Ad Hoc Committee on Cameras in the Courtroom urging that the news media be permitted to provide camera and audio coverage on an experimental basis in selected federal courts. As discussed below, the Judicial Conference ultimately authorized such an experiment, which is now in effect in six district courts and two courts of appeals.

cameras and audio equipment should be allowed in the courts is not an issue of criminal procedure. The issue should instead be treated as one of judicial administration.

The Supreme Court recognized in Chandler v. Florida, 449 U.S. 560 (1981), that the presence of cameras at criminal trials is not a violation of due process. The American Bar Association shortly thereafter amended Canon 3(A)(7) of its Code of Judicial Conduct to permit camera and audio coverage of civil and criminal trials pursuant to appropriate guidelines. Canon 3(A)(7) was ultimately deleted entirely from the Code of Judicial Conduct. In the decade following the Chandler decision, most states have adopted new rules permitting camera and audio coverage of criminal trials on either a permanent or an experimental basis.

In 1990, the Judicial Conference of the United States repealed Canon 3A(7) of the Code of Conduct for United States Judges, which had previously barred camera and audio coverage of federal criminal or civil proceedings. The change had been proposed on the ground that "rules governing cameras in a courtroom are misplaced in a code of ethics."[2] At the same time, the Judicial Conference authorized a three-year experiment with camera and audio coverage of civil proceedings in selected district courts and courts of appeals. However, the Judicial

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[2] Report of the Judicial Conference Ad Hoc Committee on Cameras in the Courtroom at 2 (September 1990) ("Ad Hoc Committee Report"). The Ad Hoc Committee Report is appended to this Memorandum.

Conference declined, in view of Rule 53, to include criminal trials or appeals in the experiment.

The proposed amendment would provide the Judicial Conference with the same authority in criminal proceedings as in civil proceedings to establish policies for the federal courts with respect to camera and audio coverage. It would also avoid the prospect of repeated piecemeal amendments to Rule 53 in the future.

By recognizing that the question of camera and audio coverage of the courts is a matter of judicial administration best left to the Judicial Conference, the proposed amendment would simply conform Rule 53 to the policy reflected in the Judicial Conference's 1990 deletion of Canon 3A(7) from the Code of Conduct for United States Judges. In view of the non-substantive nature of this proposed amendment, these parties respectfully suggest that a public notice-and-comment period is unnecessary.

These parties also request the opportunity to make an oral presentation to the Committee at its April 1993 meeting.

## I. BACKGROUND

### A. Provisions Governing Camera and Audio Coverage of Proceedings in the Federal Courts

Rule 53 was included in the Federal Rules of Criminal Procedure when they were promulgated in 1946. The Advisory Committee notes explained that "while the matter to which the rule refers has not been a problem in the Federal courts as it has been in some State tribunals, the rule was nevertheless

included with a view to giving expression to a standard which should govern the conduct of judicial proceedings."[3] The notes included a citation to a contemporaneous commentary on the proposed criminal rules, which observed that "[t]he Advisory Committee was aware of the fact that such a rule [against camera and audio coverage] is needed much more in the state courts than in the federal courts."[4]

No provision similar to Rule 53 has ever existed in the Federal Rules of Civil Procedure. In 1972, the Judicial Conference adopted a prohibition against camera and audio coverage of virtually all federal civil and criminal proceedings as Canon 3A(7) of the Code of Conduct for United States Judges. Canon 3A(7) set forth a general rule that "[a] judge should prohibit broadcasting, televising, recording, or taking photographs in the courtroom and areas immediately adjacent thereto during sessions of court or recesses between sessions." At the time that Canon 3A(7) was adopted by the Judicial Conference, the provision mirrored Canon 3(A)(7) of the American Bar Association's Code of Judicial Conduct.

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[3] Notes of Advisory Committee on Rules (1944 adoption).

[4] Lester B. Orfield, The Preliminary Draft of the Federal Rules of Criminal Procedure, 22 Texas L. Rev. 194, 223 (1944).

## B. The Repeal of Prohibitions Against Camera and Audio Coverage of State Court Proceedings

In 1981, the Supreme Court held in Chandler v. Florida, 449 U.S. 560 (1981), that the presence of television cameras at criminal trials is not a denial of due process. The Court observed that no empirical data suggested that the presence of cameras and audio equipment in the courtroom, operated in accordance with appropriate guidelines, affected the conduct of trial participants in a manner that impaired the "fundamental fairness" of the trial. Id. at 575-83.

One year after Chandler, the American Bar Association amended Canon 3(A)(7) of its Code of Judicial Conduct to permit camera and audio coverage "under rules prescribed by a supervising appellate court or other appropriate authority." No distinction was made between civil and criminal proceedings. In 1990, the ABA repealed Canon 3(A)(7) entirely on the ground that the subject "is more appropriately addressed by administrative rules adopted within each jurisdiction."[5]

In the wake of the Chandler decision and the amendment of ABA Canon 3(A)(7), a number of states began to reexamine their own prohibitions on camera and audio coverage of the courts. At present, forty-seven states allow such coverage on either a

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[5] ABA Standing Committee on Ethics and Professional Responsibility, Final Draft of Recommended Revisions to ABA Code of Judicial Conduct at 6 (December 1989). A similar provision allowing camera and audio coverage under appropriate guidelines remains as Standard 8-3.8 of the ABA's Criminal Justice Standards on Fair Trial and Free Press.

permanent or an experimental basis.[6] Of the forty-one states that have adopted permanent rules permitting camera and audio coverage of the courts, thirty-six did so after a period of formal experimentation.[7]

Most of the state experiments with camera and audio coverage of the courts have involved criminal as well as civil proceedings. Similarly, most states have not distinguished between civil and criminal cases in their permanent rules governing camera and audio coverage. Of the forty-three states that allow camera and audio coverage of civil trials, whether on a permanent or an experimental basis, only three do not allow camera and audio coverage of criminal trials.[8] And all states that permit camera and audio coverage of civil appeals also permit such coverage of criminal appeals.[9]

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[6] Radio-Television News Directors Association, News Media Coverage of Judicial Proceedings with Cameras and Microphones B-1, B-5 (1993).

[7] Id. at B-5.

[8] Id. at B-6 to B-7. The three exceptions are Maryland, Pennsylvania and Texas (which is reportedly in the process of promulgating rules allowing camera coverage of criminal trials). Nebraska allows audio coverage, but not camera coverage, of certain criminal and civil proceedings (i.e., criminal sentencings and civil non-jury trials in specified districts).

[9] Id. at B-6 to B-7. A number of states have recently repealed or modified criminal rules that once mirrored Rule 53 of the Federal Rules of Criminal Procedure. For example, Maine and Tennessee have simply eliminated prohibitions on camera coverage from their criminal rules, while Delaware has modified its Rule 53 by appending the phrase "except in accordance with rules adopted by the Supreme Court." Del. R. Crim. P. 53. The North Dakota Supreme Court has adopted an administrative rule that expressly modifies the state's Rule 53 and sets forth conditions under which camera (continued...)

In addition to the activity in the states with respect to camera and audio coverage of the courts, the United States Court of Military Appeals has allowed several criminal appeals to be televised. According to the then-Chief Judge of that Court, he and his colleagues concluded after the initial arguments that they "had not felt distracted in any way" by the presence of cameras and audio equipment and that "the quality of the argument and the rapport between court and counsel had not diminished."[10]

The progressive easing and eventual elimination of ABA Canon 3(A)(7), and the widespread acceptance of cameras in the state courts, are largely the result of three developments: the Supreme Court's decision in Chandler that camera coverage does not pose due process concerns; the perception of state judges that camera coverage has not adversely affected witnesses, jurors or other trial participants; and modern technology and court rules (e.g., rules requiring "pooling" of coverage) that have eliminated any significant risk of disruption of judicial proceedings. The Supreme Court's decision in Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555 (1980), which recognized the vital role of the print and electronic media "as surrogates for the public" in

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[9] (...continued)
coverage of criminal and civil proceedings is permitted. N.D. Supreme Court Admin. R. 21. Vermont has promulgated a new Rule 53 that permits camera and audio coverage under specified conditions. Vt. R. Crim. P. 53.

[10] Letter of Hon. Robinson O. Everett to Timothy B. Dyk (June 9, 1989).

reporting on criminal and civil trials, also supports the opening of the courts to camera and audio coverage. Id. at 573 (plurality opinion); see also id. at 586 n.1 (Brennan, J., concurring) ("the institutional press . . . serves as the 'agent' of interested citizens, and funnels information about trials to a large number of individuals").

### C. The Judicial Conference's Response to Requests for Camera and Audio Coverage of the Federal Courts

In 1983, a number of broadcasters, publishers, media organizations and others petitioned the Judicial Conference to permit camera and audio coverage of the federal courts, citing "the technological, constitutional and experiential developments since the existing federal rules were adopted."[11] The petitioners proposed that Canon 3A(7) and Criminal Rule 53 be amended in a manner that would expressly authorize "the broadcasting, televising, recording and photographing of judicial proceedings . . . in accordance with guidelines promulgated by the Judicial Conference."[12] The Judicial Conference appointed a committee to consider the matter, but the proposal was ultimately rejected.[13]

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[11] Petition to the Judicial Conference of the United States Concerning Visual and Aural Coverage of Federal Court Proceedings by the Electronic and Print Press at 5 (March 1983).

[12] Petition at 7.

[13] See Report of the Judicial Conference Ad Hoc Committee on Cameras in the Courtroom (Sept. 6, 1984).

Six years later, however, the Judicial Conference appointed a new Ad Hoc Committee on Cameras in the Courtroom to consider revisions to Canon 3A(7). The Ad Hoc Committee received submissions from various broadcasters, publishers and media organizations, including most of the parties to this application. These parties did not urge the Ad Hoc Committee, as they had in 1983, immediately to repeal the prohibitions on cameras and audio equipment in the courts. Instead, they suggested that the Ad Hoc Committee consider the approach adopted by a number of states, which had first conducted controlled experiments with camera and audio coverage before deciding whether to adopt a permanent rule.[14]

These parties explained to the Ad Hoc Committee that the cameras and audio equipment available today to cover judicial proceedings are inconspicuous and unobtrusive.[15] Television cameras are small and entirely silent, and they can be operated with existing courtroom lighting. One or two of these cameras placed in a fixed location are adequate to provide coverage. As one district court has observed:

> A single, silent, fixed-location camera is no more intrusive than the familiar phenomena of courtroom artists working on their sketches and notetaking reporters making entrances and hasty

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[14] See Memorandum Concerning Proposed Revisions of the Prohibitions on Cameras in the Federal Courts (Dec. 6, 1989); Further Comments of News Organizations Concerning Possible Revisions to Canon 3A(7) (April 9, 1990).

[15] Memorandum Concerning Proposed Revisions of the Prohibitions on Cameras in the Federal Courts at 4-5.

exits to phone in their stories on deadline.[16]

Still photographic cameras are also small and require only normal lighting. In most cases, the court's existing audio equipment can be used for television and radio coverage.[17]

These parties also advised the Ad Hoc Committee that "[t]he adoption of appropriate guidelines, which include requirements for pooling," would further reduce concerns about camera and audio coverage.[18] For example, judges would be spared from having to engage in routine supervision of camera and audio coverage, yet would have the authority "to regulate coverage to avoid any possibility of prejudice to the trial participants in a particular case."[19]

In addition, these parties provided the Ad Hoc Committee with data documenting the results of the state experiments with cameras in the courts.[20] According to the data submitted to the Ad Hoc Committee, of the surveyed judges who had experience

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[16] Westmoreland v. CBS, Inc., 596 F. Supp. 1166, 1168 (S.D.N.Y.), aff'd, 752 F.2d 16 (2d Cir. 1984), cert. denied, 472 U.S. 1017 (1985).

[17] A practical effect of allowing camera and audio coverage is a reduction in the number of reporters and other media personnel in the courtroom. Many reporters choose to view the television feed of the proceedings in an adjacent room, where they can use personal computers, confer with colleagues, and come and go more freely than they could in the courtroom.

[18] Memorandum Concerning Proposed Revisions of the Prohibitions on Cameras in the Federal Courts at 5.

[19] Id.

[20] Further Comments of News Organizations Concerning Possible Revisions to Canon 3A(7) at 6-8.

with camera coverage, 81% favored allowing cameras in the courts. The data also revealed that 84% of the judges said that camera coverage was not disruptive; 92% said that camera coverage did not affect their own behavior in the courtroom; 85% said that camera coverage had no effect on attorneys' conduct; and 82% said that camera coverage did not affect the conduct of witnesses.[21]

In August 1990, the Ad Hoc Committee recommended that Canon 3A(7) be deleted from the Code of Conduct for United States Judges on the ground that "rules governing cameras in a courtroom are misplaced in a code of ethics."[22] The Judicial Conference adopted this recommendation in September 1990. The Judicial Conference decided that the issue would henceforth be addressed in a policy statement in the Guide to Judiciary Policies and Procedures and in the Proceedings of the Judicial Conference of the United States.[23]

At the same time, the Judicial Conference authorized a three-year experiment with camera and audio coverage of federal civil proceedings. The experiment began on July 1, 1991, and will conclude on June 30, 1994. The experiment involves two courts of appeals and six district courts, which were selected by the Ad

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[21] Id.

[22] Ad Hoc Committee Report at 2.

[23] Id. at 2.

Hoc Committee from among the many courts that volunteered to participate.[24]

The Judicial Conference expressly limited the experiment to civil cases, noting that Rule 53 "specifically prohibits the broadcasting of criminal proceedings."[25] Indeed, the Judicial Conference apparently viewed Rule 53 as barring camera and audio coverage of criminal proceedings at the appellate level as well as the trial level.[26]

The Judicial Conference adopted a number of rules with respect to coverage conducted during the experiment. These include restrictions on the numbers of cameras and operators in the courtroom, requirements that equipment "not produce distracting sound or light" (e.g., no flash photography), and provisions that the news media enter into "pooling" arrangements for the sharing of material.[27] In addition, the rules broadly provide:

> A presiding judicial official may refuse, limit, or terminate media coverage of an entire case, portions thereof, or testimony of particular witnesses, in the interests of justice to protect the rights of the parties,

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[24] The experiment involves the U.S. Courts of Appeals for the Second and Ninth Circuits and the U.S. District Courts for the Southern District of New York, the District of Massachusetts, the Southern District of Indiana, the Eastern District of Michigan, the Eastern District of Pennsylvania and the Western District of Washington.

[25] Ad Hoc Committee Report at 6 n.3.

[26] Id., Appendix C at 1 (Guidelines for the Pilot Program on Photographing, Recording, and Broadcasting in the Courtroom).

[27] Id., Appendix C at 2.

> witnesses, and the dignity of the court; to assure the orderly conduct of the proceedings; or for any other reason considered necessary or appropriate by the presiding judicial officer.[28]

The experiment has now been in place for one and one-half years. The Research Division of the Federal Judicial Center is compiling data on the experiment.

The Ad Hoc Committee completed its business with the selection of the courts to participate in the experiment. The Judicial Conference transferred jurisdiction over the issue to its Committee on Court Administration and Case Management. These parties have provided copies of this submission to the chairs of both the Ad Hoc Committee and the Committee on Court Administration.

## DISCUSSION

These parties are not asking this Committee to decide whether camera and audio coverage should be permitted in federal criminal proceedings. We are simply seeking a conforming amendment to Rule 53 similar in purpose to the 1990 amendment to the Code of Conduct for United States Judges, which would transfer jurisdiction over this issue from the Rules of Criminal Procedure to the Judicial Conference of the United States. The Judicial Conference already exercises jurisdiction over the issue of camera and audio coverage of federal civil proceedings through

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[28] Id., Appendix C at 1.

its Committee on Court Administration. Accordingly, we propose that the text of Rule 53 be amended as follows:

> The taking of photographs in the court room during the progress of judicial proceedings or radio broadcasting of judicial proceedings from the court room shall not be permitted by the court except as such activities may be authorized under guidelines promulgated by the Judicial Conference of the United States.

The amended Rule 53 would not itself require, or even permit, federal judges to admit cameras and audio equipment into their courtrooms in criminal cases. Instead, the Rule would simply enable the Judicial Conference to decide whether the blanket prohibition on camera and audio coverage of criminal proceedings should be modified and, if so, under which conditions individual federal courts could allow such coverage.

As noted above, in deleting the cameras prohibition from the Code of Conduct for United States Judges, the Judicial Conference correctly recognized that "rules governing cameras in a courtroom are misplaced in a code of ethics."[29] Such rules are similarly misplaced in the Rules of Criminal Procedure. Whether cameras and audio equipment should be allowed in the courtroom is no more an issue of "criminal procedure" than of "ethics." It is instead an issue of judicial administrative policy. The Judicial Conference apparently recognized that this question is one of judicial administrative policy in deciding that the question is

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[29] Ad Hoc Committee Report at 2.

most appropriately addressed as a "policy statement" in the Guide to Judiciary Policies and Procedures.

Ordinarily, the Judicial Conference has broad discretion to determine which policies should govern the administration of the federal courts. The Judicial Conference may freely reexamine and, if appropriate, revise those policies in light of experience and changed conditions, without having to subject each revision to the sort of formalized approval process that is required of amendments to the Federal Rules.

The Judicial Conference should have the same authority in the criminal context as in the civil context to make policy for the federal courts with respect to camera and audio coverage. For example, the Judicial Conference should have the authority, if it so chooses, to extend its current experiment to federal criminal proceedings. The Judicial Conference should likewise have the authority to decide at the conclusion of that experiment whether cameras and audio equipment are to be allowed in criminal proceedings and, if so, on what terms. The proposed amendment to Rule 53 would provide the Judicial Conference with this authority. It would then be left to the Judicial Conference to decide whether or how to exercise that authority.

This Committee has recognized in other contexts that the Rules of Criminal Procedure should accord considerable discretion to the Judicial Conference and the Administrative Office of the United States Courts in matters of judicial administration. For example, in drafting what ultimately became Rule 55, the

Committee expressly chose not to specify the precise records to be maintained by district court clerks in criminal cases, "but to vest the power to do so in the Director of the Administrative Office of the United States Courts with the approval of the Conference of Senior Circuit Judges [now the Judicial Conference]."[30]

Moreover, in subsequently eliminating Rule 55's requirement that district court clerks keep "a book known as the 'criminal docket' in which, among other things, shall be entered each order or judgment of the court," the Committee again deferred to the Judicial Conference and the Administrative Office on judicial administration matters. As the Committee explained:

> The Advisory Committee Note to original Rule 55 observes that, in light of the authority to which the Director [of the Administrative Office] and Judicial Conference have over the activities of clerks, "it seems best not to prescribe the records to be kept by clerks." Because of current experimentation with automated record-keeping, this approach is more appropriate than ever before. The amendment will make it possible for the Director to permit use of more sophisticated record-keeping techniques, including those which may obviate the need for a "criminal docket" book.[31]

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[30] Notes of Advisory Committee on Rules (1944 adoption).

[31] Notes of Advisory Committee on Rules (1983 amendment). See also, e.g., Advisory Committee Notes to Fed. R. Civ. P. 79 (1946 amendment) (discussion of amendment designed to "give[] latitude for the preservation of court records in other than book form, if that shall seem advisable," to "permit[] with the approval of the Judicial Conference the adoption of such modern, space-saving methods as microphotography," and to "enabl[e] the Administrative Office, with the approval of the Judicial Conference, to carry out any improvements in clerical procedure with respect to books and records which may be deemed advisable").

The same rationale is applicable here. Rule 53 should not constrain the Judicial Conference's ability to experiment with new technologies, but rather should permit the Judicial Conference to determine whether or how existing practices concerning camera and audio coverage of the federal courts should be modified. As the Committee recognized in the Rule 55 context, "[b]ecause of current experimentation" -- here, with camera and audio coverage of civil proceedings -- "this approach is more appropriate than ever before."

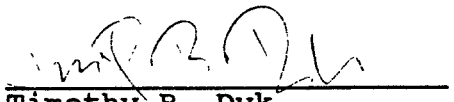
Finally, it would be unnecessarily cumbersome for the Judicial Conference to have to seek an amendment to Rule 53 whenever a change in the rules governing camera and audio coverage of the courts seemed appropriate. The proposed amendment would enable the Judicial Conference to modify its camera policy expeditiously, and would free this Committee from the prospect of having to consider repeated piecemeal amendments to Rule 53.

## CONCLUSION

For the reasons discussed above, these parties respectfully request that the Committee adopt the proposed non-substantive amendment, which would conform Rule 53 to the Judicial Conference's deletion of Canon 3A(7) from the Code of Conduct for United States Judges. In addition, we request the opportunity to

make an oral presentation to the Committee at its April 1993 session.

Respectfully submitted,



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Counsel for AMERICAN SOCIETY OF NEWSPAPER EDITORS, ASSOCIATED PRESS, CABLE NEWS NETWORK, INC., CAPITAL CITIES/ABC, INC., CBS INC., C-SPAN, GANNETT COMPANY, INC., NATIONAL ASSOCIATION OF BROADCASTERS, NATIONAL BROADCASTING COMPANY, INC., NATIONAL PRESS PHOTOGRAPHERS ASSOCIATION, NATIONAL PUBLIC RADIO, THE NEW YORK TIMES COMPANY, POST-NEWSWEEK STATIONS, INC., PUBLIC BROADCASTING SERVICE, RADIO-TELEVISION NEWS DIRECTORS ASSOCIATION, THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS, SOCIETY OF PROFESSIONAL JOURNALISTS AND THE WASHINGTON POST

February 3, 1993

Agenda E-22 (Summary)
Cameras in the Courtroom
September 1990

# SUMMARY OF THE

# REPORT OF THE JUDICIAL CONFERENCE COMMITTEE

# ON CAMERAS IN THE COURTROOM

The Ad Hoc Committee on the Cameras in the Courtroom recommends that the Conference:



The remainder of the report is for information and the record.

Agenda E-22
Cameras in the Courtroom
September 1990

# REPORT OF THE JUDICIAL CONFERENCE AD HOC COMMITTEE ON CAMERAS IN THE COURTROOM

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

The Ad Hoc Committee on Cameras in the Courtroom met in Baltimore, Maryland, on May 9, 1990, and also met by teleconference on June 7 and July 12, 1990. All members of the Committee participated. Administrative Office personnel James E. Macklin, Jr. (Deputy Director) and Karen K. Siegel (Chief, Office of the Judicial Conference Secretariat) participated in both teleconferences; Karen Siegel also attended the May 9 meeting.

The Committee was created in October 1988, "to review recommendations from other Conference committees on the introduction of cameras in the courtroom, and to take into account the American Bar Association's ongoing review of Canon 3A(7) of its Code of Judicial Conduct, dealing with the subject." The Committee submitted interim reports to the September 1989 and March 1990 Judicial Conferences, and now recommends that the Judicial Conference (1) strike the existing ban on cameras in the courtroom from the Code of Conduct for United States Judges (Canon 3A(7)) and henceforth include policy on the subject in the Guide to Judiciary Policies and Procedures; (2) adopt a policy statement expanding the permissible use of cameras and other electronic means to include ceremonial proceedings, for perpetuation of the record, for security purposes, for other

purposes of judicial administration, or in accordance with pilot programs approved by the Judicial Conference; and (3) authorize a three-year experiment in up to two courts of appeals and up to six district courts, to permit camera coverage of certain federal court proceedings.

A. In its two previous reports, the Committee detailed the history of Canon 3A(7) of the Code of Conduct for United States Judges, which currently provides as follows:

> (7) A judge should prohibit broadcasting, televising, recording, or taking photographs in the courtroom and areas immediately adjacent thereto during sessions of court or recesses between sessions, except that a judge may authorize:
>
> (a) The use of electronic or photographic means for the presentation of evidence, or for the perpetuation of a record; and
>
> (b) the broadcasting, televising, recording, or photographing of investitive, ceremonial, or naturalization proceedings.

This policy, which has been in effect for almost forty years, was last comprehensively reviewed by the Conference in September 1984 (Conf. Rpt., p. 89), when a petition by 28 news organizations to allow broadcasting, televising, and camera coverage of federal court proceedings was denied.

B. The Committee is unanimous in its view that rules governing cameras in a courtroom are misplaced in a code of ethics. Accordingly, the Committee recommends that Canon 3A(7) be stricken and replaced with a policy statement in the Guide to Judiciary Policies and Procedures and in the Proceedings of the Judicial Conference of the United States.

With respect to the contents of the policy statement, the Committee once again agrees that the current rules are unduly restrictive and should be expanded somewhat. The Committee would draw a distinction between ceremonial and non-ceremonial proceedings. Cameras should be permitted in the courtroom during ceremonial proceedings for any purpose. For non-ceremonial proceedings, the Committee suggests broadening their utilization from the current "presentation of evidence" and "perpetuation of the record", to include "security purposes" and for other purposes of "judicial administration". This would permit, for example, videotaping of certain evidence during a long trial so that the absence of a juror or attorney (who can subsequently view a tape) would not require interruption of the trial, or closed circuit television linking the courtroom with a special room where a disruptive defendant is being held. Circuit councils would be assigned an oversight role.

The Committee is aware that some 44 states permit, in varying degrees, camera coverage of their judicial proceedings. In addition, the Judicial Conference has recently approved greater use of cameras in federal courtrooms. In September 1988, the Conference approved an experiment with videotaping as a means of taking the official record (Conf. Rpt., p. 83), and also approved the experimental use of videoconferencing of initial appearances and arraignments ("not guilty" pleas only) and of prisoner civil rights and habeas corpus cases (Conf. Rpt., p. 84). Moreover, the Conference authorized the videotaping of two

recent cases (March 1988 Session, Conf. Rpt., p. 27; March 1989 Session Conf. Rpt., p. 8), provided that the videotape would not constitute the official court record and there would be no public access to the tapes. Nevertheless, lifting all restrictions on camera coverage in federal courthouses would not, in the Committee's view, be an appropriate move reflective of the current sentiment of most federal judges. On the contrary, to the extent that we have heard from judicial officers with regard to our consideration of this issue, the substantial majority favor the Committee's more cautious, deliberative approach.

C. Thus, the Committee remains unpersuaded that it would be appropriate to drop all restrictions on media coverage of federal court proceedings, nor are we being seriously pressed to do so at this time. Instead, the Committee has been petitioned by media groups who are requesting that a controlled experiment be conducted.[1] These groups point to a number of factors which, they maintain, justify a limited experiment.

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[1]The Committee has received both written and oral submissions from Steven Brill and E. Barrett Prettyman, Jr., on behalf of American Lawyer Media, L.P., and from Timothy B. Dyk, on behalf of the American Society of Newspaper Editors, Associated Press, Cable News Network, Inc., Capital Cities/ABC, Inc., CBS Inc., C-Span, Gannett Company, Inc., Independent Network News, National Association of Broadcasters, National Broadcasting Co., Inc., The New York Times Company, Post-Newsweek Stations, Inc., Public Broadcasting Service, Radio-Television News Directors Association, The Reporters Committee for Freedom of the Press, Society of Professional Journalists, and The Washington Post.

First, of the 34 states that have permanent rules in place, 26 began on an experimental basis. An additional ten state programs remain experimental today. The media groups suggest that initial judicial skepticism has been greatly reduced after first-hand experience in these programs, and that a trial run would be worthwhile to ascertain whether there might be similar reactions in federal courts. They also maintain that the disruptive and intrusive aspects of broadcasting have been largely eliminated by modern technology.

Media representatives also point to the fact that in the last decade, the American Bar Association, whose Model Code of Judicial Conduct originally mirrored the judiciary's Canon 3A(7), has substantially revised its canon to permit camera coverage "under rules prescribed by a supervising appellate court or other appropriate authority." The ABA has under consideration a proposal to strike its Canon 3A(7) as inappropriate for a canon of ethics. In addition, the ABA House of Delegates has before it for action later this summer a resolution by the State Bar of Wisconsin and others, urging the Judicial Conference of the United States "to adopt rules authorizing broadcasting, televising, recording, and photographing of judicial proceedings in courtrooms and areas immediately adjacent thereto."

Finally, Congressman Robert Kastenmeier, chairman of the House Judiciary Subcommittee on Courts, Intellectual Property, and the Administration of Justice, informed the Committee on

May 1, 1990, of his view that "the time has come for the Federal judicial branch to allow cameras in the courtroom." Mr. Kastenmeier's letter, and a letter from the Chief Justice in response, are attached at Appendix A.

Like the Chief Justice, a majority of your Committee is not averse to controlled experimentation on a voluntary basis and would like to offer federal judges the opportunity to observe first-hand the effect of camera coverage and broadcasting of proceedings in federal court.[2] Consequently, we propose adding a fifth exception to the policy statement, to allow media coverage "in accordance with pilot programs approved by the Judicial Conference". We further propose that the Conference authorize a "Pilot Program on Photographing, Recording, and Broadcasting in the Courtroom", for a limited period of time, in a limited number of courts, and in limited circumstances. The three-year experiment, commencing July 1, 1991, and "sunsetting" June 30, 1994, would be entirely elective: it would permit -- not require -- camera coverage without government expense of civil proceedings only[3] in up to two volunteer courts of appeals and up to six volunteer district courts, after reasonable advance notice to the presiding judicial officer. The Committee notes that many states impose stringent rules on cameras in the courtroom and allow presiding judicial officers broad discretion to exclude

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[2]Judge Cacheris declines to join in the Committee's recommendation that the Conference approve a pilot program.

[3]Rule 53 of the Federal Rules of Criminal Procedure specifically prohibits the broadcasting of criminal proceedings.

cameras when circumstances warrant. After careful consideration of the state rules, the Committee agrees that similar provisions are both necessary and appropriate for the federal court test. The Committee has therefore drafted guidelines for the pilot, which participating courts would be required to adopt. Under the guidelines, presiding judicial officers would have the discretion, at any time, to:

> refuse, limit, or terminate media coverage of an entire case, portions thereof, or testimony of particular witnesses, in the interests of justice to protect the rights of the parties, witnesses, and the dignity of the court; to assure the orderly conduct of the proceedings; or for any other reason considered necessary or appropriate by the presiding judicial officer.

The Director of the Federal Judicial Center has advised the chairman that the Judicial Center will monitor the pilot and file a report and recommendations for Conference consideration in September 1993 or, at the latest, March 1994.

If the Conference approves the program and considers it appropriate, your Committee could select the pilot courts from among those willing to participate. We request that the Committee then be discharged from further service, and that the Conference assign oversight of the the pilot to the new Committee on Court Administration and Case Management.

The full text of the recommended policy statement, with commentary, is attached at Appendix B, and guidelines for the pilot are attached at Appendix C.

**Recommendations:**

That the Judicial Conference:

(a) strike Canon 3A(7) from the Code of Conduct for United States Judges, and henceforth include policy on cameras in the courtroom in the Guide to Judiciary Policies and Procedures;

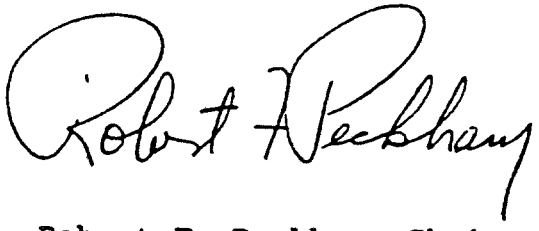
(b) adopt the policy statement and commentary on cameras in the courtroom attached at Appendix B;

(c) authorize a three-year experiment in up to two courts of appeals and up to six district courts, permitting photographing, recording, and broadcasting of certain federal court proceedings, in accordance with the guidelines at Appendix C;

(d) delegate authority to your Committee to select the courts to participate in the pilot; and

(e) upon completion of the selection process, discharge the Committee from further service and assign oversight of the pilot to the Committee on Court Administration and Case Management.

Respectfully submitted,



Robert F. Peckham, Chairman
James C. Cacheris
John P. Moore
Sam C. Pointer, Jr.
Walter F. Stapleton

Appendix A: Letter dated May 1, 1990 from Congressman Kastenmeier to Judge Robert F. Peckham and a May 7, 1990 letter from Chief Justice Rehnquist to Congressman Kastenmeier

Appendix B: Policy Statement and Commentary

Appendix C: Guidelines for the Pilot Program on Photographing, Recording, and Broadcasting in the Courtroom

ONE HUNDRED FIRST CONGRESS

# Congress of the United States

## House of Representatives

COMMITTEE ON THE JUDICIARY

2138 RAYBURN HOUSE OFFICE BUILDING

WASHINGTON, DC 20515-6216

May 1, 1990

The Honorable Robert F. Peckham
Chief Judge
United States District Court
for the Northern District of
California
450 Golden Gate Avenue
San Francisco, California 94102

Re: U.S. Judicial Conference Ad Hoc
Committee on Cameras in the Courtroom

Dear Judge Peckham:

The purpose of this letter is to inform you of my view that the time has come for the Federal judicial branch to allow cameras in the courtroom. My expression of this opinion is not done rashly and without reflection. It has developed over time and is rooted in my experiences as the long-time chairman of the House Judiciary Subcommittee which oversees the Federal courts.

Earlier this year, as you may know, the Federal Courts Study Committee conducted a series of field hearings to solicit suggestions for improving the Federal court system. As a member of the Committee, I chaired the hearing in Madison, Wisconsin. The hearing was a good one, eliciting testimony about a number of important topics. I was particularly impressed by the testimony there about the need to permit radio and television coverage of the Federal courts at work. The Study Committee, in its Final Report, ultimately deferred on this issue to your Ad Hoc Committee on Cameras in the Courtroom.

Since you are so directly involved in the Judicial Conference's reassessment of this question, I want to share with you some of my thoughts and, in return, request a report from you on your Committee's progress. That will enable me to delineate a course for my Subcommittee on this important issue.

It is timely for the Federal courts, at both the trial and appellate levels, to permit electronic and photographic news coverage in the courtroom. I am familiar with the history of the issue -- and, indeed, with some of the inherent problems that existed decades ago -- but technology has changed and so has the

traditional resistance of many judges and lawyers. Of greatest importance, perhaps, is the unchanged and still unmet need to provide the public with more information that will lead to a better understanding of the Federal courts. On this latter point the Federal Courts Study Committee recommended that the courts hold "press days" to facilitate communications between the courts and the media, and further that the courts expand publications programs to explain court operations to the public. I heartily concurred in these recommendations.

I was the first chair of a congressional subcommittee to open legislative proceedings (mark-ups) to the press and the public. That occurred over twenty years ago, and given the current success of C-SPAN, certainly has neither hindered the legislative process nor reduced citizen confidence in the Congress.

My own state provides a compelling example of the benefits of cameras in the courtroom. Wisconsin was one of the first states to permit virtually unlimited radio and television coverage of its judicial system. What began as an "experiment" in 1979 is now a matter of common practice, accepted by the bench, by the bar and by the public served by the courts. There is no better evidence of that than the State Bar's unequivocal commitment to expanded news media coverage as a means of providing better public access to the Federal courts. John Decker, the State Bar's new president, urged the Study Committee at its hearing to recommend permitting cameras in the Federal courtrooms. In fact, the Wisconsin Bar's Board of Governors, on April 21, 1990, unanimously approved a resolution for presentation to the ABA House of Delegates urging the Judicial Conference of the United States and the circuit courts to adopt rules authorizing such courtroom coverage. I am enclosing a copy of the recommended resolution and an accompanying report which I believe you will find pertinent to your Committee's work.

David Zweifel -- editor of the Capital Times and President of the Wisconsin Freedom of Information Council -- presented testimony on behalf of the Freedom of Information Committee of the American Society of Newspaper Editors. Mr. Zweifel concluded his statement by observing "If the federal courts are really sincere about gaining more public understanding and visibility and drawing the attention that they deserve, nothing will serve more to achieve those goals than opening the courtrooms of the country to the light of cameras." A copy of his remarks is enclosed.

Undoubtedly, you are already familiar with the trial and appellate court decisions on this question. I found particularly

relevant Judge Barbara Crabb's comments in a recent decision from the U.S. District for the Western District of Wisconsin (Lac Courte Oreilles Band v. Wisconsin, 17 Med. L. Rptr. 1381 (W.D. Wis., Jan. 30, 1990). Judge Crabb denied a motion for limited broadcast news coverage of a very important civil bench trial only because she felt bound by the policy of the Judicial Conference. But she did not question the merits of the case for cameras in the Federal courts. It was not surprising that every television station in the State and the Wisconsin Newspaper Association as well joined that motion, and significant that the State Bar joined it as well.

In view of the acceptance of this kind of expanded media coverage in 45 States, it is my thought that the Judicial Conference and the Judiciary Committees of the Congress would benefit from a program in the Federal courts, giving courts the discretion to begin addressing this issue. We took that step in Congress several years ago, as you know, and the "experiment" has effectively become a television tradition that brings our work into people's homes across the country.

I am firmly committed to a Federal judiciary that has the resources it needs and the independence guaranteed it by the Constitution. I have taken a lead -- along with my full Committee Chairman (Mr. Brooks) -- to bring the fruits of automation to the Federal court system. Late last year, President Bush signed Public Law 101-162, which created an automation fund for the Federal judiciary. Allowing the Federal court system to benefit from technological change, in the words of Judge Richard Bilby (Chairman, Committee on Judicial Improvements), is one of the judicial branch's highest priorities.

In my view, we ought not differentiate between technological changes in digitalized information, video and audio taping, and information processing. You, as one of the foremost proponents of experimentation within the Federal courts, hopefully share my confidence in technological change, controlled experimentation, and learning from each other.

There is room within the Federal judicial system for greater public access -- in part through news coverage with cameras and microphones -- which can only lead to greater public confidence

in the Federal judiciary. The legislative and judicial branches share that goal, I know, and I look forward to learning more about your Committee's work and having the benefit of your insights.

Sincerely,

ROBERT W. KASTENMEIER
Chairman
Subcommittee on Courts,
Intellectual Property, and the
Administration of Justice

RWK:mrj

Enclosure

CC: Hon. William Rehnquist
Hon. Barbara Crabb
John Decker, Esq.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

May 7, 1990

The Honorable Robert W. Kastenmeier
Chairman
Subcommittee on Courts, Intellectual Property
And the Administration of Justice
Congress of the United States
Committee on the Judiciary
2138 Rayburn Building
Washington, D.C. 20515-6216

Dear Bob,

Thanks for your letter of May 4th, enclosing a copy of your letter to Bob Peckham about television and radio coverage of federal court proceedings. I am by no means averse to the idea of the sort of experiment with television and radio coverage in federal courts which you describe, but before committing myself I would like to see what Bob Peckham's Committee has to say on the subject.

Sincerely,

Bill Rehnquist

# POLICY STATEMENT

A judge may authorize broadcasting, televising, recording, or taking photographs in the courtroom and in adjacent areas during investitive, naturalization, or other ceremonial proceedings. A judge may authorize such activities in the courtroom or adjacent areas during other proceedings, or recesses between such other proceedings, only:

(a) for the presentation of evidence,

(b) for the perpetuation of the record of the proceedings,

(c) for security purposes,

(d) for other purposes of judicial administration; or

(e) in accordance with pilot programs approved by the Judicial Conference of the United States.

When broadcasting, televising, recording, or photographing in the courtroom or adjacent areas is permitted, a judge should ensure that it is done in a manner that will be consistent with the rights of the parties, will not unduly distract participants in the proceeding, and will not otherwise interfere with the administration of justice.

It shall be the responsibility of the circuit councils to oversee the implementation of the foregoing policy within their respective circuits.

## COMMENTARY

Technology that permits the reproduction of sound and visual images provides our courts with a valuable resource to assist in their efforts to improve the administration of justice. That resource should be utilized, however, for purposes and in a manner consistent with the nature and objective of the judicial process.

The general policy of the Conference recognizes a distinction between ceremonial and non-ceremonial proceedings. Cameras and electronic reproduction equipment may be used in the courtroom during ceremonial proceedings for any purpose. During non-ceremonial proceedings, they may be utilized only for the limited purposes specified in the policy statement: presentation of evidence, perpetuation of the record, security, and other purposes of judicial administration. An exception is also recognized for pilot programs duly authorized by the Judicial Conference of the United States.

During non-ceremonial proceedings, audio and audio-visual recording equipment may be utilized to make the official record of the proceedings. The authority to use such equipment for the perpetuation of the record does not include the authority to make a record of the proceedings for any other purpose.

Presentation of evidence through electronic means can take many forms. Closed circuit television, for example, can be used to present the testimony of witnesses who are available at a

remote location such as a hospital or correctional facility, but who cannot conveniently attend the trial. A further example is provided by a long, complex case in which the judge authorized videotaping of the evidence so that the trial would not have to be interrupted in the event a juror or lawyer became ill or was otherwise required to be absent for a short period of time; the evidence taken during such absences was thus available on videotape to be presented to the juror or lawyer on his or her return.

The use of electronic means for purposes of courtroom security is illustrated by a closed circuit video system that allows a marshal to maintain a security surveillance of one or more trials from a remote location.

The policy statement also authorizes a trial judge to make use of electronic means for other purposes of judicial administration. This is intended to provide the necessary flexibility for experimentation with new uses of technology so long as those uses directly assist the judge and other judicial personnel in the performance of their official responsibilities. This "judicial administration" authorization, for example, would permit closed circuit television linking the courtroom with a special room where a disruptive defendant is being held.

Except with respect to ceremonial proceedings or for the limited purpose of conducting voluntary, controlled experiments (see below), the Conference policy does not authorize the contemporaneous broadcasting of proceedings from the courtroom to

the public beyond the courthouse walls. The Judicial Conference remains of the view that it would not be appropriate to require all non-ceremonial proceedings to be subject to media broadcasting. However, courts willing to experiment with broadcasting should, under controlled conditions, be permitted to do so. Accordingly, the Conference has adopted the attached guidelines to be effective July 1991 through June 1994, in those courts selected to participate in the "Pilot Program on Photographing, Recording, and Broadcasting in the Courtroom".

Except in connection with the enumerated exceptions, the Conference policy does not authorize audio or video taping in the courtroom for the purpose of subsequent public dissemination. Where an audio or video taping is used to perpetuate the official record, that record will be available to the public and the media to the same extent that an official transcript record is currently available to them.

The policy statement assigns a supervisory role to the circuit councils. A circuit council may elect to establish guidelines, or require preclearance, for particular permitted uses of cameras and other electronic means in the district courts of its circuit. Even in the absence of an applicable preclearance requirement, trial judges should consult their circuit council when a proposed use of cameras or other electronic means will make a significant demand on judicial resources or will require coordination with other elements of the judiciary. For example, since the equipment necessary to review

a video record of a trial is not currently available to all courts of appeals, it is contemplated that trial judges will authorize the use of video tape to perpetuate a record only with circuit council approval. However, in the absence of such special considerations or an applicable circuit preclearance requirement, and subject to any relevant circuit guidelines, trial judges will determine if, when, and how cameras and other electronic means will be utilized in their courtrooms.

# GUIDELINES FOR THE PILOT PROGRAM ON PHOTOGRAPHING, RECORDING, AND BROADCASTING IN THE COURTROOM

## 1. General Provisions.

(a) Media coverage of federal court proceedings under the pilot program on cameras in the courtroom is permissible only in accordance with these guidelines.

(b) Reasonable advance notice is required from the media of a request to be present to broadcast, televise, record electronically, or take photographs at a particular session. In the absence of such notice, the presiding judicial officer may refuse to permit media coverage.

(c) A presiding judicial officer may refuse, limit, or terminate media coverage of an entire case, portions thereof, or testimony of particular witnesses, in the interests of justice to protect the rights of the parties, witnesses, and the dignity of the court; to assure the orderly conduct of the proceedings; or for any other reason considered necessary or appropriate by the presiding judicial officer.

(d) No direct public expense is to be incurred for equipment, wiring, or personnel needed to provide media coverage.

(e) Nothing in these guidelines shall prevent a court from placing additional restrictions, or prohibiting altogether, photographing, recording, or broadcasting in designated areas of the courthouse.

(f) These guidelines take effect July 1, 1991, and expire June 30, 1994.

## 2. Limitations.

(a) Coverage of criminal proceedings, both at the trial and appellate levels, is prohibited.

(b) There shall be no audio pickup or broadcast of conferences which occur in a court facility between attorneys and their clients, between co-counsel of a client, or between counsel and the presiding judicial officer, whether held in the courtroom or in chambers.

(c) No coverage of the jury, or of any juror or alternate juror, while in the jury box, in the courtroom, in the jury deliberation room, or during recess, or while going to or from the deliberation room at any time, shall be permitted. Coverage of the prospective jury during voir dire is also prohibited.

3. Equipment and Personnel.

(a) Not more than one television camera, operated by not more than one camera person, shall be permitted in any trial court proceeding. Not more than two television cameras, operated by not more than one camera person each, shall be permitted in any appellate court proceeding.

(b) Not more than one still photographer, utilizing not more than one camera and related equipment, shall be permitted in any proceeding in a trial or appellate court.

(c) If two or more media representatives apply to cover a proceeding, no such coverage may begin until all such representatives have agreed upon a pooling arrangement for their respective news media. Such pooling arrangements shall include the designation of pool operators, procedures for cost sharing, access to and dissemination of material, and selection of a pool representative if appropriate. The presiding judicial officer may not be called upon to mediate or resolve any dispute as to such arrangements.

(d) Equipment or clothing shall not bear the insignia or marking of a media agency. Camera operators shall wear appropriate business attire.

4. Sound and Light Criteria.

(a) Equipment shall not produce distracting sound or light. Signal lights or devices to show when equipment is operating shall not be visible. Motorized drives, moving lights, flash attachments, or sudden light changes shall not be used.

(b) Except as otherwise approved by the presiding judicial officer, existing courtroom sound and light systems shall be used without modification. Audio pickup for all media purposes shall be accomplished from existing audio systems present in the court facility, or from a television camera's built-in microphone. If no technically suitable audio system exists in the court facility, microphones and related wiring essential for media purposes shall be unobtrusive and shall be located in places designated in advance of any proceeding by the presiding judicial officer.

5. **Location of Equipment and Personnel.**

(a) The presiding judicial officer shall designate the location in the courtroom for the camera equipment and operators.

(b) During the proceedings, operating personel shall not move about nor shall there be placement, movement, or removal of equipment, or the changing of film, film magazines, or lenses. All such activities shall take place each day before the proceeding begins, after it ends, or during a recess.

6. **Compliance.**

Any media repesentative who fails to comply with these guidelines shall be subject to appropriate sanction, as determined by the presiding judicial officer.

7. **Review.**

It is not intended that a grant or denial of media coverage be subject to appellate review insofar as it pertains to and arises under these guidelines, except as otherwise provided by law.

Memorandum for the Criminal Rules Advisory Committee

Re: Possible Amendment to Rule 53
of the Federal Rules of Criminal Procedure

This memorandum is submitted at the suggestion of Professor Steven Salzburg. It requests that the Committee consider a non-substantive amendment to Rule 53 of the Federal Rules of Criminal Procedure at its next meeting in Washington, D.C. in May 1993.

As the Committee is aware, the Judicial Conference in September 1990 authorized a three-year experiment with cameras in the federal courts. The experiment began on July 1, 1991, in two courts of appeals and six district courts. It will conclude on July 1, 1994.

Unlike most state experiments, the federal experiment is limited to civil cases because of the prohibition in Rule 53 against "[t]he taking of photographs in the court room during the progress of judicial proceedings or radio broadcasting of judicial proceedings from the court room." In recommending the federal experiment, Judge Peckham's Committee noted that "Rule 53 . . . specifically prohibits the broadcasting of criminal proceedings." Report of the Judicial Conference Ad Hoc Committee on Cameras in the Courtroom (September 1990) at 6 n.3.

The coalition of news organizations that originally sought the federal experiment (see attached) wishes to propose a non-substantive amendment to delete the cameras prohibition from Rule 53. The coalition does not seek an amendment to Rule 53 that would authorize cameras in criminal proceedings. Rather, we are seeking an amendment that would simply transfer jurisdiction over the issue of cameras in federal criminal proceedings from the Rules of Criminal Procedure to the Judicial Conference, which already exercises jurisdiction over the issue of cameras in civil proceedings. That matter is currently within the jurisdiction of the Committee on Court Administration.

We note that the Judicial Conference determined to delete the cameras prohibition from the Code of Judicial Conduct on a similar theory -- that the prohibition was a matter for the Judicial Conference to decide rather than a matter of judicial ethics. Report of the Judicial Conference Ad Hoc Committee on Cameras in the Courtroom at 2.

We request that this item be added to the Committee's agenda for its May 1993 meeting and, if appropriate, that a subcommittee be appointed to consider the matter in the interim. We would submit more extensive materials within the next 30-60 days for the Committee's consideration and, of course, provide copies of these materials to the Committee on Court Administration.

Timothy B. Dyk
Barbara McDowell
JONES, DAY, REAVIS & POGUE
1450 G Street, N.W.
Washington, D.C. 20005-2088
(202) 879-7600

ATTACHMENT

The coalition of news organizations that sought the federal experiment includes the American Society of Newspaper Editors, Associated Press, Cable News Network, Inc., Capital Cities/ABC, Inc., CBS INC., C-SPAN, Gannett Company, Inc., National Association of Broadcasters, National Press Photographers Association, National Public Radio, Inc., The New York Times Company, Post-Newsweek Stations, Inc., Public Broadcasting Service, Radio-Television News Directors Association, the Reporters Committee for Freedom of the Press, Society of Professional Journalists and The Washington Post.

AGENDA II-C-8
Washington, DC
April 22-23, 1993

**MEMO TO: Advisory Committee on Criminal Rules**

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

**RE: Requirement that United States Attorneys Be Admitted to Practice in Federal Courts**

**DATE: March 15, 1993**

The attached letter from Attorney General Barr to Chief Justice Rehnquist has been circulated to the Rules Committees for their information and consideration. In his letter, the Attorney General requests that the Judicial Conference consider the problems generated by local rules which require that attorneys representing the Government must join their bars; many of those courts require payment of admission fees. He notes that these requirements appear to be in conflict with statutory provisions.

The letter offers no recommended changes to any of the rules of procedure. In any event the Committee may wish to consider whether the problem could be solved through an amendment to any of the existing rules of procedure. It may be that by the time of the Committee's meeting in April, the matter will have been resolved by the Judicial Conference which is scheduled to meet this week.

Office of the Attorney General
Washington, D. C. 20530

November 24, 1992

The Honorable William H. Rehnquist
Chief Justice
Supreme Court of the United States
1 First St., N.E.
Washington, D.C. 20543

Dear Chief Justice Rehnquist:

I am writing to you in your capacity as the presiding officer of the Judicial Conference of the United States. I would like to call to your attention a problem caused by the local rules of a number of federal courts for attorneys representing the interests of the United States under the direction of the Attorney General. These rules are promulgated under the authority of 28 U.S.C. 2071(a). By statute, the Judicial Conference of the United States has the power to modify or abrogate rules of the federal courts of appeals if they are inconsistent with federal law. See 28 U.S.C. 331 and 2071(c)(2). Thus, the Judicial Conference is well-positioned to resolve our problem.

A number of federal courts require attorneys who practice before them to join their local bars, and many of these courts require the payment of admission fees. See, for example, D.C. Circuit Rule 6, Second Circuit Rule 46, Ninth Circuit Rule 46.1, and Tenth Circuit Rule 46.2. These rules do not, as far as we are aware, include any exception for government attorneys. Certain other circuits, however, exempt government attorneys from the requirement of paying the admission fee or joining the bar of the court. See First Circuit Rule 46.1, and Federal Circuit Rule 46(d).

We believe that those court rules that require attorneys appearing at the direction of the Attorney General solely in order to represent the interests of the United States to join federal court bars and to pay a fee to do so are not consistent with federal law. Several sections of Title 28 set out the authority of the Attorney General to assign attorneys to appear in court to represent the interests of the United States. Section 515(a) provides that "[t]he Attorney General or any other officer of the Department of Justice, or any attorney specially appointed by the Attorney General under law, may, when

specifically directed by the Attorney General, conduct any kind of legal proceeding * * * which United States attorneys are authorized by law to conduct * * *." (The powers of United States Attorneys are then broadly set out in 28 U.S.C. 547.) Further, Section 517 states that any officer of the Department of Justice "may be sent by the Attorney General to any State or district in the United States to attend to the interests of the United States in a suit pending in a court of the United States * * *." Finally, Section 518(b) provides that "[w]hen the Attorney General considers it in the interests of the United States" he may "direct the Solicitor General or any officer of the Department of Justice" to "conduct and argue any case in a court of the United States in which the United States is interested * * *."

Thus, federal law clearly states that the Attorney General may direct any Department of Justice attorney to appear in federal court on behalf of the United States. The circuit rules mentioned above appear to conflict with these statutory provisions insofar as they actually require court bar membership and payment of fees by attorneys acting under the direction of the Attorney General.

Although district court rules on this point vary widely, a number of district courts also require payment of bar admission fees. I recognize that the Judicial Conference does not have direct supervision over district court rules (see 28 U.S.C. 331). However, these rules also must be in conformance with Acts of Congress (see 28 U.S.C. 2071(a)), and the judicial council in each circuit may modify or abrogate them if appropriate (see 28 U.S.C. 2071(c)(1)). Consequently, if the Judicial Conference requires the circuit rules to conform to federal law, I am confident that the district courts will either voluntarily make the necessary modifications, or that various circuit judicial councils will do so.

In sum, I respectfully request that the Judicial Conference of the United States consider our view that imposition of local bar admission fees on attorneys representing the United States is inconsistent with federal law, and modify any of the various circuit rules so that attorneys assigned by the Attorney General (or his legal designee) to represent the interests of the United States are not required to pay bar admission fees imposed by those rules.

Thank you for your attention to this matter. If you or members of the Judicial Conference would like to discuss it with me or my staff, please contact me.

Sincerely,

WILLIAM P. BARR
Attorney General

AGENDA II-D-1
Washington, DC
April 22-23, 1993

**MEMO TO: Advisory Committee on Criminal Rules**

**FROM: Dave Schlueter, Reporter**

**RE: Rule 57; Materials Re Local Rules**

**DATE: March 15, 1993**

In an effort to address several problems associated with local rules, and standing orders, the Standing Committee is coordinating the adoption of standarized language in the various rules of procedure which provide for adoption of local rules, etc. For example, in the Criminal Rules, Rule 57 is the governing rule.

Attached is a memo from Dean Dan Coquillette, Reporter for the Standing Committee, outlining standarized language informally agreed upon as a starting point. Using that language, I have drafted a proposed revision of Rule 57 for the Committee's consideration.

RULES OF CRIMINAL PROCEDURE

**Rule 57. Rules by District Courts**

(a) IN GENERAL. Each district court by action of a majority of the district judges ~~thereof~~ may from time to time, after giving appropriate notice and an opportunity to comment, make and amend rules governing its practice ~~not inconsistent these rules.~~ Local rules must conform to any uniform numbering system prescribed by the Judicial Conference of the United States. A judge may regulate practice in any manner consistent with federal statutes, rules, and with local rules of the district. No sanction or other disadvantage may be imposed for noncompliance with any requirement not in federal statutes, rules, or the local district rules unless the alleged violator has actual notice of the requirement.

(b) EFFECTIVE DATE AND NOTICE. A local rule so adopted shall take effect upon the date specified by the district court and shall remain in effect unless amended by the district court or abrogated by the judicial council of the circuit in which the district court is located. Copies of the rules and amendments so made by any district court shall upon their promulgation be furnished to the judicial council and the Administrative Office of the United States Courts

RULES OF CRIMINAL PROCEDURE

and shall be made available to the public. ~~In all cases not provided by rule, the district judges and magistrate judges may regulate their practice in any manner not inconsistent with these rules or those of the district in which they act.~~

COMMITTEE NOTE

Rule 57 provides flexibility to district courts to promulgate local rules of practice and procedure. Specifically, it permits the court to regulate practice in any manner consistent with the Acts of Congress, with rules adopted under 28 U.S.C. § 2072 and 2075, and with the districts local rules. But experience has demonstrated several problems. The amendments are intended to address those problems.

First, the amendment requires that the numbering of local rules conform with any numbering system that may be prescribed by the Judicial Conference. Lack of uniform numbering might create unnecessary traps for counsel and litigants. A uniform number system would make it easier for an increasingly national bar to locate a local rule that applies to a particular procedural issue.

Second, the rule recognizes that courts rely on multiple directives to control practice. Some courts regulate practice through the published Federal Rules and the local rules of the court. In the past, some courts have also used internal operating procedures, standing orders, and other internal directives. This can lead to problems. Counsel or litigants may be unaware of the various directives. In addition, the sheer volume of directives may impose an unreasonable barrier. For example, it may be difficult to obtain copies of the directives. Finally, counsel or litigants may be unfairly sanctioned for failing to comply with a directive. For these reasons, the amendment disapproves imposing any sanction or other disadvantage on a person for noncompliance with such an internal directive, unless the alleged violator has actual notice of the requirement.

**RULES OF CRIMINAL PROCEDURE**

There should be no adverse consequence to a party or attorney for violating special requirements relating to practice before a particular judge unless the party or attorney has actual notice of those requirements. Furnishing litigants with a copy outlining the judge's practices -- or attaching instructions to a notice setting a case for conference or trial -- would suffice to give actual notice, as would an order in a case specifically adopting by reference a judge's standing order and indicating how copies can be obtained.

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

ROBERT E. KEETON
CHAIRMAN

PETER G. McCABE
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CHAIRMEN OF ADVISORY COMMITTEES
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EDWARD LEAVY
BANKRUPTCY RULES

# Memorandum

TO: Chairmen and Reporters of the Advisory Committees

FROM: Daniel R. Coquillette, Reporter
Mary P. Squiers, Consultant

RE: Federal Rules Amendments Concerning Local Rules and Technical Amendments, Including Committee Notes

DATE: February 5, 1993

At our lunch meeting in Asheville, North Carolina, last month, the Chairmen and Reporters of the Advisory Committees agreed on precise language for rule amendments concerning local rules and technical amendments. The need for uniform committee notes on these rules was also discussed. We have set out the language for the proposed rules below. We have also set out committee notes that we believe accurately reflect the views of those present at the lunch meeting.

It is our understanding that each of the Advisory Committees will consider these rules and notes at their respective winter or spring 1993 meetings.

If you have any questions or comments about this material, please feel free to contact either one of us (Dan: (617) 552-4340; Mary: (617) 552-8851).

## Technical and Conforming Amendments

The Judicial Conference of the United States may amend these rules to correct errors in spelling, cross-references, or typography, or to make technical changes needed to conform these rules to statutory changes.

Committee Note

This rule is added to enable the Judicial Conference to make minor technical amendments to these rules without having to burden the Supreme Court and Congress with reviewing such changes. This delegation of authority will relate only to uncontroversial, nonsubstantive matters.

**Uniform Numbering of Local Rules**

Local rules must conform to any uniform numbering system prescribed by the Judicial Conference of the United States.

Committee Note

This rule requires that the numbering of local rules conform with any uniform numbering system that may be prescribed by the Judicial Conference. Lack of uniform numbering might create unnecessary traps for counsel and litigants. A uniform numbering system would make it easier for an increasingly national bar and for litigants to locate a local rule that applies to a particular procedural issue.

**Procedure When There is No Controlling Law**

A judge may regulate practice in any manner consistent with federal statutes, rules, [official forms],* and with local rules of the district. No sanction or other disadvantage may be imposed for noncompliance with any requirement not in federal statutes, rules, [official forms],* or the local district rules unless the alleged violator has actual notice of the requirement.

* Bankruptcy Rules only

Committee Note

This rule provides flexibility to the court in regulating practice when there is no controlling law. Specifically, it permits the court to regulate practice in any manner consistent with Acts of Congress, with rules adopted under [insert appropriate enabling legislation], [in bankruptcy cases: with Official Forms,] and with the district's local rules.

This rule recognizes that courts rely on multiple directives to control practice. Some courts regulate practice through the published Federal Rules and the local rules of the court. In the past, some courts have also used internal operating procedures, standing orders, and other internal directives. This can lead to problems. Counsel or litigants may be unaware of various directives. In addition, the sheer volume of directives may impose an unreasonable barrier. For example, it may be difficult to obtain copies of the directives. Finally, counsel or litigants may be unfairly sanctioned for failing to comply with a directive. For these reasons, this Rule disapproves imposing any sanction or other disadvantage on a person for noncompliance with such an internal directive, unless the alleged violation has actual notice of the requirement.

There should be no adverse consequence to a party or attorney for violating special requirements relating to practice before a particular judge unless the party or attorney has actual notice of those requirements. Furnishing litigants with a copy outlining the judge's practices--or attaching instructions to a notice setting a case for conference or trial--would suffice to give actual notice, as would an order in a case specifically adopting by reference a judge's standing order and indicating how copies can be obtained.

L. RALPH MECHAM
DIRECTOR

JAMES E. MACKLIN, JR.
DEPUTY DIRECTOR

ADMINISTRATIVE OFFICE OF THE
UNITED STATES COURTS

WASHINGTON, D.C. 20544

JOHN K. RABIEJ
CHIEF, RULES COMMITTEE
SUPPORT OFFICE

September 1, 1992

MEMORANDUM TO THE MEMBERS OF THE RULES COMMITTEES

SUBJECT: Uniform Numbering of Local Rules

On behalf of Judge Robert Keeton, I am sending a copy of a memorandum pertaining to the "uniform numbering of local rules," which was sent to all chief judges of the district courts.

John K. Rabiej

Attachments

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE

OF THE

JUDICIAL CONFERENCE OF THE UNITED STATES

WASHINGTON, D.C. 20544



# M E M O R A N D U M

**TO:** Chief Judges, United States District Courts

**INFORMATION COPIES TO:** Chief Circuit Judges
Circuit Executives
Members of Circuit Councils
Members of Circuit Committees on District Plans for Expense and Delay Reduction (Established Under 28 U.S.C. §474(a))

**FROM:** Robert E. Keeton

**DATE:** August 25, 1992

**SUBJECT:** Local Rule Renumbering; Integration of Civil Justice Delay and Expense Reduction Plan

In September of 1988, the Judicial Conference of the United States "urged each district court to adopt a Uniform Numbering System for its local rules, patterned upon the Federal Rules of Civil Procedure." Report of the Judicial Conference, 103 (Sept. 1988). Both the need for and the usefulness to the bar and bench of uniform numbering of local rules have become more compelling as district Expense and Delay Reduction Plans have been or will be developed in response to the Civil Justice Reform Act of 1990, 28 U.S.C. §§471 et sequitur.

The Judicial Conference assigned to the Standing Committee on Rules of Practice and Procedure a responsibility for overseeing the Local Rules Project and its work in aid of implementation of the Uniform Numbering System.

Although the Committee on Rules of Practice and Procedure has an ongoing responsibility regarding recommendations to the Judicial Conference, we are sensitive to the fact that we do not have authority with respect to implementation of the Judicial Conference Resolution or with respect to oversight of Expense and Delay Reduction Plans of the various districts. Rather, we understand that authority to be partly in the Circuit Councils, partly in the Circuit Chief Judges and Circuit Committees as provided in the Act of 1990, and partly in the Judicial Conference Committee to which the Conference has delegated responsibility under the 1990 Act -- that is, the Committee on Court Administration and Case Management, chaired by Judge Robert Parker, with whom I have conferred and to whom I am sending a copy of this memorandum. For information, I have attached a memorandum summarizing the statutory provisions in which all these different assignments of responsibility for oversight of local rules are rooted. Also included is the Judicial Conference Resolution on uniform numbering of local rules.

The Committee on Rules of Practice and Procedure is acutely conscious of how much time and effort of judges, staff, and members of the bar in each district are required for full compliance with the Judicial Conference Resolution regarding uniform numbering, and of the added burden incident to keying provisions of Expense and Delay Reduction Plans to the uniform numbering system. We have asked our Reporter, Dean Coquillette, and our Consultant, Professor Mary Squiers, to examine some of the draft Plans now under consideration and to confer with district representatives about keying them into the uniform numbering system. They have prepared a new outline of the Uniform Numbering System that incorporates recommendations about ways of designating rules adopted as parts of a district Expense and Delay Reduction Plan. Their new outline and a memorandum from Professor Squiers on this subject are being sent to you along with this memorandum.

I request your help in achieving the Judicial Conference goal of Uniform Numbering. If Dean Coquillette, Professor Squiers or I can be helpful in any way to you or to any group in your district that is working on this matter, we would welcome a letter or call from you.

Robert E Keeton

**Summary of Statutes Bearing on Oversight of Local Rules of District Courts March 1992**

Section 2071(a) of Title 28 declares that "all courts established by Act of Congress may from time to time prescribe rules for the conduct of their business," on conditions stated in 2071(b). Section 2071(b) declares that a rule of a district court is subject to modification or abrogation "by the judicial council of the relevant circuit."

Section 2072 declares that the Supreme Court

> shall have the power to prescribe general rules of practice and procedure and rules of evidence for cases in the United States district courts ....

Section 332(a) creates a judicial council for each circuit, and 332(d)(4) declares that the judicial council of each circuit

> shall periodically review the rules which are prescribed under section 2071 of this title by district courts within its circuit for consistency with rules prescribed under section 2072 of this title. Each council may modify or abrogate any such rule found inconsistent in the course of such a review.

The Act of 1990, codified in 28 U.S.C. §§471-482, includes a section on "Review of district court action," the text of which is as follows:

> (a)(1) The chief judges of each district court in a circuit and the chief judge of the court of appeals for such circuit shall, as a committee --
>
> > (A) Review each plan and report submitted pursuant to section 472(d) of this title; and
> >
> > (B) make such suggestions for additional actions or modified actions of that district court as the committee considers appropriate for reducing cost and delay in civil litigation in the district court.
>
> (2) The chief judge of a court of appeals and the chief judge of a district court may designate another judge of such

court to perform the chief judge's responsibilities under paragraph (1) of this subsection.

(b) The Judicial Conference of the United States --

(1) shall review each plan and report submitted by a district court pursuant to section 472(d) of this title; and

(2) may request the district court to take additional action if the Judicial Conference determines that such court has not adequately responded to the conditions relevant to the civil and criminal dockets of the court or to the recommendations of the district court's advisory group.

28 U.S.C. §474.

**Judicial Conference Resolution of September 1988**

LOCAL RULES

The Judicial Conference authorized the Committee on Rules of Practice and Procedure to undertake a study of local rules of the district courts. That study is under way. The Committee noted, however, that there is no uniform numbering system for federal district court local rules. Since there are many advantages of such a system, e.g., to help the bar in locating rules applicable to a particular subject, and to ease the incorporation of local rules into indexing services and the Westlaw and LEXIS computer services, the Conference approved and urged each district court to adopt a Uniform Numbering System for its local rules, patterned upon the Federal Rules of Civil Procedure.

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# Memorandum

TO: Hon. Robert E. Keeton

FROM: Mary P. Squiers

RE: An Example of a Proposed Numbering System for Local Rules, Including a Civil Justice Delay and Expense Reduction Plan

DATE: August 19, 1992

What follows is an example of a proposed numbering system for local rules which incorporates a Civil Justice Delay and Expense Reduction Plan. This example is intended to assist the districts as they begin to renumber their local rules in compliance with the recommendation of the Judicial Conference. *See* Report of the Judicial Conference (September, 1988) 103.

Because the existing rules and plans in the ninety-four districts vary in great detail, both in subject matter and format, it is difficult to provide guidance relying on one district's rules which may be helpful to many districts. Accordingly, I chose to renumber a "fictitious" district court's local rules and Plan. The directives in this district are based on a composite of many district courts' rules and Plans. For instance, the numbering is based on several districts' current numbering systems; the chapter format is based on others'. Lastly, the actual titles of rules are taken from many of the jurisdictions' local rules. I also incorporated several different Delay and Expense Reduction Plans into these rules. The list of rules in this fictitious court is quite lengthy. I did not attempt to reduce the number of rules since I wanted to cover the subject matter of as many courts' rules as possible. I do not suggest, however, that courts do or should have such a lengthy listing of rules.

This memorandum consists of three sections: 1. Proposed Numbering; 2. Renumbered Local Rules; and, 3. Alphabetical List of Local Rule Topics. I believe the first section setting forth the proposed numbering is quite easy to follow. The rules of the fictitious jurisdiction are listed down the left side of the page. The proposed numbering, in compliance with the recommendation of the Local Rules Project and the Judicial Conference, is on the right side of the page. The second part of the document actually sorts the local rules in this fictitious jurisdiction as they would appear after the renumbering. The new numbers are listed down the left side of the page in order. On the right side of the page are the titles of the rules with the old numbers in parentheses. The third part is simply an alphabetical list of the local rule topics used by the fictitious jurisdiction. To the left of each of the topics is a reference to the cognate local rule.

## Part 1. Proposed Numbering

| | | Proposed Numbering |
|---|---|---|
| | **Chapter I—General Rules** | |
| 100. | Title—Effective Date of These Rules—Compliance and Construction. | |
| | 100-1. Title. | LR1.1 |
| | 100-2. Scope. | LR1.1 |
| | 100-3. Sanctions and Penalties for Noncompliance. | LR1.3 |
| | 100-4. Definitions. | LR1.1 |
| | 100-5. Effective Date; Transitional Provision. | LR1.1 |
| 101. | Sessions of the Court. | |
| | 101-1. Regular Sessions. | LR77.4 |
| 102. | Divisions of the Court. | |
| | 102-1. Number of Divisions. | LR3.2 |
| | 102-2. Transfer of Civil Actions. | LR3.2 |
| 110. | Attorneys—Admission to Practice—Standards of Conduct—Duties. | |
| | 110-1. Admission to the Bar. | LR83.5 |
| | 110-2. Standards of Professional Conduct. | LR83.5 |
| | 110-3. Student Practice. | LR83.5 |
| | 110-4. Appearance, Substitution, and Withdrawal. | LR83.5 |
| | 110-5. Discipline. | LR83.6 |
| 120. | Court Library. | |
| | 120-1. Use of the Library. | LR77.6 |
| 121. | Court Reporters. | |
| | 121-1. Fee Schedule. | LR80.1 |
| 122. | Money in the Custody of the Clerk. | |
| | 122-1. Receipt and Deposit of Registry Funds. | LR67.2 |
| | 122-2. Investment of Registry Funds. | LR67.2 |
| | 122-3. Disbursement of Registry Funds. | LR67.3 |
| 130. | Format of Pleadings and Other Papers—Filing of Papers. | |
| | 130-1. Form; Legibility | LR5.1 |
| | 130-2. Filing by Clerk—Nonconforming Documents Rejected. | Deleted |
| 131. | Time Periods. | |
| | 131-1. Computation of Time. | LR6.1 |
| | 131-2. Extensions of Time by Clerk. | LR6.2 |

| | Proposed Numbering |
|---|---|
| 132. Clerk of the District Court. | |
| 132-1. Location and Hours. | LR77.1 |
| 132-2. Custody and Withdrawal of Files. | LR79.1 |
| 132-3. Custody and Disposition of Exhibits | LR79.1 |
| 132-4. Orders Grantable by Clerk. | LR77.2 |
| 140. Publicity. | |
| 140-1. Photography and Broadcasting. | LR83.4 |
| 145. Security in the Courthouse. | |
| 145-1. Weapons Not Permitted. | LR83.4 |

## Chapter II—Civil Rules

| | |
|---|---|
| 200. Institution of Civil Proceedings. | |
| 200-1. Identification of Counsel. | LR11.1 |
| 200-2. Caption and Title. | LR10.1 |
| 200-3. Jury Demand. | LR38.1 |
| 200-4. Class Actions. | LR23.1 |
| A. Complaint. | |
| B. Class Certification. | |
| C Restrictions Regarding Communications with Actual or Potential Class Members. | |
| 200-5. Three-Judge Court. | LR9.2 |
| 200-6. Claim of Unconstitutionality. | LR24.1 |
| 200-7. Social Security Cases. | LR9.1 |
| 205. Differentiated Case Management[1] | |
| 205-1. Purpose and Authority. | LR16.2CJ or LR40.1CJ |
| 205-2. Definitions. | LR16.2CJ |
| 205-3. Date of DCM Application. | LR1.1CJ |
| 205-4. Conflicts with Other Rules. | LR1.1CJ |
| 205-5. Tracks and Evaluation of Cases. | LR16.2CJ |
| 205-6. Case Information Statement. | LR16.2CJ |
| 205-7. Track Assignment and Case Management Conference. | LR16.2CJ |
| 205-8. Status Hearing and Final Pretrial Conference. | LR16.2CJ |
| 205.9. Alternative Dispute Resolution. | LR16.2CJ |

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[1] Some jurisdictions may provide for assignment of a trial date at a pretrial hearing or in a pretrial order so that placing this rule under Federal Rule 16 is appropriate. Others may prefer that such a local directive be placed under Federal Rule 40 on assignment of cases for trial. This decision is left to the individual districts to better conform to local practice. Most of the provisions of Local Rule 205, then, can be placed in one of two places; Local Rule 205-1 is illustrative. *See also* Local Rules 206 and 255.

| | | Proposed Numbering |
|---|---|---|
| 206. | Early, Firm Trial Dates[2] | |
| 206-1. | Presumptive Trial Date. | LR16.3CJ or LR40.2CJ |
| 206-2. | Firm Trial Date for Track "A" Cases. | LR16.3CJ |
| 206-3. | Firm Trial Date for Track "B" and "C". | LR16.3CJ |
| 206-4. | Continuances After Firm Trial Date is Set. | LR16.3CJ |
| 206-5. | Parties Informed of Case Status. | LR16.3CJ |
| 210. | Service of Pleadings and Other Papers. | |
| 210-1. | Service by Mail. | LR4.1 |
| 210-2. | Proof of Service. | LR5.2 |
| 210-3. | Filing with the Court. | LR5.1 |
| 215. | Motion Practice.[3] | |
| 215-1. | Motions; to Whom Made. | LR7.1 |
| 215-2. | Notice and Supporting Papers. | LR7.1 |
| 215-3. | Opposition and Reply. | LR7.1 |
| 215-4. | Briefs and Memoranda. | LR7.1 |
| A. | When Required. | |
| B. | Form of Briefs, Memoranda, and Appendices. | |
| C. | Contents of Briefs. | |
| D. | Contents of Appendices. | |
| E. | Number of Papers. | |
| 215-5. | Nonconforming Papers Rejected. | Deleted |
| 215-6. | Filing. | LR7.1 |
| 215-7. | Affidavits. | LR7.1 |
| 215-8. | Temporary Restraining Orders. | LR65.2 |
| 215-9. | Preliminary Injunctions. | LR65.1 |
| 215-10. | Continuances and Withdrawal of Motions. | LR7.1 |
| 215-11. | Extensions, Enlargements, or Shortening of Time. | LR7.1 |
| 215-12. | Submission of Orders to a Judge. | LR7.1 |
| 220. | Prejudgment Remedies. | |
| 220-1. | Receivers. | LR66.1 |
| 225. | Discovery Filing and Service Practice. | |
| 225-1. | Filing. | LR5.5 |
| 225-2. | Service. | LR5.5 |

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[2] The provisions of Local Rule 206 can be placed in one of two places, either under Federal Rule 16 or 40, depending upon the preference of the district court. *See also* Local Rules 205 and 255.

[3] If these rules refer to specific motions such as those pursuant to Rules 12 or 56, one of two options can be exercised. A notation can be made at the other rule locations, such as at LR56.1 referring the reader to LR7, or there can be multiple local rules on the subject of motions: one for motions generally at LR7 and rules relating to such specific motions at LR12 and LR56.

| | | Proposed Numbering |
|---|---|---|
| 230. | Discovery. | |
| | 230-1. Form of Certain Discovery Documents. | LR26.1 |
| | 230-2. Interrogatories. | LR33.1 |
| | 230-3. Requests for Production. | LR34.1 |
| | 230-4. Requests for Admission. | LR36.1 |
| | 230-5. Depositions. | LR30.1 |
| | A. Who May Attend Depositions. | |
| | B. Videotape Depositions. | |
| | 230-6. Physical and Mental Examination. | LR35.1 |
| | 230-7. Form of Discovery Motions. | LR37.2 |
| | 230-8. Informal Conference to Settle Discovery Disputes. | LR37.1 |
| | 230-9. Preliminary Discovery. | LR26.2CJ |
| 235. | Pretrial and Setting for Trial. | |
| | 235-1. Status Conference. | LR16.1 |
| | 235-2. Status Conference Order. | LR16.1 |
| | 235-3. Pretrial Conference. | LR16.1 |
| | 235-4. Pretrial Conference Statement. | LR16.1 |
| | 235-5. Pretrial Order. | LR16.1 |
| | 235-6. Objections to Proposed Testimony and Exhibits | LR16.1 |
| | 235-7. Dismissal for Lack of Prosecution. | LR41.1 |
| 240. | Settlement. | |
| | 240-1. Settlement Conference. | LR16.4 |
| 245. | Jury | |
| | 245-1. Six-Person Juries. | Delete |
| | 245-2. Voir Dire. | LR47.1 |
| | 245-3. Proposed Instructions. | LR51.1 |
| | 245-4. Objections to Proposed Instructions. | LR51.1 |
| | 245-5. Assessment of Jury Costs. | LR54.2 |
| 250. | Exhibits. | |
| | 250-1. Use of Exhibits. | LR39.3 |
| 255. | Trial Date.[4] | |
| | 255-1. Continuance of Trial Date. | LR16.5 or LR40.3 |
| 260. | Conduct in the Courtroom. | |
| | 260-1. Courtroom Decorum. | LR83.3 |
| | 260-2. Examination of Witnesses. | LR43.1 |
| | 260-3. Communication with Jurors. | LR47.2 |

[4] The provisions of Local Rule 255 can be placed in one of two places, either under Federal Rule 16 or 40, depending upon the preference of the district court. *See also* Local Rules 205 and 206.

| | | Proposed Numbering |
|---|---|---|
| 265. | Judgment. | |
| | 265-1. Form of Judgment. | LR58.1 |
| 270. | Taxation of Costs. | |
| | 270-1. Procedure for Taxing Costs. | LR54.1 |
| 275. | Attorneys' Fees. | |
| | 275-1. Procedure for Determining Attorneys' Fees. | LR54.3 |
| 280. | Executions. | |
| | 280-1. Procedure for Execution. | LR58.2 |
| 285. | Petitions to Stay Execution of State Court Judgments. | |
| | 285-1. Procedure to Stay Execution of State Court Judgments. | LR62.1 |
| 290. | Bonds and Sureties. | |
| | 290-1. When Required. | LR65.1.1 |
| | 290-2. Qualifications of Surety. | LR65.1.1 |
| | 290-3. Removal Bond. | Delete |
| | 290-4. Examination of Sureties. | LR65.1.1 |
| | 290-5. Supersedeas Bonds. | LR62.2 |

## Chapter III—Magistrate Judges

| | | |
|---|---|---|
| 300. | Duties of Magistrate Judges. | |
| | 300-1. General Duties of Magistrate Judges. | LR72.1 |
| 310. | Assignment of Duties to Magistrate Judges. | |
| | 310-1. Assignment of Duties to Magistrate Judges. | LR72.1 |
| 320. | Review of Magistrate Judges' Determinations. | |
| | 320-1. Procedure for Review. | LR74.1 |
| 330. | Chief Magistrate Judge. | |
| | 330-1. Selection of Chief Magistrate Judge. | LR72.1 |
| | 330-2. Duties of Chief Magistrate Judge. | LR72.1 |
| 340. | Trials of Civil Cases Upon Consent of the Parties. | |
| | 340-1. Procedure for Obtaining Consent. | LR73.1 |
| | 340-2. Effect of Magistrate Judge's Result. | LR73.1 |
| 350. | Prisoner Petitions. | |
| | 350-1. Responsibilities of Magistrate Judges. | LR72.1 |

## Chapter IV—Alternative Dispute Resolution.

| | | |
|---|---|---|
| 400. | General Provisions. | |
| | 400-1. General Provisions. | LR16.6CJ |

| | | Proposed Numbering |
|---|---|---|
| 405. | Mandatory Arbitration. | |
| | 405-1. Actions Subject to Mandatory Arbitration. | LR16.7CJ |
| | 405-2. Procedure for Referral to Arbitration. | LR16.7CJ |
| | 405-3. Selection and Compensation of Arbitrators. | LR16.7CJ |
| | 405-4. Award and Judgment. | LR16.7CJ |
| | 405-5. Trial De Novo. | LR16.7CJ |
| 410. | Voluntary Arbitration. | |
| | 410-1. General Provisions. | LR16.8CJ |
| 415. | Early Neutral Evaluation. | |
| | 415-1. General Provisions. | LR16.9CJ |
| 420. | Mediation | |
| | 420-1. General Provisions. | LR16.10CJ |
| 425. | Summary Jury Trial | |
| | 425-1. General Provisions. | LR16.11CJ |
| 430. | Summary Bench Trial | |
| | 430-1. General Provisions. | LR16.12CJ |
| 435. | Other ADR Procedures | |
| | 435-1. General Provisions. | LR16.13CJ |
| 440. | Civil Justice Delay and Expense Reduction Plan. [The last local rule for the district consists of a table of cross references for each of the directives in the Plan to its local rule number.[5]] | LR83.7CJ |

## Part 2. Renumbered Local Rules

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|---|---|
| LR1.1 | Title.(100-1) |
| LR1.1 | Scope of Local Rules. (100-2) |
| LR1.1 | Definitions. (100-4) |
| LR1.1 | Effective Date; Transitional Provisions. (100-5) |
| LR1.1CJ | Date of Differentiated Case Management (DCM) Application. (205-3) |
| LR1.1CJ | Conflicts of DCM with Other Rules. (205-4) |
| LR1.3 | Sanctions and Penalties for Noncompliance. (100-3) |

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[5] An alternative that a district may wish to consider is to omit "CJ" from all rules but include as an Appendix to the local rules of the district two tables of cross-references—one organized in the sequence of the Plan and showing corresponding local rule numbers, and the other organized in the sequence of the local rules and showing corresponding sections of the Plan.

LR3.2 Number of Divisions. (102-1)
LR3.2 Transfer of Civil Actions Among Divisions. (102-2)

LR4.1 Service by Mail. (210-1)

LR5.1 Filing with the Court. (210-3)
LR5.1 Form; Legibility of Pleadings and Other Papers. (130-1)
Deleted Filing by Clerk—Nonconforming Documents Rejected. (130-2)

LR5.2 Proof of Service. (210-2)

LR5.5 Discovery; Filing. (225-1)
LR5.5 Discovery; Service. (225-2)

LR6.1 Computation of Time Periods. (131-1)

LR6.2 Extensions of Time by Clerk. (131-2)

LR7.1 Motions; to Whom Made. (215-1)
LR7.1 Motions; Notice and Supporting Papers. (215-2)
LR7.1 Motions; Opposition and Reply. (215-3)
LR7.1 Motions; Briefs and Memoranda. (215-4)
A. When Required.
B. Form of Briefs, Memoranda, and Appendices.
C. Contents of Briefs.
D. Contents of Appendices.
E. Number of Papers.
Deleted Motions; Nonconforming Papers Rejected. (215-5)
LR7.1 Motions; Filing. (215-6)
LR7.1 Motions; Affidavits. (215-7)
LR7.1 Motions; Continuances and Withdrawal. (215-10)
LR7.1 Motions; Extensions, Enlargements, or Shortening of Time. (215-11)
LR7.1 Submission of Orders to a Judge. (215-12)

LR9.1 Social Security Cases. (200-7)

LR9.2 Three-Judge Court. (200-5)

LR10.1 Pleadings; Caption and Title. (200-2)

LR11.1 Identification of Counsel. (200-1)

LR16.1 Pretrial Status Conference. (235-1)
LR16.1 Pretrial Status Conference Order. (235-2)
LR16.1 Pretrial Conference. (235-3)
LR16.1 Pretrial Conference Statement. (235-4)
LR16.1 Pretrial Order. (235-5)
LR16.1 Pretrial Objections to Proposed Testimony and Exhibits. (235-6)

LR16.2CJ Differentiated Case Management (DCM); Purpose and Authority. (205-1)
LR16.2CJ DCM; Definitions. (205-2)
LR16.2CJ DCM; Tracks and Evaluation of Cases. (205-5)
LR16.2CJ DCM; Case Information Statement. (205-6)

LR16.2CJ DCM; Track Assignment and Case Management Conference. (205-7)
LR16.2CJ DCM; Status Hearing and Final Pretrial Conference (205-8)
LR16.2CJ DCM; Alternative Dispute Resolution. (205.9)

LR16.3CJ Trial Date; Presumptive. (206-1)
LR16.3CJ Trial Date; Firm for Track "A" Cases. (206-2)
LR16.3CJ Trial Date; Firm for Track "B" and "C". (206-3)
LR16.3CJ Trial Date ; Continuances After Date is Set. (206-4)
LR16.3CJ Trial Date; Parties Informed of Case Status. (206-5)

LR16.4 Settlement Conference. (240-1)

LR16.5 Continuance of Trial Date. (255-1)

LR16.6CJ Alternative Dispute Resolution (ADR) General Provisions. (400-1)

LR16.7CJ Arbitration; Actions Subject to Mandatory Arbitration. (405-1)
LR16.7CJ Arbitration; Procedure for Referral to Mandatory Arbitration. (405-2)
LR16.7CJ Arbitration; Selection and Compensation of Arbitrators. (405-3)
LR16.7CJ Arbitration; Award and Judgment. (405-4)
LR16.7CJ Arbitration; Trial De Novo. (405-5)

LR16.8CJ Arbitration; General Provisions for Voluntary Arbitration. (410-1)

LR16.9CJ Early Neutral Evaluation; General Provisions. (415-1)

LR16.10CJ Mediation; General Provisions. (420-1)

LR16.11CJ Summary Jury Trial; General Provisions. (425-1)

LR16.12CJ Summary Bench Trial; General Provisions. (430-1)

LR16.13CJ Other ADR Procedures. (435-1)

LR23.1 Class Actions. (200-4)
A. Complaint.
B. Class Certification.
C Restrictions Regarding Communications with Actual or Potential Class Members.

LR24.1 Claim of Unconstitutionality. (200-6)

LR26.1 Discovery Documents; Form. (230-1)

LR26.2CJ Discovery; Preliminary. (230-9)

LR30.1 Depositions. (230-5)
A. Who May Attend Depositions.
B. Videotape Depositions.

LR33.1 Interrogatories. (230-2)

LR34.1 Requests for Production. (230-3)

LR35.1 Physical and Mental Examination. (230-6)

LR36.1 Requests for Admission. (230-4)

LR37.1 Conference to Settle Discovery Disputes. (230-8)
LR37.2 Discovery Motions; Form. (230-7)

LR38.1 Jury Demand. (200-3)

Delete Six-Person Juries. (245-1)

LR39.3 Use of Exhibits. (250-1)

LR41.1 Dismissal for Lack of Prosecution. (235-7)

LR43.1 Examination of Witnesses. (260-2)

LR47.1 Jury; Voir Dire. (245-2)
LR47.2 Jury; Communication with Jurors. (260-3)

LR51.1 Jury Instructions; Proposed. (245-3)
LR51.1 Jury Instructions; Objections. (245-4)

LR54.1 Taxation of Costs; Procedure. (270-1)

LR54.2 Jury Costs. (245-5)

LR54.3 Attorneys' Fees. (275-1)

LR58.1 Judgment; Form. (265-1)

LR58.2 Execution. (280-1)

LR62.1 Stays of Execution of State Court Judgments. (285-1)

LR62.2 Supersedeas Bonds. (290-5)

LR65.1 Preliminary Injunctions. (215-9)

LR65.1.1 Bonds and Sureties; When Required. (290-1)
LR65.1.1 Bonds and Sureties; Qualifications of Surety. (290-2)
Delete Bonds and Sureties; Removal Bond. (290-3)
LR65.1.1 Bonds and Sureties; Examination of Sureties. (290-4)

LR65.2 Temporary Restraining Orders. (215-8)

LR66.1 Receivers. (220-1)

LR67.2 Receipt and Deposit of Registry Funds. (122-1)
LR67.2 Investment of Registry Funds. (122-2)

LR67.3 Disbursement of Registry Funds. (122-3)

LR72.1 Magistrate Judges' Duties. (300-1)

LR72.1 Magistrate Judges; Assignment of Duties. (310-1)
LR72.1 Magistrate Judges; Selection of Chief Magistrate Judge. (330-1)
LR72.1 Magistrate Judges; Duties of Chief Magistrate Judge. (330-2)
LR72.1 Magistrate Judges; Responsibilities. (350-1)

LR73.1 Magistrate Judges; Procedure for Obtaining Consent to Trial. (340-1)
LR73.1 Magistrate Judges; Effect of Magistrate Judge's Result. (340-2)

LR74.1 Magistrate Judges; Procedure for Review. (320-1)

LR77.1 Clerk's Office; Location and Hours. (132-1)

LR77.2 Orders Grantable by Clerk. (132-4)

LR77.4 Sessions of the Court. (101-1)

LR77.6 Library. (120-1)

LR79.1 Files; Custody and Withdrawal. (132-2)
LR79.1 Exhibits; Custody and Disposition. (132-3)

LR80.1 Court Reporters; Fee Schedule. (121-1)

LR83.3 Courtroom Decorum. (260-1)

LR83.4 Weapons Not Permitted. (145-1)
LR83.4 Photography and Broadcasting. (140-1)

LR83.5 Attorneys; Admission to the Bar. (110-1)
LR83.5 Attorneys; Standards of Professional Conduct. (110-2)
LR83.5 Attorneys; Student Practice. (110-3)
LR83.5 Attorneys; Appearance, Substitution, and Withdrawal. (110-4)

LR83.6 Attorney Discipline. (110-5)

LR83.7CJ Civil Justice Delay and Expense Reduction Plan. [The last local rule for the district consists of a table of cross references for each of the directives in the Plan to its local rule number.] (440)

## Part 3. Alphabetical List of Local Rule Topics

LR16. Alternative Dispute Resolution (ADR); General Provisions.
LR16. ADR; Other Procedures.
LR16. Arbitration; Actions Subject to Mandatory Arbitration.
LR16. Arbitration; Award and Judgment.
LR16. Arbitration; General Provisions for Voluntary Arbitration.
LR16. Arbitration; Procedure for Referral to Mandatory Arbitration.
LR16. Arbitration; Selection and Compensation of Arbitrators.
LR16. Arbitration; Trial De Novo.
LR83. Attorney Discipline.
LR83. Attorneys; Admission to the Bar.

LR83. Attorneys; Appearance, Substitution, and Withdrawal.
LR83. Attorneys; Standards of Professional Conduct.
LR83. Attorneys; Student Practice.
LR54. Attorneys' Fees.

LR65.1. Bonds and Sureties; Examination of Sureties.
LR65.1. Bonds and Sureties; Qualifications of Surety.
Delete Bonds and Sureties; Removal Bond.
LR65.1. Bonds and Sureties; When Required.

LR83. Civil Justice Delay and Expense Reduction Plan. [The last local rule for the district consists of a table of cross references for each of the directives in the Plan to its local rule number.]
LR24. Claim of Unconstitutionality.
LR23. Class Actions.
A. Complaint.
B. Class Certification.
C Restrictions Regarding Communications with Actual or Potential Class Members.
LR77. Clerk's Office; Location and Hours.
LR37. Conference to Settle Discovery Disputes.
LR1. Conflicts of DCM with Other Rules.
LR16. Continuance of Trial Date.
LR80. Court Reporters; Fee Schedule.
LR83. Courtroom Decorum.

LR1. Definitions.
LR30. Depositions.
A. Who May Attend Depositions.
B. Videotape Depositions.
LR16. Differentiated Case Management (DCM); Alternative Dispute Resolution.
LR1. DCM; Application; Dates.
LR16. DCM; Case Information Statement.
LR16. DCM; Definitions.
LR16. DCM; Purpose and Authority.
LR16. DCM; Status Hearing and Final Pretrial Conference.
LR16. DCM; Track Assignment and Case Management Conference.
LR16. DCM; Tracks and Evaluation of Cases.
LR26. Discovery Documents; Form.
LR5. Discovery; Filing.
LR26. Discovery; Preliminary.
LR5. Discovery; Service.
LR37. Discovery Motions; Form.
LR41. Dismissal for Lack of Prosecution.
LR3. Divisions; Number.

LR16. Early Neutral Evaluation; General Provisions.
LR1. Effective Date; Transitional Provisions.
LR43. Examination of Witnesses.
LR58. Execution.
LR79. Exhibits; Custody and Disposition.

LR79. Files; Custody and Withdrawal.

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| Deleted | Filing by Clerk; Nonconforming Documents Rejected. |
| LR5. | Filing with the Court. |
| LR5. | Form; Legibility of Pleadings and Other Papers. |
| LR11. | Identification of Counsel. |
| LR33. | Interrogatories. |
| LR58. | Judgment; Form. |
| LR47. | Jury; Communication with Jurors. |
| LR54. | Jury Costs. |
| LR38. | Jury Demand. |
| LR51. | Jury Instructions; Objections. |
| LR51. | Jury Instructions; Proposed. |
| LR47. | Jury; Voir Dire. |
| LR77. | Library. |
| LR72. | Magistrate Judges; Assignment of Duties. |
| LR72. | Magistrate Judges; Duties. |
| LR72. | Magistrate Judges; Duties of Chief Magistrate Judge. |
| LR73. | Magistrate Judges; Effect of Magistrate Judge's Result. |
| LR73. | Magistrate Judges; Procedure for Obtaining Consent to Trial. |
| LR74. | Magistrate Judges; Procedure for Review. |
| LR72. | Magistrate Judges; Responsibilities. |
| LR72. | Magistrate Judges; Selection of Chief Magistrate Judge. |
| LR16. | Mediation; General Provisions. |
| LR7. | Motions; Affidavits. |
| LR7. | Motions; Briefs and Memoranda. |
| A. | When Required. |
| B. | Form of Briefs, Memoranda, and Appendices. |
| C | Contents of Briefs. |
| D. | Contents of Appendices. |
| E. | Number of Papers. |
| LR7. | Motions; Continuances and Withdrawal. |
| LR7. | Motions; Extensions, Enlargements, or Shortening of Time. |
| LR7. | Motions; Filing. |
| Deleted | Motions; Nonconforming Papers Rejected. |
| LR7. | Motions; Notice and Supporting Papers. |
| LR7. | Motions; Opposition and Reply. |
| LR7. | Motions; to Whom Made. |
| LR7. | Orders; Submission of Orders to a Judge. |
| LR77. | Orders Grantable by Clerk. |
| LR83. | Photography and Broadcasting. |
| LR35. | Physical and Mental Examination. |
| LR10. | Pleadings; Caption and Title. |
| LR65. | Preliminary Injunctions. |
| LR16. | Pretrial Conference. |
| LR16. | Pretrial Conference Statement. |
| LR16. | Pretrial Objections to Proposed Testimony and Exhibits. |
| LR16. | Pretrial Order. |
| LR16. | Pretrial Status Conference. |
| LR16. | Pretrial Status Conference Order. |

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| LR5. | Proof of Service. |
| LR66. | Receivers. |
| LR67. | Registry Funds; Disbursement. |
| LR67. | Registry Funds; Investment. |
| LR67. | Registry Funds; Receipt and Deposit. |
| LR36. | Requests for Admission. |
| LR34. | Requests for Production. |
| LR1. | Sanctions and Penalties for Noncompliance. |
| LR1. | Scope of Local Rules. |
| LR4. | Service by Mail. |
| LR77. | Sessions of the Court. |
| LR16. | Settlement Conference. |
| Delete | Six-Person Juries. |
| LR9. | Social Security Cases. |
| LR62. | Stays of Execution of State Court Judgments. |
| LR16. | Summary Bench Trial; General Provisions. |
| LR16. | Summary Jury Trial; General Provisions. |
| LR62. | Supersedeas Bonds. |
| LR54. | Taxation of Costs; Procedure. |
| LR65. | Temporary Restraining Orders. |
| LR9. | Three-Judge Court. |
| LR6. | Time; Computation of Time Periods. |
| LR6. | Time; Extensions of Time by Clerk. |
| LR1. | Title. |
| LR3. | Transfer of Civil Actions Among Divisions. |
| LR16. | Trial Date; Continuances After Date is Set. |
| LR16. | Trial Date; Firm for Track "A" Cases. |
| LR16. | Trial Date; Firm for Track "B" and "C". |
| LR16. | Trial Date; Parties Informed of Case Status. |
| LR16. | Trial Date; Presumptive. |
| LR39. | Use of Exhibits. |
| LR83. | Weapons Not Permitted. |

AGENDA II-D-2
Washington, DC
April 22-23, 1993

**MEMO TO: Advisory Committee on Criminal Rules**

**FROM: Dave Schlueter, Reporter**

**RE: Proposed Amendment to Rule 59; Technical Amendments by the Judicial Conference**

**DATE: March 15, 1993**

For some time the Standing Committee has considered proposals to amend the various rules of procedure to permit "technical" amendments without the need for formalized publication, and transmittal to the Supreme Court and Congress under the Rules Enabling Act, 28 U.S.C. § 2072, 2075. Under current rules, any correction for a typographical or spelling error must go through the Judicial Conference and the Supreme Court, and then to Congress.

At its December meeting in Asheville, the Standing Committee urged the reporters for the various committees, to reach some accord on standarized language which could be used throughout the criminal, civil, appellate, and bankruptcy rules. We did so. Attached is a draft of an amendment to Rule 59 which would accomplish the intentions of the Standing Committee.

This matter is on the agenda for the April meeting in Washington.

RULES OF CRIMINAL PROCEDURE

**Rule 59. Effective Date; Technical Amendments**

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

(b) The Judicial Conference of the United States may amend these rules to correct errors in spelling, cross-references, or typography, or to make technical changes needed to conform these rules to statutory changes.

COMMITTEE NOTE

The Rule is amended to enable the Judicial Conference to make minor technical amendments to these rules without having to burden the Supreme Court and Congress with reviewing such changes. This delegation of authority will relate only to uncontroversial, nonsubstantive matters.

AGENDA II-D-3
Washington, DC
April 22-23, 1993

**MEMO TO: Advisory Committee on Criminal Rules**

**FROM: Dave Schlueter, Reporter**

**RE: Filing by Facsimile; Reports to Judicial Conference**

**DATE: March 15, 1993**

I am attaching for your information a copy of a report filed with the Judicial Conference by the Committee on Court Administration and Case Management. The Report recommends, in part, that the Judicial Conference authorize courts to adopt local rules to permit filing of papers by facsimile or other electronic means.

By the time the Committee meets in April, there may be more news to report on this proposal and whether any additional action might be taken by the Committee to amend the Rules of Criminal Procedure. You will recall that several amendments were recently proposed dealing with use of facsimile, etc. for transmitting affidavits and warrants. e.g., Rules 40 and 41. Those amendments have been approved by the Judicial Conference and approval by the Supreme Court is expected shortly.

Agenda F-7
Court Administration/Case Mngt.
March 1993

# SUMMARY OF THE REPORT OF THE JUDICIAL CONFERENCE COMMITTEE ON COURT ADMINISTRATION AND CASE MANAGEMENT

The Committee on Court Administration and Case Management recommends that the Judicial Conference:

1. Recommend that Congress amend 28 U.S.C. § 112 (a) to establish the Middletown-Wallkill area of Orange County, New York, "or such nearby location as may be deemed appropriate" as a place of holding court in the Southern District of New York. . . . . pp. 2-3

2. (a) Amend the $15 search fee provision of the schedule of fees for the United States District Courts to read:

   "For filing a requisition for and certifying the results of a search of the records of the court for judgments, decrees, other instruments, suits pending, and bankruptcy proceedings, every search of the records of the district court conducted by the clerk of the district court or a deputy clerk, $15 for each name per name or item searched." (Shaded area to be omitted.)

   (b) adopt the proposed Search Fee Guidelines for United States District and Bankruptcy Courts. . . . . pp. 3-6

3. Support the enactment of legislation providing (a) discretionary authorization to all federal district courts to utilize mandatory or voluntary arbitration programs and (b) authorization for the 20-district

arbitration programs currently allowed under the 1988 arbitration legislation to continue beyond the sunset date of the legislation. . . . . pp. 6-9

4. Adopt the following resolution:

Effective May 1, 1993, the Judicial Conference authorizes courts to adopt local rules to permit the clerk to accept for filing papers transmitted by facsimile transmission equipment or by other electronic means, provided that such filing is permitted either (a) in compelling circumstances, or (b) under a practice that was established by the court prior to May 1, 1991, or (c) on a routine basis (without prior specific approval), if the rules meet the requirements included in the Technical Guidelines for the Acceptance of Documents by Facsimile. . . . . pp. 9-12

5. Approve a pilot program in the Eastern District of North Carolina for the use of video conferencing technology to conduct competency hearings between the court and the Federal Correction Facility in Butner, North Carolina. . . . . pp. 13

Agenda F-7
Court Administration/Case Mngt.
March 1993

# REPORT OF THE JUDICIAL CONFERENCE COMMITTEE ON COURT ADMINISTRATION AND CASE MANAGEMENT

## TO THE CHIEF JUSTICE OF THE UNITED STATES AND MEMBERS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES

The Committee on Court Administration and Case Management met in La Quinta, California on December 10-11, 1992. All members of the Committee were present with the exception of Judge Roger Wollman (8th Circuit) and Judge Thomas Higgins (Middle District of Tennessee). The Chair introduced three newly appointed members, Judge Richard L. Voorhees (Western District of North Carolina), Judge Maurice M. Paul (Northern District of Florida) and Magistrate Judge John L. Wagner (Northern District of Oklahoma). The Committee was staffed by the following Administrative Office personnel: Duane R. Lee (Chief, Court Administration Division) and Robert Lowney (Assistant to the Chief). Also attending from the Administrative Office were Deputy Director James E. Macklin, Jr. and Charles W. Nihan (Chief, Long Range Planning Office). The Federal Judicial Center was represented by Director William W Schwarzer, William Eldridge (Director, Research Division) and Donna Stienstra (Senior Research Associate). Juliet Griffin (Clerk, Middle District of Tennessee) and Murray Harris (Former Clerk, Eastern District of Texas) also participated.

## Places of Holding Court

In September 1978, the Judicial Conference established procedures for consideration of legislation proposing new "places of holding court" and new judicial districts. The procedures provide that the Committee on Court Administration and Case Management may consider such proposals only when approved by both the affected district court and circuit judicial council, and only after both have filed brief reports with the Committee summarizing their reasons for approval.

In July 1992, Chief Judge Charles L. Brieant of the Southern District of New York requested that legislation be sought to establish a new place of holding court in the Middletown-Wallkill area of Orange County, New York, "or such nearby location as may be deemed appropriate." The Judicial Council of the Second Circuit endorsed the district's proposal. (Correspondence is included in Appendix A).

The court cites several factors in support of its request to establish a new place of holding court in the Middletown-Wallkill area (west of the Hudson). For calendar year 1991, 322 civil cases involving 527 parties were filed in Orange, Duchess and Sullivan counties. In the first six months of 1992, there have been 143 filings involving 286 parties. The court believes that the parties involved in these cases would have been better served by a courthouse west of the Hudson. In addition to the number of cases being filed, the court also cites the changing nature of its caseload. The court's civil rights docket has expanded with most cases originating in the northern part of the district. A new place of holding court in Orange County would be more convenient to the jurors, attorneys and parties of these cases.

The population of Orange County increased by 17% from 1980 to 1990. In addition, several federal agencies have increased their presence in the county during this period of time. A U.S. Probation Office is currently located in Middletown and several other agencies include the Social Security Administration, the Internal Revenue Service and the Food and Drug Administration.

> **Recommendation 1:** That the Judicial Conference recommend that Congress amend 28 U.S.C. § 112 (a) to establish the Middletown-Wallkill area of Orange County, New York, "or such nearby location as may be deemed appropriate" as a place of holding court in the Southern District of New York.

## Search Fee Guidelines

The Judicial Conference prescribes the fees and costs to be charged and collected in the United States Courts of Appeals, United States District Courts, United States Bankruptcy Courts and the Court of Federal Claims. Under the schedules of fees prescribed for district and bankruptcy courts there currently is a provision for a $15 fee for searches of court records.[1] Your Committee has been made aware of

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[1]The District Court provision reads:

> (2) For filing a requisition for and certifying the results of a search of the records of the court for judgments, decrees, other instruments, suits pending, and bankruptcy proceedings, $15 for each name searched. (emphasis added)

The bankruptcy court provision reads:

> (5) For every search of the records of the bankruptcy court conducted by the clerk of the bankruptcy court or a deputy clerk, $15 per name or item searched.

complaints from the public to the Administrative Office, judges, and Congress regarding inconsistencies in the application of the search fee from court to court and the need for the provision of more specific guidance to clerks in this area.

As a result of these concerns, your Committee asked the Administrative Office to develop specific guidelines to assist the clerks of district and bankruptcy courts in administering the fee to be charged for searches. The district and bankruptcy courts were surveyed to determine their general practices and procedures for imposition of the fee. The proposed guidelines reflect the results of those surveys to the greatest extent possible. (The proposed guidelines are included as Appendix B.)

In addition to adoption of the guidelines, your Committee believes that a revision of the schedule of fees for the district courts is necessary in order to bring that schedule's search fee provision into conformity with the search fee provision for bankruptcy courts. At present, the $15 search fee provision for the district courts requires a certification of the search before the fee can be charged.

It is clear from the district court surveys that it is the practice of several district courts to charge the $15 search fee for a search of the court records without a request for certification of the search. Your Committee believes that there is no reason why the district courts should have a different search fee structure from the bankruptcy courts. The imposition of the search fee should not be limited to requests which are accompanied by a request for certification. Rather, imposition of the search fee should be based on the amount of time expended by the clerk's office in finding the requested information.

The advent of automated docketing and automated public access to court information has greatly changed the "search" process. When the process of automating the federal courts was only partially complete, it was difficult to promulgate any standards because of the vast differences in the time and resources required to conduct a search between automated and non-automated courts. Now that the vast majority of courts have been automated, the interpretation of what constitutes a "search" for the purposes of assessing a fee is more amenable to standardization.

The proposed guidelines for the district and bankruptcy courts require imposition of the $15 search fee for two different types of requests: (1) when the request is made in writing and requires a written response; and (2) when the search requires a physical search of the court's records. In both of these situations, performance of the search requires more than a minimal amount of work by a court employee. In contrast, the guidelines provide that no fee be charged for a single request for a retrieval of basic information through an automated database or the front of a docket card. In addition, the guidelines are designed to encourage maximum use of available automated databases.

Your Committee believes that the proposed guidelines strike a balance between the public's right to access to the dockets and the clerk's office's need for sufficient available resources to carry out its important support mission to judicial officers. The guidelines were developed with the assistance of bankruptcy and district court clerks.

**Recommendation 2:** that the Judicial Conference

(a) amend the $15 search fee provision of the schedule of fees for the United States District Courts to read:

"For every search of the records of the district court conducted by the clerk of the district court or a deputy clerk, $15 per name or item searched.": and

(b) adopt the proposed Search Fee Guidelines for United States District and Bankruptcy Courts as shown in Appendix B.

## Court-Annexed Arbitration

The Judicial Improvements and Access to Justice Act of 1988, Public Law No. 100-702, provided formal statutory authorization to continue the mandatory non-binding arbitration programs previously piloted by the Judicial Conference in ten district courts. The Act also permitted the Judicial Conference to designate ten additional courts to adopt programs of non-binding arbitration with the consent of the parties only.[2]

Pursuant to Section 903(b) of the 1988 Act, the Federal Judicial Center has submitted to Congress a report on the implementation of the Act which includes a recommendation for enactment of an arbitration provision in title 28, United States Code, authorizing arbitration in all Federal district courts, to be mandatory or voluntary in the discretion of the court, without diminishing the authority of individual judges to manage their assigned cases. The major findings of the Center's report were that:

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[2]The Act provides for a sunset date of five years after enactment [Nov. 19, 1988] with the exception of cases referred to arbitration before the date of repeal.

* Arbitration programs provided more timely adjudicative case resolutions, from two to eighteen months sooner than cases resolved by trial.

* Most parties and attorneys did not view arbitration as a form of second-class justice.

* Large majorities of both clients and attorneys believed the arbitration program procedures and hearings were fair.

* Arbitration programs can reduce the overall cost of litigation by reducing costs in cases referred to arbitration that close before or as a result of the hearing.

* The majority of attorneys report no cost or time savings where trial de novo was demanded; however, parties reported that time and money costs were generally reasonable.

* The majority of cases closed prior to an arbitration hearing, and at least two-thirds of the arbitration caseload in each district terminated before returning to the trial calendar.

* Of those cases that were arbitrated, the majority demanded trial de novo, but few reached trial.

* The arbitration programs in Florida (Middle), Michigan (Western) and Missouri (Western) appeared to reduce the time from filing to disposition. There was no such evidence in the remaining pilot courts. However, the majority of attorneys in de novo demand cases did not believe that the arbitration hearing delayed case resolution.

* Judges overwhelmingly believed that arbitration programs reduced their caseload burden, but there is no good data available on whether the number of trials was reduced.

* Districts with less than 15 percent of their civil caseload diverted to arbitration were less likely to result in a perceived reduction of court burden.

* No particular program characteristic led to an overall lack of program acceptance from the parties. The characteristic that was most frequently found to be significantly related to

attorneys' perceptions toward arbitration in general and its ability to produce time and money savings was litigant input in the arbitration selection process, with more litigant input associated with slightly more negative views.

* Ninety-seven percent of the judges surveyed supported the expansion of court-annexed arbitration to other courts.

In the past, a major concern about any mandatory referral of cases to an alternative dispute resolution mechanism has been that it might interfere with the right to trial. The FJC study concluded that litigants did not see the programs as "significant barriers" to trial. All programs contained exemption procedures and any party not satisfied with the outcome of the arbitration hearing could demand trial de novo.

Your Committee supports the Center's recommendation for legislation authorizing mandatory and voluntary arbitration in all federal district courts. At a minimum, your Committee strongly recommends the enactment of legislation allowing the 20 courts currently authorized to utilize arbitration to continue those programs beyond the November 1993 sunset date of the 1988 arbitration legislation. In the past decade many federal and state courts have adopted alternative techniques to standard procedures for processing civil cases. Studies of different alternative dispute resolution (ADR) systems report general satisfaction by participants and, in some cases, positive effects on litigation cost and delay. Your Committee believes that the experience to date provides justification for allowing individual federal courts to institute ADR techniques that best suit the preferences of judges, attorneys and interested parties.

The Judicial Conference has consistently supported various alternative dispute mechanisms, including mandatory court-annexed arbitration. At its September 1987 session, the Conference supported a court-annexed arbitration bill and proposed minor amendments which, ultimately, were included in the 1988 Act.

The Federal Courts Study Committee also recommended that Congress broaden statutory authorization for federal courts to adopt local rules establishing dispute resolution mechanisms that are complementary or supplementary to the traditional civil pretrial, trial, and appellate procedures. The Committee specifically recommended that Congress permit, but not require, all district courts to include in their local rules mandatory mechanisms, including court-annexed arbitration, with limitations on case types subject to mandatory reference, authorization for motions to exempt cases from the mandatory procedure, and no limitations on the individual judge's case management authority. The former Committee on Judicial Improvements supported this recommendation, as did the Executive Committee on May 18, 1990.

> **Recommendation 3:** That the Judicial Conference support the enactment of legislation to provide (a) continued authorization for the 20-district arbitration programs currently allowed under the 1988 arbitration legislation to continue beyond the sunset date of the legislation and (b) discretionary authorization to all federal district courts to utilize mandatory or voluntary arbitration programs.

## Amendments To Guidelines For Filing By Facsimile

The Judicial Conference, through its Committee on Court Administration and Case Management and the Committee on Automation and Technology, has examined the use of facsimile technology for the filing of court documents over the last several

years. In June 1989, the former Committee on Judicial Improvements recommended amendments to the Appellate, Civil, and Bankruptcy Rules to provide for local rules permitting papers to be filed by facsimile transmission or other electronic means, consistent with guidelines promulgated by the Judicial Conference.

Subsequently, the Committees on Automation and Technology and Court Administration and Case Management, while developing the guidelines required by the amended Federal Rules, determined that until such time as the technological, budgetary, and procedural implications of facsimile filings were resolved, the Conference should authorize the promulgation of local rules permitting the filing of papers by facsimile only in the most limited circumstances.

In September 1991, the Judicial Conference adopted a resolution implementing guidelines for the use of facsimile for the filing of court papers. The guidelines took into consideration the practical and technological constraints regarding the acceptance of court documents by facsimile, as previously identified by the Committee on Judicial Improvements. The Conference action was an initial measure, intended to provide a narrow margin of opportunity for courts to allow the filing of papers by facsimile transmission. The Conference resolution as adopted is as follows:

> Effective December 1, 1991, the Judicial Conference authorizes courts to adopt local rules to permit the clerk to accept for filing papers transmitted by facsimile transmission equipment, provided that such filing is permitted only (a) in compelling circumstances or (b) under a practice which was established by the court prior to May 1, 1991.

This resolution serves as guidelines that accompany amendments to the Federal Rules of Appellate, Civil, and Bankruptcy Procedure regarding the acceptance of documents by facsimile, which became effective December 1, 1991.

At its June 1992 meeting, the Committee on Court Administration and Case Management revisited this issue as it relates to the implementation of the Civil Justice Reform Act and determined that, notwithstanding the practical and economical problems related to facsimile use, courts should be allowed to determine at the local level whether to implement the practice of accepting papers for filing by facsimile transmission on a routine basis. Several courts have expressed a desire to implement a local rule to routinely accept papers by this method since the Conference adopted the more restrictive policy. Therefore, your Committee recommends that the Conference modify the resolution adopted in 1991 to allow courts to adopt by local rule a broader policy regarding the acceptance of papers by facsimile transmission.

Your Committee recognizes that for many courts, the technological, budgetary, and procedural problems may continue to pose enough of a hardship as to prevent any divergence from the guidelines established in 1991. Those courts that elect to maintain the existing, narrower guidelines may continue to do so. However, the Committee also recognizes that those courts with the capability of accepting filings by facsimile on a more routine basis should be allowed to do so, particularly in consideration of the obligations placed on both the courts and parties involved in federal litigation under the Civil Justice Reform Act.

Your Committee has further determined that national guidelines to be followed by courts enacting local rules should be adopted. The specific guidelines for the technical requirements for equipment, procedures for compliance with the requirement of an original signature, filing procedures, and potential fees for the service, are included as Appendix C. These guidelines were developed with assistance from appellate, district and bankruptcy clerks. Issues not governed by the guidelines may be left to the discretion of the courts. A discussion of the issues to be governed by local policy will be provided, as well. A subcommittee of the Committee on Automation and Technology has reviewed this recommendation and believes that this issue warrants further study before a local option allowing acceptance of documents by facsimile is approved. Your Committee believes sufficient provisions have been included in the proposed guidelines to address all of the identified concerns and will work with the Committee on Automation and Technology to attempt to address any specific concerns it has with the guidelines. Further, the proposed resolution would simply create the option in those districts that have the inclination and the resources to accept documents by this method and would not impose the policy on those courts that object.

**Recommendation 4:** that the Conference adopt the following resolution:

> Effective May 1, 1993, the Judicial Conference authorizes courts to adopt local rules to permit the clerk to accept for filing papers transmitted by facsimile transmission equipment or by other electronic means, provided that such filing is permitted either (a) in compelling circumstances, or (b) under a practice which was established by the court prior to May 1, 1991, or (c) on a routine basis (without prior specific approval), if the rules meet the requirements included in the Technical Guidelines for the Acceptance of Documents by Facsimile.

## Video Conferencing of Competency Hearings

At the June 1992 meeting, your Committee tentatively approved the use of video conferencing technology by the Eastern District of North Carolina for competency hearings. This action was the result of a request received from the court to apply video conferencing technology being utilized in several Judicial Conference approved pilots, to a specific problem in the Eastern District of North Carolina (Correspondence is included as Appendix D).

The court receives many cases from the Federal Correctional Facility at Butner dealing with the commitment of federal prisoners under 18 U.S.C. §§4245 and 4246. The Federal Bureau of Prisons concentrates these cases at Butner and another facility in Springfield, Missouri. The use of a video-conferencing system would alleviate the need to transport prisoners to the Federal courthouse and, therefore, improve security.

The court, based upon your Committee's tentative approval, is in the process of determining functional specifications and design of a pilot program. Potential funding for the equipment has not been identified, although the use of Civil Justice Reform Act funds may be appropriate. In addition, because use of this technology would save resources of the Federal Bureau of Prisons for the transportation and security of prisoners and improve overall security, the Bureau may be willing to provide funding for the purchase and installation of the system and the monthly transmission charges.

> **Recommendation 5:** That the Judicial Conference approve a pilot program in the Eastern District of North Carolina for the use of video conferencing technology to conduct competency hearings between the court and the Federal Correction Facility in Butner, North Carolina.

## Revision to Juror Qualification Questionnaire

Your Committee believes that the ability to accurately account for Hispanic ethnicity on juror qualification questionnaires is vital to satisfy the policy stated in 28 U.S.C. § 1861 that potential jurors be selected at random from a representative cross section of the community. This concern was illustrated recently in questions raised during a successful jury challenge in the District of Connecticut. The court determined that questionnaires indicating that the respondent was white, but not whether he or she was Hispanic, should be considered as having been submitted by non-Hispanic white individuals. As a result, the court's conclusion regarding the percentage of Hispanics in the qualified wheel was significantly less than the actual percentage of Hispanics of the voting-age population.

Accurate indications of Hispanic populations are critical because the majority of courts will be refilling their master jury wheels this year and must conduct and report statistical samplings of their wheels to determine the constituency of the wheels by racial and sex classifications.

The Judicial Conference at its September 1987 meeting authorized the Administrative Office, in consultation with your Committee, to make necessary non-substantive changes in the form of the questionnaire. As a result, your Committee has approved a revision to the juror qualification form by adding the question "Are you Hispanic? separate from the race portion and designating it as Question #11".

## Status Report on the Civil Justice Reform Act

Pursuant to §482(b) of the Civil Justice Reform Act (CJRA), each district court must, by December 1, 1993, implement a civil justice expense and delay reduction plan. To date 35 districts have done so. The majority of the remaining courts have indicated final reports would not be completed until the first quarter of this year. Several of the remaining districts have indicated that the hiring and spending freeze has delayed the implementation of their plan.

**Future Reports and Projects**

Pursuant to §479(a) of CJRA on or before December 1, 1994, the Judicial Conference of the United States must prepare a comprehensive report on all plans received pursuant to section 472(d) of the CJRA.

Pursuant to §104(c) of the Act the Judicial Conference of the United States must report to Congress on the results of the Demonstration Program on or before December 31, 1995. The Federal Judicial Center is studying the demonstration districts.

Pursuant to §105(c) of the Act, on or before December 31, 1995, the Judicial Conference of the United Sates must report to Congress regarding the results of the Pilot Program. This report must include the data gathered and analyzed by the RAND study.

There are two tasks required by the Act with no specific deadline which the Judicial Conference of the United States must complete. Both should receive attention in the coming months. First, pursuant to §479(b), the Judicial Conference must, on a

continuing basis, study ways to improve litigation management and dispute resolution and make recommendations to the district courts.

Second, section 479(c)(1) requires the Judicial Conference to prepare and periodically revise a Manual for Litigation Management and Cost Delay Reduction. The Manual is to based on the experience of the courts, including the experience of Demonstration Project, and the Pilot Program. A volume focusing on individual judge-based management techniques has been completed by the Federal Judicial Center. This volume will be revised as necessary after further experience under the CJRA. A second volume which will focus on court wide systems of case management will be prepared by the Administrative Office and Federal Judicial Center after courts have had more opportunity to use and evaluate these systems.

**Model Plan**

The Model Plan authorized by §477 of the CJRA has been developed through a joint effort of the Administrative Office and the Federal Judicial Center. The plan addresses each of the procedures and techniques set forth in 28 U.S.C §473, giving examples of types of programs courts have adopted to implement the procedure or technique. The document contains a discussion of the types of problems or conditions that are effectively addressed by each procedure and technique and the factors a court may wish to consider in deciding whether a procedure or technique would be useful in the district.

The Model Plan has been approved on behalf of the Committee by the Subcommittee on Case Management and was distributed to all district courts in

November 1992. The Model Plan was also transmitted to the Committees on the Judiciary in the Senate and the House of Representatives. Based on the number of requests for, and questions about, the Model Plan received by the Court Programs Branch from CJRA advisory groups the document should prove very useful to those districts which have not adopted an Expense and Delay Reduction Plan as well as courts wishing to amend existing plans.

**Alternative Dispute Resolution and Differential Case Management Assistance Program**

A technical assistance program jointly staffed by an Administrative Office and Federal Judicial Center working group has been initiated. The districts expressing a current interest in either ADR or Differential Case Management (DCM) assistance in response to surveys were sent a letter explaining the details of the assistance available. Several courts, utilizing funds authorized for CJRA, have already arranged for visits with or by court experts in both fields. Other courts have requested only written information, which is being provided.

**CJRA Documents on Westlaw**

In August, in response to a request by the Federal Judicial Center, West Publishing Company agreed to create a CJRA database within WESTLAW. Mead has indicated an interest in placing the documents in LEXIS, but has not given a final answer. By February or March 1993, all reports and plans from the early implementation districts will be available through WESTLAW. The model plan will also be placed on-line, as will the reports and plans from the non-EID districts as they are completed.

Assistance to Courts and Advisory Groups

As part of the on-going assistance to the courts and CJRA advisory groups, Federal Judicial Center and Administrative Office staff sent a memorandum to all district court chief judges and clerks, as well as to all advisory group chairs and reporters, to advise them on recent implementation developments. As part of this mailing, each district received a set of tables summarizing the district's 1992 caseload statistics.

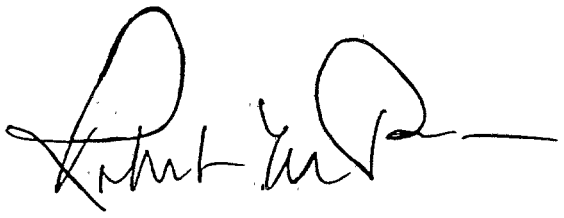
Status of RAND Study

The RAND Corporation was awarded the contract for an independent study of pilot and comparison courts under section 105 of the Civil Justice Reform Act (CJRA). The first phase of its work, the development of a finalized study design, was carried out under a letter contract signed September 11, 1991. This preliminary contract was replaced by a final contract on May 19, 1992 which incorporates the final study design approved by your Committee, and extends over the entire term of the study (through December 31, 1995).

On September 30, 1992, with the approval of your Committee, the contract of May 19, 1992, was amended to incorporate an additional, more detailed study of Alternative Dispute Resolution (ADR) programs developed by individual CJRA pilot courts in compliance with §473(a)(6) of the Act. The objective of this amendment was to ascertain the value of these programs in the achievement of the Act's aims of cost and delay reduction, and to document the costs of the programs. The broader objective was to draw general conclusions about ADR programs in Federal courts

based on the data from individual districts. This additional study will commence shortly, so that the research team can take advantage of all site visits for the purposes of both studies.

Respectfully Submitted



Robert M. Parker, Chairman
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Ann C. Williams
Roger Wollman

## Appendices

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|---|---|
| Appendix A..... | Correspondence regarding the establishment of the Middletown-Walkill area as a place of holding court for the Southern District of New York. |
| Appendix B..... | Proposed guidelines for the application of the $15 search fee. |
| Appendix C..... | Proposed guidelines for the acceptance of filings by facsimile. |
| Appendix D..... | Correspondence regarding the establishment of a pilot for the video conferencing of competency hearings in the Eastern District of North Carolina. |

L. RALPH MECHAM
DIRECTOR

JAMES E. MACKLIN, JR.
DEPUTY DIRECTOR

ADMINISTRATIVE OFFICE OF THE
UNITED STATES COURTS

WASHINGTON, D.C. 20544

JOHN K. RABIEJ
CHIEF, RULES COMMITTEE
SUPPORT OFFICE

February 9, 1993

MEMORANDUM TO CHAIRMEN AND REPORTERS OF THE ADVISORY COMMITTEES ON RULES

SUBJECT: Filing by Facsimile

On February 2, 1993, I mailed to you a copy of the report of the Committee on Court Administration and Case Management to the Judicial Conference. One of the Committee's recommendations to the Conference would "authorize courts to adopt local rules to permit the clerk to accept for filing papers transmitted by facsimile transmission equipment or by other electronic means ... if the rules meet the requirements included in the Technical Guidelines for the acceptance of Documents by Facsimile."

A copy of the "Technical Guidelines" was mailed to you under separate cover on February 8, 1993.

The Judicial Conference is meeting on March 15-16, 1993. Judge Keeton has requested that you advise him as soon as possible if you wish to have the views of your Advisory Committee on this matter expressed before the Conference acted on the recommendation of the Committee on Court Administration and Case Management.

John K. Rabiej

cc: Honorable Robert E. Keeton
Honorable James J. Barta

L. RALPH MECHAM
DIRECTOR

JAMES E. MACKLIN, JR.
DEPUTY DIRECTOR

ADMINISTRATIVE OFFICE OF THE
UNITED STATES COURTS

WASHINGTON, D.C. 20544

JOHN K. RABIEJ
CHIEF RULES COMMITTEE
SUPPORT OFFICE

February 5, 1993

MEMORANDUM TO JUDGE ROBERT E. KEETON

SUBJECT: Attached Material

For your information, I am attaching a copy of Appendix C to the Judicial Conference's Committee on Court Administration and Case Management that I have just received. I had sent the full report to you on February 2, 1993.

John K. Rabiej

Attachment

cc: Chairmen & Reporters of
the Advisory Committees

Agenda F-7 (Appendix C)
Court Administration/Case Mngt.
March 1993

# GUIDELINES FOR FILING BY FACSIMILE

I. *Definitions:*

(1) "Facsimile transmission" means the transmission of a copy of a document by a system that encodes a document into electronic signals, transmits these electronic signals over a telephone line, and reconstructs the signals to print a duplicate of the original document at the receiving end.

(2) "Facsimile filing" or "filing by fax" means the facsimile transmission of a document to a court or fax filing agency [1] for filing with the court.

(3) "Fax" is an abbreviation for "facsimile" and refers, as indicated by the context, to a facsimile transmission or to a document so transmitted.

(4) "Transmission record" means the document printed by the sending facsimile machine stating the telephone number of the receiving machine, the number of pages sent, the transmission time, and an indication of errors in transmission.

II. *Transmission does not constitute filing*: Electronic transmission of a document via facsimile machine or other electronic means does not constitute filing; filing is complete when the document is filed by the clerk.

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[1] A "fax filing agency" is a private entity (business, law firm, etc.) that receives facsimile transmissions of documents to be filed with the court. The fax filing agency acts similar to a messenger service, filing a hard copy facsimile transmission as if it were the original with the court. The court does not have to maintain facsimile machines, establish mechanisms to accept filing fees via fax, or make copies of filed documents. [See Section VII.]

III. *Technical requirements:*

For purposes of these guidelines, in order for courts to accept the filing of papers by facsimile on a routine basis, the following technical requirements must be met. [2]

(1) Facsimile Standards for Courts: "Facsimile machine" means a machine that can send a facsimile transmission using the international standard for scanning, coding, and transmission established for Group 3 machines by the Consultative Committee of International Telegraphy and Telephone of the International Telecommunications Union (CCITT), in regular resolution. "Facsimile machine" also means a receiving unit meeting the standards specified in this subdivision that is connected to and prints through a printer using xerographic technology, or a facsimile modem that is connected to a personal computer that prints through a printer using xerographic technology. Only plain paper (no thermal paper) facsimile machines may be used.

(2) Facsimile Standards for Senders:

(a) Each sender must have the following equipment standards:

(i) CCITT Compatibility - Group 3 [3]

(ii) Modem Speed - 9600-2400 bps (bits per second) with automatic stepdown

(iii) Image Resolution - Standard 203 x 98

(b) A facsimile machine used to send documents to a court shall be able to produce a transmission record, as proof of transmission at the time transmission is completed.

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[2] The Administrative Office will monitor technological advances and will recommend modifications to these guidelines when necessary.

[3] Group 3 fax machines are currently the most common, accounting for 97% of the devices on the market. Group 3 compatibility is mandatory for public applications at the present time. Group 3 fax can utilize the public telephone network (voice grade lines) and does not require special data lines. Group 3 fax devices transmit at under 1 minute per page, may have laser printing capability, and use various standard data compression techniques to increase transmission speed.

IV. *Resource Availability:* No additional personnel (FTEs) or funds for equipment will be made available due to a court's adoption of a fax filing policy. Courts should be aware of the potential burdens on the clerk's office and should examine thoroughly the potential impact on the court before adopting a fax policy.

V. *Original Signature:* The court shall make provisions to meet the requirements under the Federal Rules for court documents to bear an original signature [4] in one of the following ways:

(1) The date the clerk files the fax copy will be the date of filing, subject to receipt by the court of a signed original within three days; or

(2) The image of the original manual signature on the fax copy will constitute an original signature for all court purposes. The original signed document shall not be substituted, except by court order. The original signed document shall be maintained by the attorney of record or the party originating the document, for a period no less than the maximum allowable time to complete the appellate process.

VI. *Transmission record:* The sending party is required to maintain a transmission record in the event fax filing later becomes an issue.

VII. *Fax filing agency as intermediary:* A fax filing agency may file pleadings on behalf of the parties or their counsel. The court should set standards to be met by any fax filing agency seeking to act in this capacity. The fax filing agency must also meet the requirements of all applicable statutes and regulations. In addition, the following requirements shall apply:

(1) The fax filing agency acts as the agent of the filing party and not as agent of the court. A document shall be deemed to be filed when it is submitted by the fax filing agency, received in the clerk's office, and filed by the clerk. Mere transmission or receipt by the fax filing agency will not be construed as filing.

(2) The fax filing agency must meet all technical requirements under "Part III" of these guidelines.

(3) Duties of the fax filing agency: The fax filing agency will:

(a) ensure that additional copies necessary for filing shall be reproduced;

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[4] Rule 11, Federal Rules of Civil Procedure; Rule 9011, Federal Rules of Bankruptcy Procedure.

(b) take the document(s) to the court and file the document(s) with the court;

(c) on behalf of the client, attorney or litigant, pay any applicable filing fee; and

(d) ensure that all documents to be filed with the court shall be on size 8 1/2 x 11 inch bond.

VIII. *Cover sheet:*

(1) Each document transmitted to the court shall be accompanied by a cover sheet, which shall include the following:

(a) court in which the pleading is to be filed;

(b) type of action, e.g., civil, criminal, bankruptcy, or adversary proceeding

(c) case title information

(d) case number identification

(e) title of document(s)

(f) sender's name, address, telephone number, and fax number

(g) number of pages transmitted including cover sheet

(h) billing or charge information for court fees

(i) date and time of transmission

(2) The cover sheet shall be the first page transmitted. The cover sheet shall not be filed in the case, nor shall it be counted toward any page limit established by the court.

(3) The facsimile cover sheet is not intended to replace any cover sheet which the court may require. It is for use by the clerk's office in identifying the document and identifying any applicable fees.

IX. *Prohibited documents:* The court is free to accept for filing any documents subject to the local rules, except that bankruptcy courts are prohibited from accepting petitions or schedules by facsimile transmission.

X. *Fees:*

Payment of filing fees and any additional charges prescribed by the Judicial Conference for the use of the facsimile filing option shall be paid in a manner determined by the court.

(1) Filing Fee:

Courts which accept the filing of papers by facsimile on a routine basis must ensure that filing fees are paid.

Courts may decide not to allow the filing of complaints by facsimile [see Section XII(6)], thus alleviating the issue of collecting a filing fee. If a court does allow the filing of complaints by fax, the fee may be paid in person, by mail, by credit card, [5] or through use of an escrow account or advance deposit method, as follows:

(a) The filing fee, accompanied by a copy of the facsimile filing cover sheet, shall be deposited with the court not later than three days after the filing by fax.

(b) If the filing fee is not received by the court within three days after the filing by fax, the court shall proceed in the same manner as required for returned checks, except that no further notice need be given any party. The bad check fee shall not be assessed.

(c) A three day grace period will be allowed for receipt of direct (non-credit card or escrow account) payments. Non-receipt of payments will result in suspension of facsimile privileges, the striking of pleadings for which fees were not tendered, and any other penalties deemed appropriate within the discretion of the court.

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[5] Use of credit card payment for this purpose is allowed only if otherwise authorized.

(2) Fees for Filing by Fax [6]

(a) When documents are received on the court's fax equipment, the court shall collect the following fees, in addition to any other filing fees required by law:

For the first ten pages of the document, excluding the cover sheet and special handling instruction sheet . . . . . $ 5.00

For each additional page . . . . . $ .75

Any necessary copies to be reproduced by the court [see Section XII(5)], for each page [7] . . . . . $ .50

(b) No fees are to be charged for services rendered on behalf of the United States.

XI. *The following are among the issues to be addressed by the courts in local rules:*

(1) After hours filings: The court may make arrangements for acceptance of papers filed by fax after business hours, or the court may limit the acceptance of papers filed by fax to normal business hours. If the court accepts filings after normal business hours, then the court shall provide guidelines to determine time and date of filing.

(2) Page limits: The court may limit the number of pages that will be accepted by fax transmission. The court may consider increasing permitted document length after normal business hours.

(3) Exhibits: Certain exhibits may not lend themselves to fax filing, and the court should establish guidelines to handle such situations.

(4) Whether the sender will be notified of receipt or error in transmission: The court shall provide guidance as to whether it is the responsibility of the sender to confirm complete and legible transmission, or whether the court will notify sender of errors.

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[6] These fees may be collected once the Judicial Conference approves amendments to the Miscellaneous Fee Schedules promulgated under 28 U.S.C. §§ 1913, 1914, and 1930.

[7] See Miscellaneous Fee Schedules.

(5) Number of copies to be filed: Whether the party must provide required number of copies or whether the court will reproduce required number of copies and charge a fee for reproduction. [See Section XI(2)(a).]

(6) Types of document: The court may limit the types of document that will be accepted for filing by fax. [See Sections X, XI(1).]

(7) Legibility: The court may decide how to address the problems associated with illegibility due to faulty transmission.

(8) Whether there are any circumstances under which an incomplete transmission would be sufficient to fix the filing date.

AGENDA II-D-4
Washington, DC
April 22-23, 1993

**MEMO TO: Advisory Committee on Criminal Rules**

**FROM: Dave Schlueter, Reporter**

**RE: Proposal to Renumber Rules of Procedure**

**DATE: March 12, 1993**

Attached is a memorandum concerning a proposal to develop a uniform numbering system for the Civil and Criminal Rules of Procedure. The issue has been bubbling in the Standing Committee for several years. To date, no one has suggested that the Advisory Committees actively work on the problem.

L. RALPH MECHAM
DIRECTOR

JAMES E. MACKLIN, JR.
DEPUTY DIRECTOR

ADMINISTRATIVE OFFICE OF THE
UNITED STATES COURTS

WASHINGTON, D.C. 20544

JOHN K. RABIEJ
CHIEF, RULES COMMITTEE
SUPPORT OFFICE

December 2, 1992

MEMORANDUM TO PARTICIPANTS AT THE STANDING COMMITTEE MEETING IN ASHEVILLE, NORTH CAROLINA

SUBJECT: Renumbering and Reintegration of the Federal Rules

The attached memorandum from Judge Pratt on the renumbering and reintegration of the Federal Rules will be considered at the meeting in Asheville.

John K. Rabiej

Attachment

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

ROBERT E. KEETON
CHAIRMAN

PETER G. McCABE
SECRETARY

CHAIRMEN OF ADVISORY COMMITTEES
KENNETH F. RIPPLE
APPELLATE RULES

SAM C. POINTER, JR.
CIVIL RULES

WILLIAM TERRELL HODGES
CRIMINAL RULES

EDWARD LEAVY
BANKRUPTCY RULES

# Memorandum

TO: Robert E. Keeton, Members of the Standing Committee, Chairmen of the Advisory Committees, and Reporters

FROM: George C. Pratt, Chair
Subcommittee on Numerical and Substantive Integration

RE: Renumbering and Reintegration of the Federal Rules

DATE: November 25, 1992

Attached please find a copy of a Memorandum discussing possible renumbering and reintegration of the Federal Rules. This Memorandum was distributed to our Subcommittee October 29, 1992. The Subcommittee plans to meet to discuss this document while we are in Asheville. We intend to report on our discussion at the Standing Committee meeting.

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

ROBERT E. KEETON
CHAIRMAN

PETER G. McCABE
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SAM C. POINTER, JR.
CIVIL RULES

WILLIAM TERRELL HODGES
CRIMINAL RULES

EDWARD LEAVY
BANKRUPTCY RULES

# MEMORANDUM

**TO:** Subcommittee on Numerical and Substantive Integration

**FROM:** Daniel R. Coquillette, Reporter
Mary P. Squiers, Consultant

**DATE:** October 29, 1992

**RE:** Renumbering and Reintegration of the Federal Rules

Judge Pratt has asked that the attached Memorandum by distributed to you for your review and comment. We invite your reactions to this document.

As you may recall, the Standing Committee is interested in examining the feasibility and desirability of renumbering and reintegrating the Federal Rules at its December 1992 meeting in Asheville, North Carolina, with guidance from your Subcommittee. At the June 1992 Standing Committee meeting, we were instructed to prepare options on federal rule renumbering for the Subcommittee. The attached document consists of four options based in large part on suggestions and prior memoranda from both Judge Keeton and Judge Pratt. After consideration of the various options by the Subcommittee, we plan to submit its views and final recommendation to the Standing Committee comfortably in advance of the December 17 meeting.

Judge Pratt has requested that any comments about the renumbering and reintegration be directed to him by memorandum, with copies to the other members of the Subcommittee. After receiving these comments, he will communicate with the Subcommittee.

If you have any questions, please call either of us directly at (617) 552-4340 (Dan) or (617) 552-8851 (Mary).

cc: Hon. Robert E. Keeton
Joseph F. Spaniol, Jr.

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

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# MEMORANDUM

**TO:** Subcommittee on Numerical and Substantive Integration

**FROM:** Daniel R. Coquillette, Reporter
Mary P. Squiers, Consultant

**DATE:** October 29, 1992

**RE:** Renumbering and Reintegration of the Federal Rules

## INTRODUCTION

At the Standing Committee meeting of June 18, 1992, we were instructed to prepare options on federal rule renumbering for the Subcommittee. The objective is to discuss these options and to express a preference to the Standing Committee before the December 17 Committee meeting in Asheville, North Carolina. Judge Pratt has requested that you send your comments on these options to him, with copies to the rest of the Subcommittee. We will then draft a report expressing the Subcommittee's recommendations to the Standing Committee in November.

We have tried to keep in mind some of the purposes that can be achieved with a unified system. Most importantly, we want to be sure that all the rules, and cases interpreting rules, are as accessible as possible to practitioners and the bench, both through traditional methods and through the various computer services. In addition, we hope to highlight accidental differences among similar rules, with a view toward ultimately eliminating these differences.

Substantive integration could reduce the volume of rules. There is some needless repetition. There is also value in an internally consistent package of directives. Regulations will be more acceptable to all if they are better organized. Of course, this purpose can be partly achieved just by better numbering .

Several issues deserve attention at the outset. The first is whether the computer services will be able to accommodate changes proposed by the Subcommittee. We consulted with both Lexis and Westlaw. Representatives from both companies were understandably reluctant to make any firm commitment until they knew exactly what the Subcommittee would propose. They were, however, eager to comment and suggested that we submit to them the preferred Subcommittee Options. They were very appreciative of our contacting them at this initial stage.

Westlaw can make programmatic changes so that users can retrieve information, even if our system is not Westlaw's ideal choice. We asked about the use of periods, hyphens, and spacing. Interestingly, a space in the numbering could lead to problems for Westlaw. For example, simply adding an A in front of all civil rules, separated by a space, could be problematic. Rule 16 would become: A 16. This search request in the Westlaw system would retrieve any A adjacent to any 16, resulting in a huge number of items being retrieved, most of which are inapplicable. If a user wanted to only search for A 16 as a unit, she would have to use parentheses: "A 16". Westlaw explained that it could prompt the user with additional instructions at that point to tell her to insert the parentheses, but it is an extra, and potentially cumbersome step.

Lexis explained that it did not see any particular problems with hyphens, spaces, and periods and that, generally, the Lexis system could accommodate any numbering change.

Another issue concerns the work of the Local Rules Project. Many individual jurisdictions have now been persuaded to renumber their local rules in conformance with the suggestions of the Project and the Standing Committee. The Project has suggested, for example, that a local rule concerning pretrial practice that was originally numbering "27" be renumbered as "LR16.1," following the structure of the Federal Rules of Civil Procedure. If the Civil Rules change numbers, these local rules will also have to be changed. This may not present an insurmountable problem, but it does suggest an argument for retaining the structure of the existing rule numbering.

A third issue concerns exactly what rules will be subject to renumbering or substantive integration. There are many possibilities. For example, the Civil and Criminal Rules can be renumbered and integrated, without including the other Federal Rules. The Civil and Criminal Rules concern courtroom activities at the trial level undertaken by the majority of trial attorneys. This reasoning could also lead to incorporating the Rules of Evidence. One could justify exclusion of the Bankruptcy Rules. These are only used by bankruptcy practitioners and not by most attorneys in federal court. On the other hand, the Bankruptcy Rules rely to a great extent on the Federal Civil Rules, so there may be strong justification for integrating the Bankruptcy Rules with all of the other rules relating to trial in the federal system. One may want to include Appellate Rules in this integration, particularly if those are the only remaining unintegrated Rules. Alternatively, one may conclude that these Rules address a sufficiently different set of circumstances and that they should remain distinct.

A fourth issue concerns the on-going work of the Subcommittee on Style. This Subcommittee has been extensively involved in a stylistic rewriting of the existing Federal Rules of Civil Procedure. It is our understanding that they will soon move on to tackle the other rules in similar fashion. Additional changes to the Federal Rules, such as renumbering and reintegration, may meet with resistance if undertaken at the same time. On the other hand, the entire job could be completed simultaneously.

Lastly, one may want to consider integrating certain directives found in the United States Code that are applicable to trial and appellate practice. For example, there are numerous provisions in Title 28 that bear on a civil trial or appeal in the federal system. There are other related provisions in Title 18 (criminal), Title 21 (drugs), and Title 26 (IRS). On the other hand, such an endeavor may be perceived as too cumbersome. It also may be problematic that these provisions were enacted by Congress in a manner distinct from the rulemaking process so that integrating them may appear to be a usurpation of Congressional authority. If they are only being moved for ease in retrieval, perhaps that can be better achieved by the publishing companies when they compile texts for

practitioners, as is currently the case. With all these arrangements, it is important that the package does not become so large as to be burdensome to a practitioner. If a civil practitioner has to consult numerous pages of criminal, appellate, and bankruptcy directives just to move between two civil rules, then efficiency may be lost. The options outlined below do not involve any U.S. Code provisions.

## OPTIONS

We are including four options that draw heavily on suggestions and prior memoranda from both Judge Keeton and Judge Pratt. In particular, we draw your attention to the memorandum of July 6, 1992 to this Subcommittee (Judge Pratt) and the memorandum of May 27, 1992 to the Standing Committee (Judge Keeton). If any wish additional copies of those memoranda, please simply call (617) 552-4340.

The four options vary from the least ambitious renumbering scheme ("Option 1, A Letter or Number Prefix") to the most ambitious ("Option 3, Throw Out the Existing Rules and Start Over"), with Option 4 added as a discussion point ("Do Nothing"). As a practical matter, we predict that most discussion will center on Option 1 ("A Letter or Number Prefix") and Option 2 ("Integration of Like Rules"). For this reason, we have provided Appendix A, which begins to explore in specific terms how Option 2 might work. In our opinion, both Option 1 and Option 2 are perfectly feasible, and Option 1 could be easily achieved.

Option 1. A Letter or Number Prefix. This option involves renumbering of the Rules only. There are at least four different ways to insert a prefix:

1) A letter prefix with no prefix for the Civil Rules. "A" could be inserted before Appellate Rules, "B" could be inserted before the Bankruptcy Rules, "C" could be inserted before the Criminal Rules, and "E" could be inserted before the Rules of Evidence. For example, Criminal Rule 29 becomes "C.29" or "C-29" or "C29".

2) A letter prefix with one for the Civil Rules. This is basically the same as 1), above, except that "C" could be inserted before the Civil Rules and "D" could be inserted before the Criminal Rules. For example, Criminal Rule 29 becomes "D.29" or "D-29" or "D29".

3) a) A number prefix with nothing for the Civil Rules. The numbers "1" through "4" could be inserted before each of the sets of Rules, with no prefix for the Civil Rules. For example, Criminal Rule 29 becomes "2.29" or "2-29" or "229".

b) A number prefix with nothing for the Civil Rules. The numbers "2" through "9" can be used in the following arrangement: "2" is the pre[illegible] for the Criminal Rules; "3" is the pre[illegible] for all Evidence Rules now numbered below 401; the Evidence [illegible]les numbered 401 through 806 remain the same; Evidence Rules 901 through the end become the 800 series; "9" is the prefix for the Appellate Rules; and, the Bankruptcy Rules retain their present numbers.

4) A number prefix with one for the Civil Rules. The numbers "1" through "5" could be inserted before each of the sets of Rules. For example, Criminal Rule 29 becomes "3.29" or "3-29" or "329".

An advantage of these options is that the basic number of each of the Rules does not change. Thus, a practitioner does not have to relearn a new system of numbering. Another advantage is that, with 1) and 3), above, the numbering of the local rules of the district courts will not need to be changed. Another possible advantage is that a practitioner will not need lengthy instruction, or even additional instruction, to retrieve the material from a computer base.

An advantage of 3.b) is that if, in the future, rulemakers prefer having a set of provisions common to all rules, that can be accomplished without changing the other rules:

They can leave the Civil Rules as they are now and use the 101 through 200 series for the common provisions; or,

They can use the 1 through 100 series for the common provisions and the 101 through 200 series for the Civil Rules by adding a "1" prefix for the Civil Rules.

A disadvantage with 2) and 4) above, is that the numbering of the local district court rules would need to be altered. There is also no particular internal consistency expressed by any of these arrangements. As they only involve renumbering, the quantity of rules is not diminished. Further, minor but troublesome variations among like rules are not highlighted.

Option 2. Integration of Like Rules. This option involves integrating like rules. Similar rules can be integrated and then placed at the beginning of a list of rules. For example, Civil Rule 1, concerning the scope of the civil rules, could be integrated with Criminal Rule 1, concerning the scope of the criminal rules. This particular rule needs a title or designation or prefix to distinguish it from other rules. (*E.g.*, General Rule 1, Rule 1.1, Rule A.1) The other rules can be renumbered in one of at least two ways. First, the remaining rules can be completely renumbered, consistent with the integrated rules. (*E.g.*, Civil Rule 1, 2, 3, Rule 2.1, 2.2, 2.3, Rule B.1, B.2, B.3) Another suggestion is to use one of the possibilities outlined in Option 1, above, keeping the numbers as they are now and simply deleting those rules that are being integrated in the first portion of the rules. So, there would be no Rule 1 in the civil rules section and the civil rules would begin with Rule 2, concerning one form of action, for which there is no criminal equivalent.

A Boston College law student, Joseph Centeno, has been very helpful to us in preparing Appendix A which is attached to this Memorandum. Essentially, Appendix A is an initial screening of the Federal Rules to determine how much integration may be possible. Specifically, Mr. Centeno was charged with reviewing the Civil and Criminal Rules to determine what overlap existed in general subject matter. He was not asked to determine whether the rules that were similar in title, but which varied in substance, should be substantively integrated. As you can see, there are more than forty existing Civil Rules that have a potential cognate rule in the Criminal Rules. All of these rules are not exactly identical with each other, nor are they intended to be so in all cases. There may be a large number, however, that probably should be identical in language and function.

One advantage of this option is that it would organize those Federal Rules which are intended to govern all litigants in one place in the Federal Rules. This would

reduce the actual number of rules and the overall length of the rules. It would also provide some consistency and logic to the arrangement of the rules.

A disadvantage of this option is that it requires renumbering of most, if not all of the rules. All practitioners and judges would need to relearn a numbering system. In addition, a civil litigant would need to look in two places to determine if there were an applicable rule—in the portion of the rules that are applicable in both criminal and civil cases, and in the portion of the rules that are only for civil practice.

Option 3. Throw Out the Existing Rules and Start Over. The existing numbering system can be removed and the rules arranged and integrated with no attempt to preserve any of the existing format and structure. This is similar to Option 2 but it assumes that there is no interest in maintaining the existing rules in the same form as they currently exist. For example, there can be a section of rules applicable to all litigants as in Option 2. The remaining rules can become subparts under broad headings or rules. All rules relating to the commencement of an action, for instance, can be in part 2 of the rules and either numbered sequentially (regardless of whether they are criminal, civil, bankruptcy...), or organized under broad titles with subparts for different subcategories (*e.g.*, Rule 3: Motions; subsection a. Civil Motions; subsection b, Summary Judgment Motions; subsection c, Criminal Motions, subsection d, Post Trial Motions; subsection e, Form of Written Motions and Supporting Memoranda, subsection f, Motions Made at Trial).

One advantage to this system is that everyone would be starting fresh. Preconceived notions would be inapplicable. Also, rulemaking bodies have fifty years of experiences with the existing system and would have the opportunity to use what has been learned over the years in formulating the new structure. Another advantage is that the evidence rules can be easily integrated into the trial rules. The new system could promote one coherent and logical method and organization for all existing rules, including local rules.

The obvious disadvantage of this system is that it would meet political resistance. No one would know the numbers for the rules without new effort and training. In addition, cases decided under the old rules would be difficult to retrieve directly under the applicable new rules, a problem confronted by the change from the ABA Model Code of Professional Conduct to the ABA Model Rules.* Lastly, the rulemaking process is quite slow, and the benefit of this system may be outweighed by the administrative time and energy needed to complete the task.

Option 4. Do Nothing. This is the "if it isn't broken, don't fix it" position. Some believe that the current system, although imperfect, is not sufficiently flawed to require "fixing." Even if this option is adopted, the on-going work represented by Appendix A may be helpful to the rulemaking committees. It provides a useful starting point for the Advisory Committees to review systematically those rules that are so similar that perhaps they should be identical.

* This is not an insurmountable problem. The ABA has developed parallel indexes and citation systems that link precedents under the old Code with the new Model Rules.

## Appendix A

What follows is a brief comparison of the Federal Rules of Civil and Criminal Procedure. First, each of the Civil Rules is listed by number and title with a comment as to whether there is a cognate Criminal Rule. The second portion of this Appendix lists each of the Criminal Rules with a comment where there is an equivalent Civil Rule.

### FEDERAL RULES OF CIVIL PROCEDURE

### I. Scope of Rules

Rule 1: Scope of Rules
- Criminal Rule 1: Scope

Rule 2: One Form of Action
- No corresponding Criminal Rule.

### II. Commencement of Action; Service of Process, Pleadings, Motions, and Orders.

Rule 3: Commencement of Action
- No corresponding criminal rule.

Rule 4: Process
- Criminal Rule 3: The Complaint
- Criminal Rule 4: Arrest Warrant or Summons upon Complaint
- Criminal Rule 6: The Grand Jury.
- Criminal Rule 9: Warrant or Summons Upon Indictment or Information.

Rule 5: Service and Filing of Pleadings and Other Papers
- Criminal Rule 49: Service and Filing of Papers

Rule 6: Time
- Criminal Rule 45: Time.

### III. Pleadings and Motions

Rule 7: Pleadings Allowed; Form of Motions
- Criminal Rule 12: Pleadings and Motions Before Trial
- Criminal Rule 47: Motions

Rule 8: General Rules of Pleading
- Criminal Rule 12: Pleadings and Motions Before Trial

Rule 9: Pleading Special Matters
- No corresponding criminal rule.

Rule 10: Form of Pleadings
- No corresponding criminal rule.

Rule 11: Signing of Pleadings, Motions, and Other Papers; Sanctions
- No corresponding criminal rule.

Rule 12: Defenses and Objections
- No corresponding criminal rule.

Rule 13: Counterclaim and Cross-Claim
- No corresponding criminal rule.

Rule 14: Third-Party Practice
- No corresponding criminal rule.

Rule 15: Amended and Supplemental Pleadings
- No corresponding criminal rule.

Rule 16: Pretrial Conferences; Scheduling; Management
- Criminal Rule 17.1: Pretrial Conference

## IV. Parties

Rule 17: Parties Plaintiff and Defendant; Capacity
- No corresponding criminal rule.

Rule 18: Joinder of Claims and Remedies
- No corresponding criminal rule.

Rule 19: Joinder of Persons Needed for Just Adjudication
- No corresponding criminal rule.

Rule 20: Permissive Joinder of Parties
- No corresponding criminal rule.

Rule 21: Misjoinder and Non-Joinder of Parties.
- No corresponding criminal rule.

Rule 22: Interpleader
- No corresponding criminal rule.

Rule 23: Class Actions
- No corresponding criminal rule.

Rule 23.1: Derivative Actions by Shareholders
- No corresponding criminal rule.

Rule 23.2: Actions Relating to Unincorporated Associations
- No corresponding criminal rule.

Rule 24: Intervention
- No corresponding criminal rule.

Rule 25: Substitution of Parties
- No corresponding criminal rule.

## V. Depositions and Discovery

Rule 26: General Provisions Governing Discovery
- Criminal Rule 16: Discovery and Inspection.

Rule 27: Depositions Before Action or Pending Appeal
- Criminal Rule 15: Depositions

Rule 28: Persons Before Whom Depositions May be Taken
- Criminal Rules 15(a) and 15(d): Depositions.

Rule 29: Stipulations Regarding Discovery Procedure
- Criminal Rule 15(g): Depositions by Agreement not Precluded.

Rule 30: Depositions upon Oral Examination
- Criminal Rule 15(a): Depositions

Rule 31: Depositions upon Written Questions
- Criminal Rule 15: Depositions

Rule 32: Use of Depositions in Court Proceedings
- Criminal Rule 15(e): Depositions

Rule 33: Interrogatories to Parties
- No corresponding criminal rule.

Rule 34: Production of Documents and Things and Entry upon Land
- Criminal Rule 16(a)(1)(C): Government Documents and Tangibles.
- Criminal Rule 16(b)(1)(A): Defendant Documents and Tangibles.

Rule 35: Physical and Mental Examination of Persons
- Criminal Rule 16(b)(1)(B): Reports of Examinations and Tests.

Rule 36: Requests for Admission
- No corresponding criminal rule.

Rule 37: Failure to Make or Cooperate in Discovery: Sanctions
- Criminal Rule 16(c): Continuing Duty to Disclose
- Criminal Rule 16(d)(2): Failure To Comply With Requests

## VI. Trials

Rule 38: Jury Trial of Right
- Criminal Rule 23(a): Trial by Jury

Rule 39: Trial by Jury or by the Court
- Criminal Rule 23: Trial by Jury or By the Court.

Rule 40: Assignment of Cases for Trial
- No corresponding criminal rule.

Rule 41: Dismissal of Actions
- Criminal Rule 48: Dismissal.

**Rule 42:** Consolidation; Separate Trials
- Criminal Rule 8: Joinder of Offenses and Defendants
- Criminal Rule 13: Trial Together of Indictments or Informations.

**Rule 43:** Taking of Testimony
- Criminal Rule 26: Taking of Testimony

**Rule 44:** Proof of Official Record
- Criminal Rule 27: Proof of Official Record

**Rule 44.1:** Determination of Foreign Law
- Criminal Rule 26.1: Determination of Foreign Law

**Rule 45:** Subpoena
- Criminal Rule 17: Subpoena

**Rule 46:** Exceptions Unnecessary
- Criminal Rule 51: Exceptions Unnecessary

**Rule 47:** Selection of Jurors
- Criminal Rule 24: Trial Jurors.

**Rule 48:** Number of Jurors - Participation in Verdict
- Criminal Rule 23(b): Jury of Less Than Twelve

**Rule 49:** Special Verdicts and Interrogatories
- No corresponding criminal rule.

**Rule 50:** Judgment as a Matter of Law in Actions Tried by Jury
- No corresponding criminal rule.

**Rule 51:** Instructions to Jury: Objection
- No corresponding criminal rule.

**Rule 52:** Findings by the Court; Judgment on Partial Findings
- No corresponding criminal rule.

**Rule 53:** Masters
- No corresponding criminal rule.

## VII. Judgment

**Rule 54:** Judgments; Costs
- Rule 32(b) corresponds to Judgments, but there is no criminal rule for costs.

**Rule 55:** Default
- No corresponding criminal rule.

**Rule 56:** Summary Judgment
- Criminal Rule 29(a): Motion for Judgment of Acquittal.

**Rule 57:** Declaratory Judgments
- No corresponding criminal rule.

Rule 58: Entry of Judgment
- No corresponding criminal rule.

Rule 59: New Trials; Amendment of Judgments
- Criminal Rule 33: New Trials.
- Criminal Rule 32.1: Revocation or Modification of Probation or Supervised Release.
- Criminal Rule 35: Correction of Sentence.

Rule 60: Clerical Mistakes and Relief from Judgment or Order
- Criminal Rule 36: Clerical Mistakes

Rule 61: Harmless Error
- Criminal Rule 52: Harmless Error.

Rule 62: Stay of Proceedings to Enforce a Judgment
- No corresponding criminal rule.

Rule 63: Inability of Judge to Proceed
- Criminal Rule 25: Judge; Disability

## VIII. Provisional and Final Remedies

Rule 64: Seizure of Person or Property
- No corresponding criminal rule.

Rule 65: Injunctions
- No corresponding criminal rule.

Rule 65.1: Security - Proceedings Against Sureties
- No corresponding criminal rule.

Rule 66: Receivers Appointed by Federal Courts
- No corresponding criminal rule.

Rule 67: Deposit in Court
- No corresponding criminal rule.

Rule 68: Offer of Judgment
- No corresponding criminal rule.

Rule 69: Execution
- No corresponding criminal rule.

Rule 70: Judgment for Specific Acts; Vesting Title
- No corresponding criminal rule.

Rule 71: Process in Behalf of an Against Persons Not Parties
- No corresponding criminal rule.

## IX. Special Proceedings

Rule 71A: Condemnation of Property
- No corresponding criminal rule.

**Rule 72:** Magistrates; Pretrial Orders
- Rule 5 and 40(a) correspond in the criminal rules.

**Rule 73:** Magistrates; Trial by consent and Appeal Options
- No corresponding criminal rule.

**Rule 74:** Method of Appeal from Magistrate to District Judge Under Title 28, U.S.C. § 636(c)(4) and Rule 73(d)
- No corresponding criminal rule.

**Rule 75:** Proceedings on Appeal from Magistrate to District Judge Under Rule 73(d)
- No corresponding criminal rule.

**Rule 76:** Judgment of the District Judge on the Appeal Under Rule 73(d) and Costs
- No corresponding criminal rule.

## X. District Courts and Clerks

**Rule 77:** District Courts and Clerks
- Criminal Rule 56: District Courts and Clerks

**Rule 78:** Motion Day
- Criminal Rule 12(c): Pleadings and Motions Before Trial.

**Rule 79:** Books and Records Kept by the Clerk and Entries Therein
- Criminal Rule 55: Records.

**Rule 80:** Stenographer; Stenographic Report or Transcript as Evidence
- No corresponding criminal rule.

## XI. General Provisions

**Rule 81:** Applicability in General
- Criminal Rule 1: Scope.

**Rule 82:** Jurisdiction and Venue Unaffected
- Criminal Rule 57: Rules by District Courts.

**Rule 83:** Rules by District Courts
- Criminal Rule 57: Rules by District Courts.

**Rule 84:** Forms
- No corresponding criminal rule.

**Rule 85:** Ti
- ( ninal Rule 60: Ti

**Rule 86:** Effective Date
- Criminal Rule 59: Effective Date.

# FEDERAL RULES OF CRIMINAL PROCEDURE

## I. Scope, Purpose, and Construction

Rule 1: Scope
- Civil Rule 1: Scope
- Civil Rule 81: Applicability in General

Rule 2: Purpose and Construction

## II. Preliminary Proceedings

Rule 3: The Complaint
- Civil Rule 4: Process

Rule 4: Arrest Warrant or Summons upon Complaint
Civil Rule 4: Process

Rule 5: Initial Appearance Before the Magistrate
- Civil Rule 72: Magistrates; Pretrial Orders

Rule 5.1: Preliminary Examination

## III. Indictment and Information

Rule 6: The Grand Jury
- Civil Rule 4: Process

Rule 7: The Indictment and the Information

Rule 8: Joinder of Offenses and of Defendants
- Civil Rule 42: Consolidation; Separate Trials

Rule 9: Warrant or Summons Upon Indictment or Information
- Civil Rule 4: Process

## IV. Arraignment and Preparation for Trial

Rule 10: Arraignment

Rule 11: Pleas

Rule 12: Pleadings and Motions Before Trial; Defenses and Objections
- Civil Rule 7: Pleadings Allowed; Form of Motions
- Civil Rule 8: General Rules of Pleading
- Civil Rule 78: Motion Day

Rule 12.1: Notice of Alibi

Rule 12.2: Notice of Insanity Defense or Expert Testimony of Defendant's Mental condition:

Rule 12.3: Notice of Defense Based Upon Public Authority

**Rule 47:** Motions
- Civil Rule 7: Pleadings Allowed; Form of Motions

**Rule 48:** Dismissal
- Civil Rule 41: Dismissal of Actions

**Rule 49:** Service and Filing of Papers
- Civil Rule 5: Service and Filing of Pleadings and Other Papers

**Rule 50:** Calendars; Plan for Prompt Disposition

**Rule 51:** Exceptions Unnecessary
- Civil Rule 46: Exceptions Unnecessary

**Rule 52:** Harmless Error and Plain Error
- Civil Rule 61: Harmless Error

**Rule 53:** Regulation of Conduct in the Court Room

**Rule 54:** Application and Exception

**Rule 55:** Records
- Civil Rule 79: Books and Records Kept by the Clerk

**Rule 56:** Courts and Clerks
- Civil Rule 77: District Courts and Clerks

**Rule 57:** Rules by District Courts
- Civil Rules 82-83.

**Rule 58:** Procedure for Misdemeanors and Other Petty Offenses

**Rule 59:** Effective Date
- Civil Rule 86: Effective Date

**Rule 60:** Title
- Civil Rule 85: Title

AGENDA III-A
Washington, DC
April 22-23, 1993

**MEMO TO:** **Advisory Committee on Criminal Rules**

**FROM:** **Dave Schlueter, Reporter**

**RE:** **Appointment of Evidence Advisory Committee**

**DATE:** **March 12, 1993**

Attached is a roster of the newly appointed Advisory Committee on the Federal Rules of Evidence.

Professor Steve Saltzburg will be serving as a liaison to that Committee.

# ADVISORY COMMITTEE ON EVIDENCE RULES

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| Honorable Ralph K. Winter, Jr.<br>United States Circuit Judge<br>Audubon Court Building<br>55 Whitney Avenue<br>New Haven, Connecticut 06511 | Area Code 203<br>773-2353<br><br>FAX-203-773-2415 |

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**Criminal:**

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**Evidence:**

Magistrate Judge Wayne D. Brazil

Professor Stephen A. Saltzburg

AGENDA III-B
Washington, DC
April 22-23, 1993

**MEMO TO:** **Advisory Committee on Criminal Rules**

**FROM:** **Dave Schlueter, Reporter**

**RE:** **Status Report on Proposed Amendments to Federal Rule of Evidence 412**

**DATE:** **March 15, 1993**

Attached is a copy of Federal Rule of Evidence 412, as it was published for public comment. You will recall that at the suggestion of Judge Keeton, the Committee proposed amendments to Rule 412 at its October 1992 meeting, with the understanding that the proposal would receive expedited consideration.

At its December 1992 meeting, the Standing Committee considered the Criminal Rules Committee proposal along with a proposal from the Civil Rules Committee. What emerged from the meeting was a blend of the two.

An Evidence Committee has now been appointed and will be handling the Rule from this point on; they are scheduled to hold hearings on the proposed amendments on March 29th and May 6th. The Comment period ends on April 15th.

**Rule 412. Sex Offense Cases; Relevance of Victim's Past Sexual Behavior or Predisposition**

(a) Evidence Generally Inadmissible. ~~Notwithstanding any other provision of law, in a criminal case in which a person is accused of an offense under chapter 109A of title 18, United States Code, reputation or opinion evidence of the past sexual behavior of an alleged victim of such offense is not admissible.~~ Evidence of past sexual behavior or predisposition of an alleged victim of sexual misconduct is not admissible in any civil or criminal proceeding except as

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

provided in subdivisions (b) and (c).

(b) **Exceptions.** ~~Notwithstanding any other provision of law, in a criminal case in which a person is accused of an offense under chapter 109A of title 18, United States Code,~~ Evidence ~~evidence~~ of ~~a victim's~~ the past sexual behavior ~~other than reputation or opinion evidence~~ or predisposition of an alleged victim of sexual misconduct ~~is also not admissible, unless such evidence other than reputation or opinion evidence is~~ may be admitted only if it is otherwise admissible under these rules and is --

~~(1) admitted in accordance with subdivisions (c) (1) and (c) (2) and is constitutionally required to be admitted; or~~



~~(2) admitted in accordance with subdivision (c) and is evidence of~~

~~(A)~~(1) evidence of specific instances of ~~past~~ sexual behavior with ~~persons~~ someone other than the person accused~~,~~ of the sexual misconduct, when offered ~~by the accused upon the issue of whether the accused was or was not, with respect to the alleged victim,~~ to prove that the other person was the source of semen, other physical evidence, or injury; ~~or~~

~~(B)~~(2) evidence of specific instances of ~~past~~ sexual behavior with the

~~accused and is offered by the accused upon the issue of whether the alleged victim consented to the sexual behavior with respect to which such offense is alleged~~ person accused of the sexual misconduct, when offered to prove consent by the alleged victim;

(3) evidence of specific instances of sexual behavior, when offered in a criminal case in circumstances where exclusion of the evidence would violate the constitutional rights of the defendant; or



(4) evidence of specific instances of sexual behavior, or other evidence concerning the sexual behavior or predisposition of the victim, when either type of evidence is offered in a civil case in circumstances where [the evidence is essential to a fair and accurate determination of a claim or defense] [its probative value substantially outweighs the danger of unfair prejudice to the parties and harm to the victim].

(c) **Procedure to Determine Admissibility.** Evidence must not be

offered under this rule unless the proponent obtains leave of court by a motion filed under seal, specifically describing the evidence and stating the purposes for which it will be offered. The motion must be served on the alleged victim and the parties and must be filed at least 15 days before trial unless the court directs an earlier filing or, for good cause shown, permits a later filing. After giving the parties and the alleged victim and opportunity to be heard in chambers, the court must determine whether, under what conditions, and in what manner and form the evidence may be admitted. The motion and the record of any hearing in chambers must, unless otherwise ordered, remain under seal.



~~(c)(1) If the person accused of committing an offense under chapter 109A of title 18, United States Code intends to offer under subdivision (b) evidence of specific instances of the alleged victim's past sexual behavior, the accused shall make a written motion to offer such evidence not later than fifteen days before the date on which the trial in which such evidence is to be offered is scheduled to begin, except that the court may allow the motion to be made at a later date, including during trial if the court determines that the evidence is newly discovered and could not have been obtained~~

~~earlier through the exercise of due diligence or that the issue to which such evidence relates has newly arisen in the case. Any motion made under this paragraph shall be served on all other parties and on the alleged victim.~~

~~(2) The motion described in paragraph (1) shall be accompanied by a written offer of proof. If the court determines that the offer of proof contains evidence described in subdivision (b), the court shall order a hearing in chambers to determine if such evidence is admissible. At such hearing the parties may call witnesses, including the alleged victim, and offer relevant evidence. Notwithstanding subdivision (b) of rule 104, if the relevancy of the evidence which the accused seeks to offer in the trial depends upon the fulfillment of a condition of fact, the court, at the hearing in chambers or at a subsequent hearing in chambers scheduled for such purpose, shall accept evidence on the issue of whether such condition in fact is fulfilled and shall determine such issues.~~



~~(3) If the court determines on the basis of the hearing described in paragraph (2) that the evidence which the accused seeks to offer is~~

~~relevant and that the probative value of such evidence outweighs the danger of unfair prejudice, such evidence shall be admissible in the trial to the extent an order made by the court specifies evidence which may be offered and areas with respect to which the alleged victim may be examined or cross examined.~~

~~(d) For purposes of this rule, the term "past sexual behavior" means sexual behavior other than the sexual behavior with respect to which an offense under chapter 109A of title 18, United States Code is alleged.~~



## COMMITTEE NOTE

The changes to Rule 412 are intended to diminish some of the confusion engendered by the rule in its current form and expand the protection afforded to all persons who claim to be victims of sexual misconduct. The expanded rule would exclude evidence of an alleged victim's sexual history in civil as well as criminal cases except in circumstances in which the probative value of the evidence is sufficiently great to outweigh the invasion of privacy and potential embarrassment that always is associated with public exposure of intimate details of sexual history.

The revised rule applies in all cases in which there is evidence that someone was the victim of sexual misconduct, without regard to whether the alleged victim or person accused is a party to the litigation. The terminology "alleged victim" is used because there will frequently be a factual dispute as to whether sexual misconduct occurred, and not to connote any requirement that the misconduct be alleged in the pleadings. Similarly, the reference to a person "accused" is used in a non-technical sense. There is no requirement that there be a criminal charge pending against the person or even that the misconduct would constitute a criminal offense.

**Subdivision (a).** The amendment eliminates three parts of existing subdivision (a): the confusing introductory phrase, "(n)otwithstanding any other provision of law;" the limitation of the rule to "a criminal case in which a person is accused of an offense under chapter 109A of title 18, United States Code;" and the absolute

statement that "reputation or opinion evidence of the past sexual behavior of an alleged victim of such offense is not admissible." The Committee believes that these eliminations will promote clarity without reducing unnecessarily the protection afforded to alleged victims.

The introductory phrase in subdivision (a) was unclear and has been deleted because it contained no explicit reference to the other provisions of law that were intended to be overridden. The legislative history of the provision provided little guidance as to the purpose of the phrase. In eliminating it, the Advisory Committee intends that Rule 412 will apply and govern in any case, civil or criminal, in which it is alleged that a person was the victim of sexual misconduct and a litigant offers evidence concerning the past sexual behavior or predisposition of the alleged victim. Rule 412 applies irrespective of whether the evidence concerning the alleged victim is ostensibly offered as substantive evidence or for impeachment purposes. Thus, evidence, which might otherwise be admissible under Rules 402, 404(b), 405, 607, 608, 609, or some other evidence rule, must be excluded if Rule 412 so requires.

The reason for extending the rule to all criminal cases is obvious. If a defendant is charged with kidnapping, and evidence is offered, either to prove motive or as a background, that the defendant sexually assaulted the victim, the rule in its current form is inapplicable. The need for protection of the victim is as great in the kidnapping case as it would be in a prosecution for sexual assault. There is a strong social



policy in protecting the victim's privacy and to encourage victims to come forward to report criminal acts, and that policy is not confined to cases that involve a charge of sexual assault. Although a court might well exclude sexual history evidence under Rule 403 in a kidnapping or similar case, the Advisory Committee believes that Rule 412 should be extended so that it explicitly covers all criminal cases in which a claim is made that a person is the victim of sexual misconduct.

The reason for extending Rule 412 to civil cases is equally obvious. A person's privacy interest does not disappear simply because litigation involves a claim of damages or injunctive relief rather than a criminal prosecution. There is a strong social policy in not only punishing those who engage in sexual misconduct, but in also providing relief to the victim. Thus, in any civil case in which a person claims to be the victim of sexual misconduct, evidence of the person's past sexual behavior or predisposition will be excluded except in circumstances in which the evidence has high probative value as recognized by amended Rule 412.

The conditional clause, "except as provided in subdivisions (b) and (c)" is included in subdivision (a) to emphasize that evidence described in subdivisions (b)(1) through (b)(4) is not automatically admissible. To be admitted, the evidence must not only meet one of the four listed reasons, but also must satisfy the procedural requirements for admissibility contained in subdivision (c). Additionally, subdivision (b) notes that the exceptions only apply if the evidence is otherwise admissible under other

rules of evidence. For example, in determining admissibility, the court would have to consider Rules 402 and 403, and perhaps other Rules such as Rules 404 and 405.

**Subdivision (b).** As it currently stands, subdivision (b) excludes evidence of a victim's past sexual behavior in the limited category of criminal cases to which the rule applies unless the Constitution requires admission, the evidence relates to sexual behavior with persons other than the accused and is offered to show the source of semen or injury, or the evidence relates to sexual behavior with the accused and is offered to show consent. As amended, Rule 412 will be virtually unchanged in criminal cases, but will provide protection to any person alleged to be a victim of sexual misconduct regardless of the charge actually brought against an accused.

Under subdivision (b)(1) the exception for evidence of specific instances of sexual behavior with persons other than the person whose sexual misconduct is alleged is admissible if it is offered to prove that another person was the source of semen, physical evidence, or injury. Although the language of the amended rule is slightly different from the language found in existing (b)(2)(A), the difference is explicable by the extension of the rule to civil cases. Evidence offered for the specific purpose identified in this subdivision is likely to have high probative value, and the probative value is likely to be the same in civil and criminal cases where the evidence is relevant.

Under the exception in subdivision



(b)(2), evidence of specific instances of sexual behavior with the person whose sexual misconduct is alleged is admissible if offered to prove consent. Although the language of the amended rule is slightly different from the language found in existing (b)(2)(B), the difference is explicable by the extension of the rule to civil cases. Evidence offered for the specific purpose identified in the subdivision is likely to have high probative value, and the probative value is likely to be the same in civil and criminal cases where the evidence is relevant.

Under (b)(3), evidence of specific instances of conduct may not be excluded if the result would be to deny a criminal defendant the protections afforded by the Constitution. Recognition of this basic principle is found in existing subdivision (b)(1), and is carried forward in subdivision (b)(3) of the amended rule. The United States Supreme Court has recognized that in various circumstances a defendant may have a right to introduce evidence otherwise precluded by an evidence rule under the Confrontation Clause. See, e.g., Olden v. Kentucky, 488 U.S. 227 (1988) (defendant in rape case had right to inquire into alleged victim's cohabitation with another man to show bias).

It is not nearly as clear in civil cases as it is in criminal cases to what extent constitutional protections, such as the right to confrontation, provide protection to civil litigants against exclusion of evidence that arguably has sufficient probative value that exclusion would undermine confidence in the accuracy of a judgment against the person whose evidence is excluded. The Committee

concluded that exclusion of evidence that is essential to a fair, determination of a claim or defense is undesirable and thus provided in subdivision (b)(4), infra, of the amended rule that evidence otherwise excluded by the rule would be admissible when exclusion "would deprive the trier of fact of evidence which is essential to a fair and accurate determination of a claim or defense." This amendment provides a civil litigant with protection akin to that provided to a criminal defendant, but recognizes that some specific constitutional provisions may require admission of evidence in a criminal case that would not be admitted under the amended Rule 412. The inclusion of a specific reference to the constitution in (b)(3) is not intended to reject the argument that Rule 412 evidence would not be otherwise subject to constitutional scrutiny, as would any other rule of evidence. Instead, as with the original version of Rule 412, the amended version states that certain evidence should be excluded unless the Constitution requires admission.

Subdivision (b)(4) is new. It provides a civil analog to (b)(3), recognizing that there are a limited number of civil cases in which exceptions (b)(1) and (b)(2) would not apply but admission of the evidence should be admissible. Two alternative provisions have been offered for public comment. The first recognizes that some evidence might be "essential to a fair and accurate determination of a claim or defense." One example might be a case in which the plaintiff claims defamation and this evidence might be essential to show that the alleged defamatory statements were true or did not damage the plaintiff's reputation. The exception alters



for this type of evidence the normal standard of relevancy prescribed by Rule 402 by specifying that the evidence must be essential to an accurate determination of an issue. In specifying that the evidence must be essential to a "fair" determination of an issue, the exception also requires the court to consider the legitimate privacy interests of the alleged victim, a concern that may not be adequately covered by Rule 403, particularly if the victim is not a party to the action. Unlike the rules governing criminal cases, which bar all such evidence, reputation and character evidence may be received in a civil case if it meets the stringent test set out in (b)(4).

The alternative language for civil cases in (b)(4) is a balancing test more restrictive than the balancing test in present Rule 412(c)(3). This alternative might prove easier to administer than a test requiring that the evidence be essential to a fair and accurate determination. The balancing test focuses directly on the need for the evidence, prejudice to the parties, and harm to the alleged victim. It raises the threshold for admission set out in the present rule by requiring that the value of the evidence substantially outweigh its dangers.

**Subdivision (c).** Amended subdivision (c) is more concise and understandable than the existing subdivision. The requirement of a motion 15 days before trial is continued in the amended rule, as is the provision that a late motion may be permitted for good cause shown. In deciding whether to permit late filing, the court may take into account the conditions previously included in the rule:

namely whether the evidence is newly discovered and could not have been obtained earlier through the existence of due diligence, and whether the issue to which such evidence relates has newly arisen in the case. The amended rule requires that any motion be filed under seal and, unless otherwise ordered, it must remain under seal during the course of trial and appellate proceedings. This is to assure that the privacy of the alleged victim is preserved in all cases in which the court rules that proffered evidence is not admissible, and in which the hearing refers to matters that are not received, or are received in another form.

The amended rule provides that the alleged victim and any party may be heard in chambers with respect to any motion, and that the court will rule on admissibility and the form in which any evidence will be received.

One substantive change made in subdivision (c) is the elimination of the following sentence: "Notwithstanding subdivision (b) of rule 104, if the relevancy of the evidence which the accused seeks to offer in the trial depends upon the fulfillment of a condition of fact, the court, at the hearing in chambers or at a subsequent hearing in chambers schedules for such purpose, shall accept evidence on the issue of whether such condition of fact is fulfilled and shall determine such issue." On its face, this language would appear to authorize a trial judge to exclude evidence of past sexual conduct between an alleged victim and an accused or a defendant in a civil case based upon the judge's belief that such past acts did not occur. Such an authorization raises



questions of invasion of the right to a jury trial under the Sixth and Seventh Amendments. See 1 S. SALTZBURG & M. MARTIN, FEDERAL RULES OF EVIDENCE MANUAL, 396-97 (5th ed. 1990).

The Advisory Committee concluded that the amended rule provided adequate protection for all persons claiming to be the victims of sexual misconduct, and that it was inadvisable to continue to include a provision in the rule that has been confusing and that raises substantial constitutional issues.

Also eliminated from former subdivision (c) is the balancing test for admissibility. The Committee believes that, with respect to evidence described in subdivisions (b)(1) to (b)(4), [Cf. alternate language proposed for (b)(4), supra] it is appropriate to apply the standards stated in Rule 403.

# Office of the Attorney General
## Washington, D. C. 20530

April 22, 1993

Honorable William Terell Hodges
United States Courthouse
Suite 152
311 West Monroe Street
Jacksonville, Florida 32202

Dear Judge Hodges:

It is my understanding that the Advisory Committee on Criminal Rules which you chair is scheduled on April 22-23, 1993, to consider a proposed amendment to Rule 16 of the Federal Rules of Criminal Procedure. In my relatively brief tenure as Attorney General, I have not yet had the opportunity to fully and carefully review this amendment. Accordingly, I am respectfully requesting that the Rules Committee defer any consideration of amending Rule 16 until I and my staff have had an adequate opportunity to review and consider both the practical and legal ramifications of such an amendment.

I sincerely appreciate your consideration of this request and look forward to working with you and the Committee in the future.

Sincerely,

Janet Reno

CHARLES W. EHRHARDT
PROFESSOR OF LAW
FLORIDA STATE UNIVERSITY
TALLAHASSEE, FLORIDA 32306

(904) 644-3240

March 23, 1993

Hon. Janet Reno
Attorney General of the United States
Department of Justice
Constitution and Tenth Street NW
Washington, D.C. 20530

Dear Janet:

At the suggestion of Judge Donald O'Brien, I am writing concerning an amendment to Federal Rule of Criminal Procedure 16 which the judge and I have previously discussed and which has been submitted to Judge William Terrell Hodges, the chair of the Advisory Committee on the Criminal Rules.

The proposed alternatives seek to solve a problem created in large multi-defendant cases when in response to a Rule 16 discovery order, the government takes counsel to a room full of a large number of documents but does not indicate which, if any, of the documents are relevant to an individual defendant. Much time is wasted by counsel reviewing documents having nothing to do with the defendant being represented. In the case of court-appointed counsel, already scarce funds are being expended in a non-productive manner. Attached are copies of proposals which seek to remedy this problem by making available to a defendant, upon request, any indexing materials in possession of the government or requiring the government to identify documents which name or clearly refer to a particular defendant.

I would be happy to work with someone in your office about this issue if you believe it is appropriate.

Very truly yours,

Charles W. Ehrhardt
Ladd Professor of Evidence

The Florida State University
Tallahassee, Florida 32306-1034

College of Law

July 14, 1992

Judge Donald E. O'Brien
U.S. District Court
Post Office Box 267
Sioux City, Iowa 51102

Dear Judge O'Brien:

I am enclosing the Proposed Amendments to Rule 16 which you requested that I draft.

There is a proposal (Alternative 1) which requires the government to specifically identify otherwise discoverable materials which name or clearly refer to a defendant who files such a request. This amendment does not expand the materials which a defendant may discover under Rule 16 but only imposes upon the government the obligation to identify those materials which specifically name a defendant. Additionally, other documents which refer to the defendant by an alias or nickname should be identified.

Alternative 2 is another approach to the problem. When a case involves multiple defendants and has voluminous documents, the government usually will have a method of identifying the documents which are relevant to each defendant. If such a method is pre-existing, this amendment requires the government to produce it on request. Using this aid, defense counsel can eliminate much wasted time.

To address the concern that the prosecution may in good faith overlook a single document naming a defendant, I have included a provision which would deal with this problem. The provision gives the trial judge the discretion to rule in the interests of justice. It is modeled on a similar provision of the Florida Rules of Criminal Procedure, where it has worked well.

I appreciate the opportunity to provide input on this important issue. Please let me know if I can be of further assistance.

Very truly yours,

Charles W. Ehrhardt
Ladd Professor of Evidence

CWE:jvs

PROPOSED AMENDMENTS
TO RULE 16
OF THE FEDERAL RULES OF CRIMINAL PROCEDURE

RULE 16(a)(1)(C).

Alternative 1

**(C) Documents and Tangible Objects.** Upon request of the defendant the government shall permit the defendant to inspect and copy or photograph books, papers, documents, photographs, tangible objects, buildings or places, or copies or portions thereof, which are within the possession, custody or control of the government, and which are material to the preparation of the defendant's defense or are intended for use by the government as evidence in chief at the trial, or were obtained from or belong to the defendant. Upon the request of a defendant, the government shall also identify any materials set forth in this paragraph which directly name the defendant or clearly refer to the defendant.

**COMMENT**

Alternative 1 adds a final sentence to the presently existing Rule 16(a)(1)(C) requiring the government to specifically identify discoverable materials which "directly name the defendant or clearly refer to the defendant."

Alternative 2

**(C) Documents and Tangible Objects.** Upon request of the defendant the government shall permit the defendant to inspect and copy or photograph books, papers, documents, photographs, tangible objects, buildings or places, or copies or portions thereof, which are within the possession, custody or control of the government, and which are material to the preparation of the defendant's defense or are intended for use by the government as evidence in chief at the trial, or were obtained from or belong to the defendant. Upon the request of a defendant, the government shall make available to the defendant any existing electronic or other method of indexing or organization which would facilitate the examination of documents set forth in this paragraph.

**COMMENT**

Alternative 2 adds a final sentence to Rule 16(a)(1)(C) which encompasses a different approach to the problem. Most prosecutions of multiple defendants have multiple counts in the indictment. The government usually has some method of identifying which documents are relevant to each of the separate counts. Upon the defendant's request, this amendment would require the government to produce such an index or other organizational method, if it already exists.

RULE 16(a)(4).

The court may prohibit the government from introducing in evidence any of the foregoing material not disclosed, so as to secure and maintain fairness in the just determination of the cause.

**COMMENT**

In order to deal with the inadvertent failure of the government to identify the materials which directly implicate a defendant, this amendment provides that the trial court has wide discretion in dealing with the matter in order to secure and maintain fairness in the just determination of the cause. This provision is identical to Florida Rule of Criminal Procedure 3.220(a)(1)(xiii).

The provision may be unnecessary in light of Rule 16(d)(2) which seems to provide this same discretion.

UNITED STATES DISTRICT COURT
CHAMBERS OF
JUDGE JOHN F. KEENAN
UNITED STATES COURTHOUSE
FOLEY SQUARE
NEW YORK, N.Y. 10007

March 16, 1993

The Honorable Sam A. Crow
United States District Judge
United States District Court
111 U.S. Courthouse
401 North Market Street
Wichita, Kansas 67202

Dear Sam:

In connection with our Subcommittee concerning Video Arraignment and possible amendments to Federal Rules of Criminal Procedure 10 and 43, I am enclosing a chart which illustrates the status of Video Arraignment in the various states throughout the union.

Dave Schlueter informed me that the subject of video conferences is being considered at a Meeting of the Judicial Conference in Washington this week and that there may be a pilot project in the Eastern District of South Carolina.

In any event from the discussion at last October's Meeting, I have the impression that the way for us to go is to permit video proceedings, only with the consent of the defendant.

Accordingly, drafts of an amended Rule 10 and 43, calling for waivers follow.

Rule 10 of the Federal Rules of Criminal Procedure shall be amended to read as follows:

> Arraignment shall be conducted in open court and shall consist of reading the indictment or information to the defendant or stating to the defendant the substance of the charge and calling on the defendant to plead thereto. The defendant shall be given a copy of the indictment or information before being called upon to plead. <u>The use of video teleconferencing technology, where the defendant is not physically present in court, is consistent with the requirements of this rule providing the defendant waives his or her right to be arraigned in open court</u>.

Rule 43(a) of the Federal Rules of Criminal Procedure shall be amended to read as follows:

> (a) Presence Required. The defendant shall be present at the arraignment, at the time of the plea, at every stage of the trial including the impaneling of the jury and the return of the verdict, and at the imposition of sentence, except as otherwise provided by this rule. <u>During pre-trial proceedings, the use of video teleconferencing technology, where the defendant is not physically present in court, is consistent with the presence requirement of this rule providing the defendant waives his or her right to be arraigned in open court.</u>

Dave Schlueter further informed me that it is unlikely that any final action will be taken on our project at the April Meeting, but I would appreciate any thoughts which you have in early April.

If there is any desire for a telephone conference on the subject, please let me know and I will be pleased to set one up.

Warmest regards and I look forward to hearing from you and seeing you at the April Meeting in Washington.

Sincerely,

John F. Keenan

JFK:maq
Enclosure

cc: The Honorable William Terrell Hodges
Professor David A. Schlueter

**M E M O R A N D U M**

March 16, 1993

TO: All Members of the Subcommittee on Video Arraignment

FROM: Judge John F. Keenan

RE: Video Arraignment

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I researched LEXIS for federal and state case law, state codes, state legislation and law review articles regarding arraignments by video/closed circuit television. The attached information is separated by state in alphabetical order.

The following chart summarizes the materials. The chart refers to those states that have addressed video arraignments.

JFK:maq
Attachment

cc: The Honorable William Terrell Hodges
Professor David A. Schlueter

| State | Source | Year | Cite |
|---|---|---|---|
| AK | | | |
| AZ | Atty General Opinion | 1985 | Ariz. Rule of Crim. Pro. 14.2 |
| CA* | Atty General Opinion | 1980 | 63 Op. Atty Gen. Cal. 193 |
| | Code | 1992 | Cal. Pen. Code @ 977 (1992) |
| | Legislation | 1992 | CA S.B. 1808, CA S.B. 2003; CA A.B. 2628 |
| CO | | | |
| DC | News Article | 6/22/92 | considering video arraignment |
| FL** | Law review articles | 1984 | 38 U. Miami L. Rev. 593 |
| | | 1984 | 38 U. Miami L. Rev. 657 |

FLA. R. CRIM. P. 3.170(a), 3.130(a); FLA. BAR CODE JUD. COND. Canon 3A(7); Sardinia v. State, 168 So. 2d 674 (Fla. 1964); Brewer v. Williams, 430 U.S. 387 (1977); Arraignment by Television, 63 Judicature 396 (1980); Argensinger v. Hamlin, 407 U.S. 25 (1972), construed in Scott v. Illinois, 440 U.S. 367 (1979).

| | | | |
|---|---|---|---|
| GA | News Article | 9/19/92 | |
| KS** | Code | 1991 | K.S.A. @ 22-3205 (1991) |

| | | | |
|---|---|---|---|
| ID** | Law review article | 1984 | 38 U. Miami L. Rev. 657 |
| | | | ID Cr. Rule 43.1 |
| IA | | | |
| LA** | Code | 1992 | La. C.Cr.P. art. 551, 831-833 (1992) |
| | Legislation | 1990 | Act 593, S.B. 211 |
| | | | Act 543, S.B. 284 |
| MD | | | |
| MA | News Article | 6/29/92 | considering video arraignment |
| MN | | | |
| MT** | Code | 1992 | Mont. Code Anno., @ 46-12-201 (1992) |
| NV** | Code | 1991 | Nev. Rev. Stat. Ann. @ 178.388 (1991) |

| | | | |
|---|---|---|---|
| NY* | Code | 1992 | Judiciary Law, Article 7-A; Judicial Administration<br>NYS CLS Jud @ 218 (1992) |
| | Legislation | 1991 | 1991 NY S.B. 3115<br>1991 NY A.B. 1361<br>1992 NY S.B. 8574<br>1992 NY A.B. 11804<br>1991 NY S.B. 5557<br>1991 NY A.B. 8184<br>1992 NY A.B. 3823-D |
| | News Article | 7/26/92 | |
| OH | Case law | 1980 | State v. Melzer, Slip Op. Ct. of Appeals of Ohio, Fifth Appellate District, Licking County |
| OR | | | |
| PA | Law review article | 1988 | 49 U. Pitt. L. Rev. 1159 |
| SC | | | |
| WA | | | |

WI

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*Denotes video arraignment by consent only.

**Denotes video arraignment by judicial discretion or in some states by local rules.

Office of the
**FEDERAL PUBLIC DEFENDER**
for the
Northern District of Ohio

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**EDWARD F. MAREK**
FEDERAL PUBLIC DEFENDER

April 1, 1993

Honorable John F. Keenan
Judge, U.S. District Court
United States Courthouse
Foley Square
New York, NY 10007

Dear Judge Keenan:

I am in receipt of your March 16, 1993 letter regarding video arraignments and other preliminary proceedings. Upon reflection, I am persuaded that the rules should not be changed to permit teleconferencing of arraignments or other pretrial proceedings, even with consent of the defendant. I fear that often the defendant's consent will be obtained through the teleconferencing itself by attorneys who are just appointed at the time of the particular proceeding or who do not make an effort to confer with the defendant in person in advance. I believe these proposed rule changes will also spawn considerable litigation over whether there was a knowing waiver, especially where something is said or done at an arraignment or other pretrial proceeding that later becomes an issue.

The arguments in favor of teleconferencing, primarily put forward by the Bureau of Prisons, to me are not convincing enough to change a practice which has served well over the years. The presence of the defendant at any court proceeding allows him/her to understand the dynamics of what is happening to him/her which cannot be conveyed via teleconferencing. While I am sure that some defendants, especially those with retained counsel with a full opportunity to confer with counsel, would be willing to give a knowing waiver, those defendants who require court appointed counsel often will only "see" the attorney for the first time at the very proceeding at which he will be expected to consider giving a "knowing" waiver.

I look forward to seeing you again in D.C.

Very truly yours,

Edward F. Marek

EFM:keenan.laj
cc: Honorable Terrell Hodges
Professor David Schlueter

Skylight Office Tower — Suite 750
1660 West Second Street
Cleveland, Ohio 44113-1454

The George Washington University
WASHINGTON DC
THE NATIONAL LAW CENTER



March 19, 1993

The Honorable John F. Keenan
U.S. District Court
United States Courthouse
Foley Square
New York, N.Y. 10007

Dear Judge Keenan:

Your proposed amendments to Rules 10 and 43 appeal to me. The great majority of the Committee at the last meeting seemed to me to be unfavorably disposed toward eliminating the right of a defendant to be present during important stages of a case. And, the feeling that arraignment and certain other pretrial proceedings were important was surprisingly strong. Thus, your approach to videoconferencing, focusing on consent of the defendant, appears to me to be both reasonable and likely to obtain approval by a majority of the Committee.

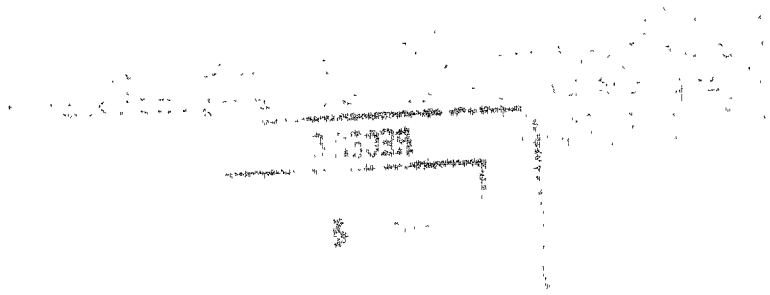
Although it is true that we generally have to circulate proposed amendments 30 days prior to a meeting, we could still do so and put this forward for final approval. If you decide to do so, you have my full support.

Thanks for doing the work.

Sincerely,

Stephen A. Saltzburg
Howrey Professor of Trial Advocacy,
Litigation and Professional Responsibility

2000 H STREET, N.W. • WASHINGTON, DC 20052



Office of the
**FEDERAL PUBLIC DEFENDER**
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**EDWARD F. MAREK**
FEDERAL PUBLIC DEFENDER



April 1, 1993

Honorable John F. Keenan
Judge, U.S. District Court
United States Courthouse
Foley Square
New York, NY 10007

Dear Judge Keenan:

I am in receipt of your March 16, 1993 letter regarding video arraignments and other preliminary proceedings. Upon reflection, I am persuaded that the rules should not be changed to permit teleconferencing of arraignments or other pretrial proceedings, even with consent of the defendant. I fear that often the defendant's consent will be obtained through the teleconferencing itself by attorneys who are just appointed at the time of the particular proceeding or who do not make an effort to confer with the defendant in person in advance. I believe these proposed rule changes will also spawn considerable litigation over whether there was a knowing waiver, especially where something is said or done at an arraignment or other pretrial proceeding that later becomes an issue.

The arguments in favor of teleconferencing, primarily put forward by the Bureau of Prisons, to me are not convincing enough to change a practice which has served well over the years. The presence of the defendant at any court proceeding allows him/her to understand the dynamics of what is happening to him/her which cannot be conveyed via teleconferencing. While I am sure that some defendants, especially those with retained counsel with a full opportunity to confer with counsel, would be willing to give a knowing waiver, those defendants who require court appointed counsel often will only "see" the attorney for the first time at the very proceeding at which he will be expected to consider giving a "knowing" waiver.

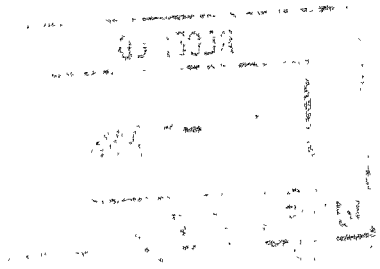
I look forward to seeing you again in D.C.

Very truly yours,

Edward F. Marek

EFM:keenan.laj
cc: Honorable Terrell Hodges
Professor David Schlueter

Skylight Office Tower — Suite 750
1660 West Second Street
Cleveland, Ohio 44113-1454



# ADVISORY COMMITTEE

# ON

# FEDERAL RULES OF CRIMINAL PROCEDURE

## PUBLIC COMMENTS ON PROPOSED AMENDMENTS

## TO

## RULES 16, 29 AND 32

April 22, 1993

ADVISORY COMMITTEE ON
FEDERAL RULES OF CRIMINAL PROCEDURE

PROPOSED AMENDMENT TO RULE 16(a)(1)(A)

## I. SUMMARY OF COMMENTS: Rule 16(a)(1)(A)

The Committee has received three written commenst on the proposed amendment to Rule 16(a)(1)(A)(statements by organizational defendants). All three commentators support the amendment but focus on the issue of what showing, if any, the defendant organization must make in order to obtain disclosure. One suggests a change in the Committee Note to the effect that the organizational defendant should not be required to show that an individual was able to legally bind the defendant. Another advocates an automatic disclosure provision. And the third indicates that the disclosure should also extend to those who the government contends were in a position to bind the defendant organization.

## II. LIST OF COMMENTATORS: Rule 16(a)(1)(A)

1. David P. Bancroft, Esq.,San Francisco, CA, 4-2-93

2. William J. Genego & Peter Goldberger, NADCL, Wash., D.C., 4-14-93.

3. Myrna Raeder, Prof., Los Angeles, CA, 4-12-93.

## III. COMMENTS: Rule 16(a)(1)(A)

David P. Bancroft, Esq.
Private Practice
San Francisco, CA,
April 2, 1993

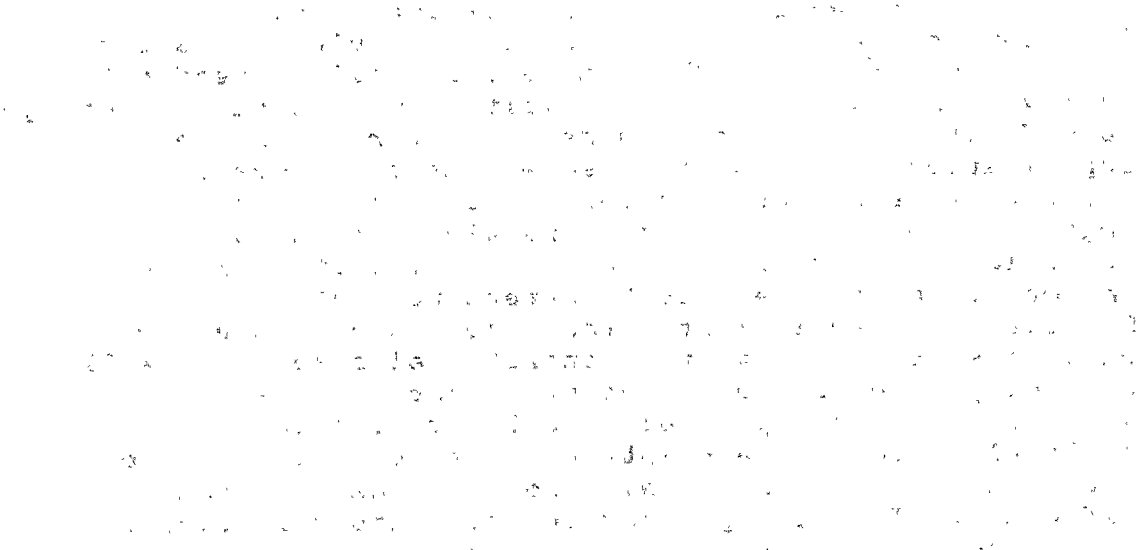
Mr. Bancroft states that the reference in the Committee Note to the process of showing that a particular individual had the ability to bind the organizational defendant is not practical; an entity often does not know which agents the government believes can bind it. He advocates an automatic disclosure provision -- based on the government's claim that an individual was in a position to bind the entity.

William J. Genego, Esq.
Peter Goldberger, Esq.
National Assoc. of Crim. Defense Lawyers
Washington, D.C.
April 14, 1993

Mr. Genego and Mr. Goldberger, on behalf of the National Association of Criminal Defense Lawyers, endorses the amendment to Rule 16. But they suggest that the rule be further modified to require disclosure for statements by persons who the government contends weer in a position to bind the defendant organization. They note that in some cases the organization may disclaim that the person was in such a position but the government will take the opposite position; the entity, they suggest, should be able to obtain the statement even if it disagrees with the government's position.

Myrna Raeder
Professor of Law
Southwestern Univ. School of Law
Los Angeles, CA
April 12, 1993

Professor Raeder, on behalf of the American Bar Association, supports the amendment to Rule 16, noting that in February 1992, the ABA approved a similar amendment. She believes, however, that the Committee Note should be changed to reflect what, if any, burden. might rest on the organizational defendant to show that the requested statements were made by a person able to bind the organization. The Note as currently written does not specifically address that question but instead leaves it for the court and the parties to determine that issue. Professor Raeder indicates that the comment is entirely too ambiguous to ensure that organizational defendants will routinely receive the statements. She recommends that the Note reflect that upon request, the government should routinely produce statements and testimony of individuals who it may contend at trial bind the organizational defendant. This change, she suggests would be simple to apply and avoid interpretive issues.



**ADVISORY COMMITTEE ON**
**FEDERAL RULES OF CRIMINAL PROCEDURE**

**PROPOSED AMENDMENT TO RULE 29**

## I. SUMMARY OF COMMENTS: Rule 29

The Committee has received two comments on the proposed amendment to Rule 29. One comment merely welcomes the amendment which would make it clear that the court's decision on a reserved motion must be based on the evidence introduced prior to the motion. The other comment suggests that either the Rule itself or the Committee Note contain a notation that the "waiver rule" does not apply; that rule indicates that if a defendant presents evidence after denial of a judgment of acquittal at the close of the government's case, he waives his objection to the denial.

## II. LIST OF COMMENTATORS: Rule 29

1. William J. Genego & Peter Goldberger, NADCL, Wash., D.C., 4-14-93.

2. Robert L. Weinberg, Esq., Washington, D.C., 4-14-93.

## III. COMMENTS: Rule 29

William J. Genego, Esq.
Peter Goldberger, Esq.
National Assoc. of Crim. Defense Lawyers
Washington, D.C.
April 14, 1993

Mr. Genego and Mr. Goldberger, on behalf of the NADCL, endorse the amendment which makes it clear that a court's reserved ruling may be based only the evidence introduced prior to the motion for judgment of acquittal.

Mr. Robert L. Weinberg, Esq.
Private Practice
Washington, D.C.
April 14, 1993

Mr. Weinberg discusses the "waiver rule" which has been adopted by all of the circuits. That rule provides that if a defendant proceeds with his case after an unsuccessful motion for a judgment of acquittal following the government's case-in-chief, he has waived his objection to the denial of his motion and the court may consider all of

the evidence presented at trial. Mr. Weinberg suggests that either the amendment or the Committee Note should be amended to indicate that the waiver rule will not apply where the ruling is reserved. Where the trial court reserves ruling on a Rule 29 motion, the defendant would not have chosen to proceed after knowing that the government's case was sufficient. Any appellate ruling on the motion, according to the rule as proposed, will be based on the evidence as it stood at the close of the government's case; thus the appellate review is not focused on all of the evidence at the close of the trial, as it is when the defendant proceeds with his case following a denial. Thus, he recommends that the Committee specifically address the point that on appeal, by either side, the appellate court may only consider the evidence as it existed at the time of the motion.

ADVISORY COMMITTEE ON
FEDERAL RULES OF CRIMINAL PROCEDURE

PROPOSED AMENDMENT TO RULE 32

## I. SUMMARY OF COMMENTS: Rule 32

There were twenty-seven (27) written comments on the proposed amendments to Rule 32. Approximately one-half of the comments were filed by Probation Officers and most of the remainder were filed by judges. Almost all of the commentators were very critical of the 70-day time limit for imposing sentence in Rule 32(a). Many of those favored retention of the more generalized language in Rule 32 as it currently exists. While several were also critical of the internal time limits for completing certain tasks incident to preparation of the Presentence Report, at least one favored the internal time limits.

Approximately one-third of the commentators expressed concern for potential delays in requiring counsel's presence at any presentence interview with the defendant in (b)(2); several recommended that the right for counsel to be present not be absolute, but instead be conditioned on counsel's reasonable availability. At least one was strongly opposed to providing the right for counsel to even be present.

Several commentators recognized the debate over whether the probation officer's recommendation regarding a sentence should remain confidential. They recommended that the presumption of confidentiality should prevail rather than the proposed amendment which reflects the opposite presumption. See proposed Rule 32(b)(6)(A).

Several comments addressed concerns about extending Rule 26.2 (disclosure of witness statements) to the sentencing proceeding. There was particular concern that the probation officer's files would be subject to disclosure. It should be noted that that particular provision has already been approved by the Supreme Court and would become part of Rule 32 even if no other amendments were made.

Additional comments addressed: the potential interplay with the computation of time in Rule 45(a); whether the court has discretion to hear additional evidence at sentencing; whether there is any need to nationalize what is now local practice in approximately one-half of the courts; who has the burden of proof on controverted matters; the need for the court to see counsel's objections to the PSR; whether the provision concerning disclosure of the reasons for the sentence in the judgment itself; and counsel's ability to make last minute objections to the PSR. There

were also a number of comments on minor technical changes or corrections.

## II. LIST OF COMMENTATORS: Rule 32

1. Rudi M. Brewster, Judge, San Diego, CA, 3-18-93.
2. Vincent L. Broderick & Mark L. Wolf, Judges, White Plains, N.Y., 4-14-93
3. Leonard J. Bronec, Prob. Off., Kansas City, Kan. 2-11-93.
4. Loren A. N. Buddress, Prob. Off., San Francisco, CA, 3-19-93.
5. Avern Cohn, Judge, Detroit, Mich., 4-2-93.
6. Julian Able Cook, Jr., Judge, Detroit, Mich., 3-19-93.
7. J. Robert Cooper, Esq., Atlanta, Ga., 2-4-93.
8. Barbara B. Crabb, Judge, Madison, Wisc., 2-2-93
9. Joseph P. Donohue, Prob. Off., Scranton, PA., 4-9-93.
10. James W. Duckett, Jr., Prob. Off., Columbia, S.C., 2-2- 93.
11. William J. Genego & Peter Goldberger, Esq., NACDL, Wash, D.C., 4-15-93.
12. T.A. Hummel, Prob. Off., Boise, Idaho, 2-2-93.
13. George P. Kazen, Judge, Laredo, Tex., 2-18-93.
14. Sim Lake, Judge, Houston, Tex., 2-24-93.
15. Robert B. Lee, Prob. Off., Seattle, Wash., 3-23-93.
16. Robert P. Longshore, Prob. Off., Montgomery, Ala., 2-10-93.
17. Robert M. Latta, Prob. Off., Los Angeles, CA, 2-16-93.

18. Allen L. Noble, Prob. Off., Little Rock, Ark. 3-24-93.

19. Justin L. Quakenbush, Judge, Spokane, Wash., 2-2-93.

20. John D. Rainey, Judge, Houston, Tex., 3-22-93.

21. Lamont Ramage, Prob. Off., Austin, Tex., 2-11-93.

22. David F. Sanders, Prob. Off., Las Vegas, Nev., 2-8-93.

23. Frederick N. Smalkin, Judge, Baltimore, Md., 4-7-93.

24. Joseph B. Steelman, Jr., Prob. Off., Winston-Salem, N.C., 4-13-93.

25. Thomas K. Tarr, Prob. Off., Concord, N.H., 4-2-93.

26. Charlie E. Vernon, Prob. Off., Sacramento, Cal., 2-4-93.

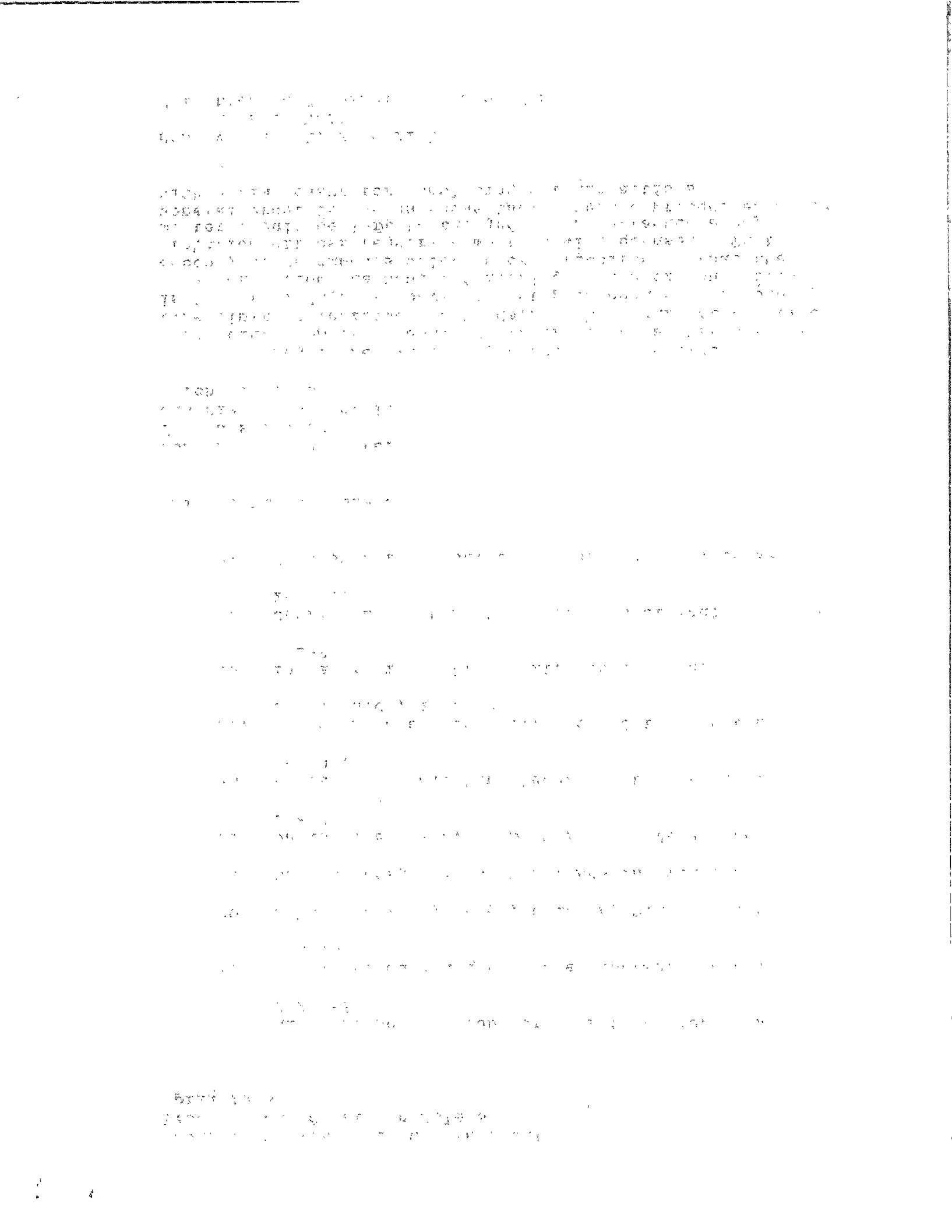
27. G. Wray Ware, Prob. Off., Roanoke, Va., 2-19-93.

## III. COMMENTS: Rule 32

Hon. Rudi M. Brewster
U.S. Dist. Court
San Diego, California
March 18, 1993

Speaking on behalf of the Districts Guidelines Sentencing Committee, Judge Brewster requests that the outer time limits b increased to 84 days; their current practice is to set 77 days if conviction or plea occurs on a Monday, or 77 days from the Monday following a plea or conviction. Second, he recommends deletion of a requirement that the probation officer require a meeting with counsel. That matter should be left to the judge. He attached a copy of General Order 350 which shows their court's procedures along with a time chart for completing certain actions.

Hon. Vincent L. Broderick
Hon. Mark L. Wolf
Committee on Criminal Law, Jud. Conference



White Plains, N.Y.
Feb. 14, 1993

Judges Broderick and Wolf, on behalf of the Judicial Conference Committee on Criminal Law and its subcommittee on Sentencing Procedures, express several concerns about the proposed amendments to Rule 32. While it supports the stylistic reorganization of the rule, it believes that the changes will affect the work of the judges and probation officers. First, the Committee questions the wisdom of adopting strict time limits; citing a recent study by the Federal Judicial Center, the Committee believes that given the need for additional time to develop the PSR, the time limits will be routinely expanded, thus reducing the effectiveness of the rule. Second, the Committee believes that the procedures for dealing with objections to the PSR should remain a matter of local control; to that end they recommend a delay in amending Rule 32 until the FJC completes an empirical study of sentencing procedures. Third, the Committee believes that the provision regarding disclosure of statements should not be extended to probation officers. Fourth, noting that the Criminal Law Committee was sharply divided on the issue of confidentiality of the sentencing recommendation, it recommends that the rule be amended to presume confidentiality, rather than the reverse. Fifth, they recommend that an ambiguity in (b)(4)(B) be clarified; it is not clear just what the probation officer is to recommend concerning a different sentence within or without the applicable guideline. Sixth, the commentators are concerned that the provision for the presence of counsel at interviews with probation officers may unduly delay the procedures; they suggest that either the Rule or the Committee Note make provision for counsel making themselves reasonably available for the interviews. Seventh, proposed subdivision (c)(1) indicates that the trial court may hear additional evidence; the commentators suggest applicable caselaw may require the court to hear such evidence. Finally, the commentators indicate that the reorganization of Rule 32 is a significant improvement; but they still recommend that most of the major revisions be deleted or delayed.

Leonard J. Bronec
Chief Probation Officer
Kansas City, Kansas
Feb. 11, 1993.

Mr. Bronec believes that Rule 32, as it currently exists is fine and that there is no need to amend it. He also questions the need to incorporate a model local rule

into a national standard. He also expresses concerns about the provision dealing with disclosure of statements at sentencing hearings; he would oppose any amendment which would require disclosure of his investigative file. Secondly, he raises concern about the confidentiality of the PSR and opposes any amendment which would permit disclosure of his recommendations. He indicates that the Rule can be reorganized by simply moving around some of the provisions without including controversial amendments. He recommends that Rule 32 not be amended.

Loren A. N. Buddress
Chief Probation Officer
San Francisco, California
March 19, 1993

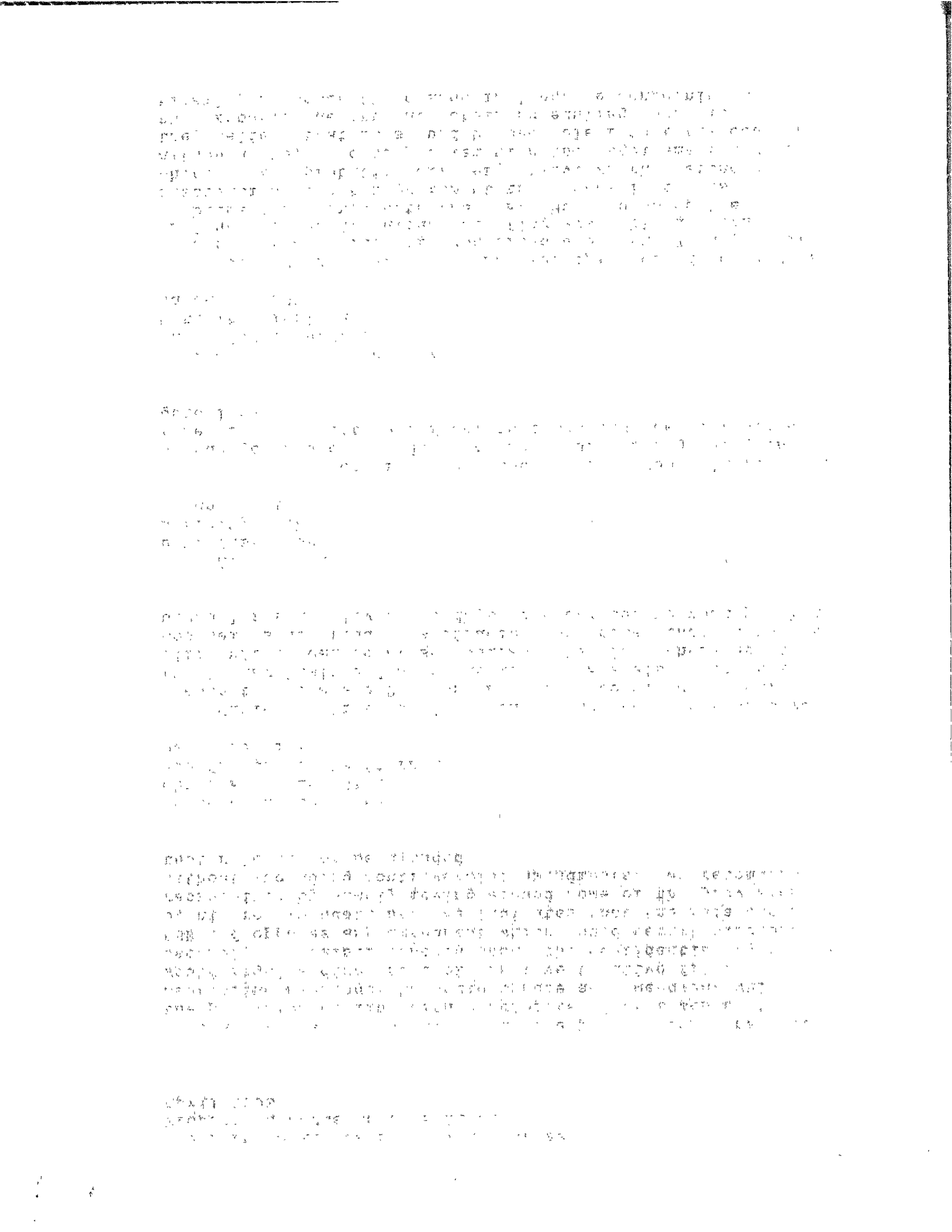
Citing statistical data concerning the amount of time needed to prepare a PSR, Ms. Buddress recommends deletion of the 70-day limit and a 35-day limit. She also notes the difficulties caused by scheduling interviews where defense counsel is not readily available. She notes that it is not unusual for a delay of 10 days to occur due to that problem.

Hon. Avern Cohn
U.S. Dist. Court
Detroit, Mich.
March 24, 1993

Judge Cohn endorses the view of Judge Cook, infra, that no change should be made in current Rule 32 regarding the role of the probation officer in computing the sentencing guideline.

Hon. Julian Able Cook, Jr.
Chief Judge, U.S. Dist. Court
Detroit, Michigan
March 19, 1993

Judge Cook offers the consensus opinions of the judges in his distict. They are concerned about the 70-day limit in light of the diminished staffing available and other problems associated with the PSR. He also notes their reservations about requirement that counsel be present whenever the probation officer interviews the defendant. Although they have no problem with the requirement itself, they believe that it should be made clear that the court and the probation department retain scheduling authority. Finally, he notes the change in language concerning the



probation officer's belief as to the applicable guideline range; it is imperative, he says, that the probation officer's calculation is only a recommendation to the judge who must determine the range.

J. Robert Cooper
Private Practice
Atlanta, Georgia
Feb. 4, 1993

Mr. Cooper, who limits his practice to "post-conviction" issues, suggests that the rule address the question of who has the burden of proof in going forward with offers of proof on controverted issues. Secondly, he recommends that the Committee address the issue of who has the authority to release the PSI.

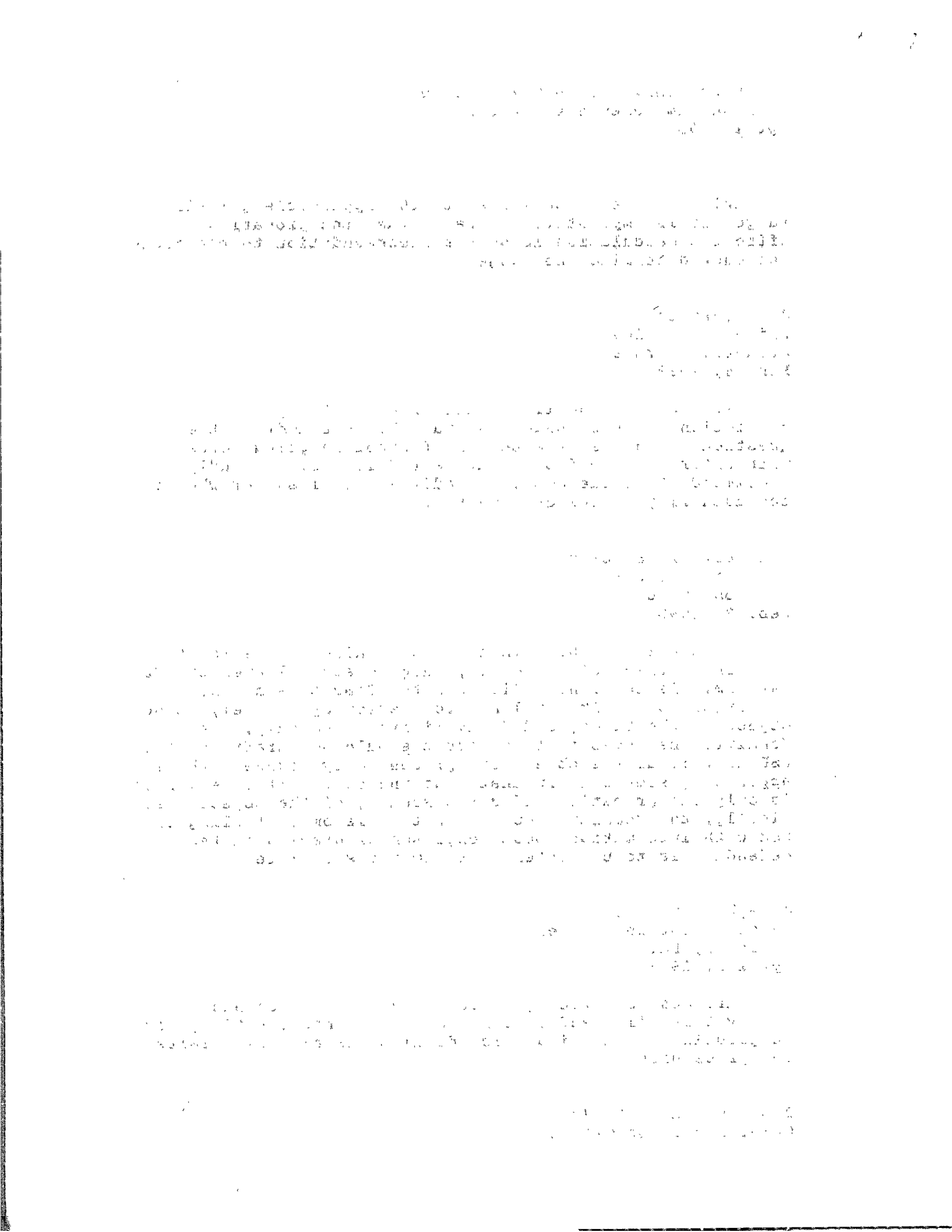
Hon. Barbara B. Crabb
U.S. Dist. Court
Madison, Wisc.
Feb. 2, 1993

On behalf of the Committee on Criminal Rules for the Western District of Wisconsin, Judge Crabb believes the 70-day limit is too long. Although the Committee has no objection to the 10-day limit for review by counsel, it does object to the 14-day and 7-day limits. Secondly, the Committee believes that the court should see drafts of the PSR as well as the objections presented by counsel; there is apparently some concern that what the court ultimately sees is only the probation officer's summary of the objections. Finally, the Committee questions the wisdom of filling the PSR with information about nonprison programs when the defendant is to be sentenced to 10 years or more.

Joseph P. Donohue
Chief Probation Officer
Scranton, PA.,
April 9, 1993

Mr. Donohue briefly expresses concern concerning the 70-day time limit and attaches a copy of his court's policy on guideline sentencing which details certain time limits and procedures.

James W. Duckett, Jr.
Chief Probation Officer



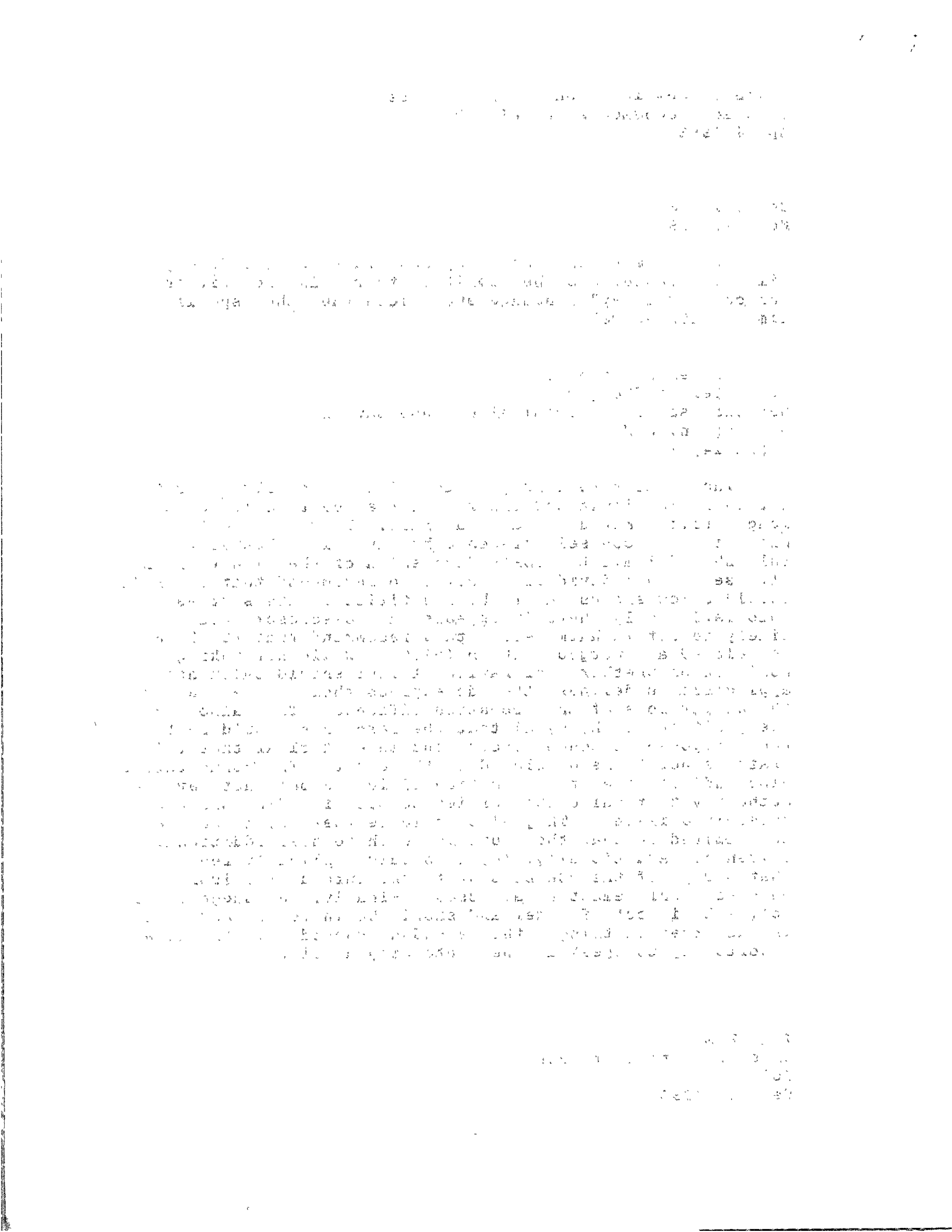
Columbia, S.C.
Feb. 2, 1993

Mr. Duckett expresses deep concern about the 70-day limit and encourages the Committee to retain the "without unnecessary delay" language and delete the other specific time limits as well.

Mr. William J. Genego, Esq.
Mr. Peter Goldberger, Esq.
National Assoc. of Criminal Defense Lawyers
Washington, D.C.
April 14, 1993

The commentators suggest that Rule 32 should not set a national time limit and observe that a court could set a longer time limit under a local rule. They welcome the provision for counsel' presence but question whether the rule should limit the PSR's discussion of the impact of an offense on an individual. They also recommend that the Rule should allow exclusion of the identities of the sources of information only where it appears that disclosure would likely result in harm, etc.; they recommend that (b)(5)(B) be deleted and merged with (b)(5)(C). While not taking a position on whether a probation officer should calculate applicable guidelines, they do express their concern about the proper role of the probation officers. They also take the position re (b)(6)(A) that the reference should be to the "proposed sentence report" and make it clear that this draft is not to be disclosed to the court. The commentators also indicate that the probation officer should not have the authority to require the parties to meet for discussion of unresolved issues. They also indicate that (c)(1) may be too limited in that the court may wish to hear additional evidence. Additionally, (c)(1) should explicitly require that a copy of the PSR be sent to the Bureau of Prisons whenever confinement is assessed. Finally, the suggest that (c)(3)(A) is out of order and should be in (c)(1) and that in the order of things, the defendant should have the final opportunity to speak at the sentencing hearing.

T.A. Hummel
Chief Probation Officer
Boise, Idaho
Feb. 2, 1993



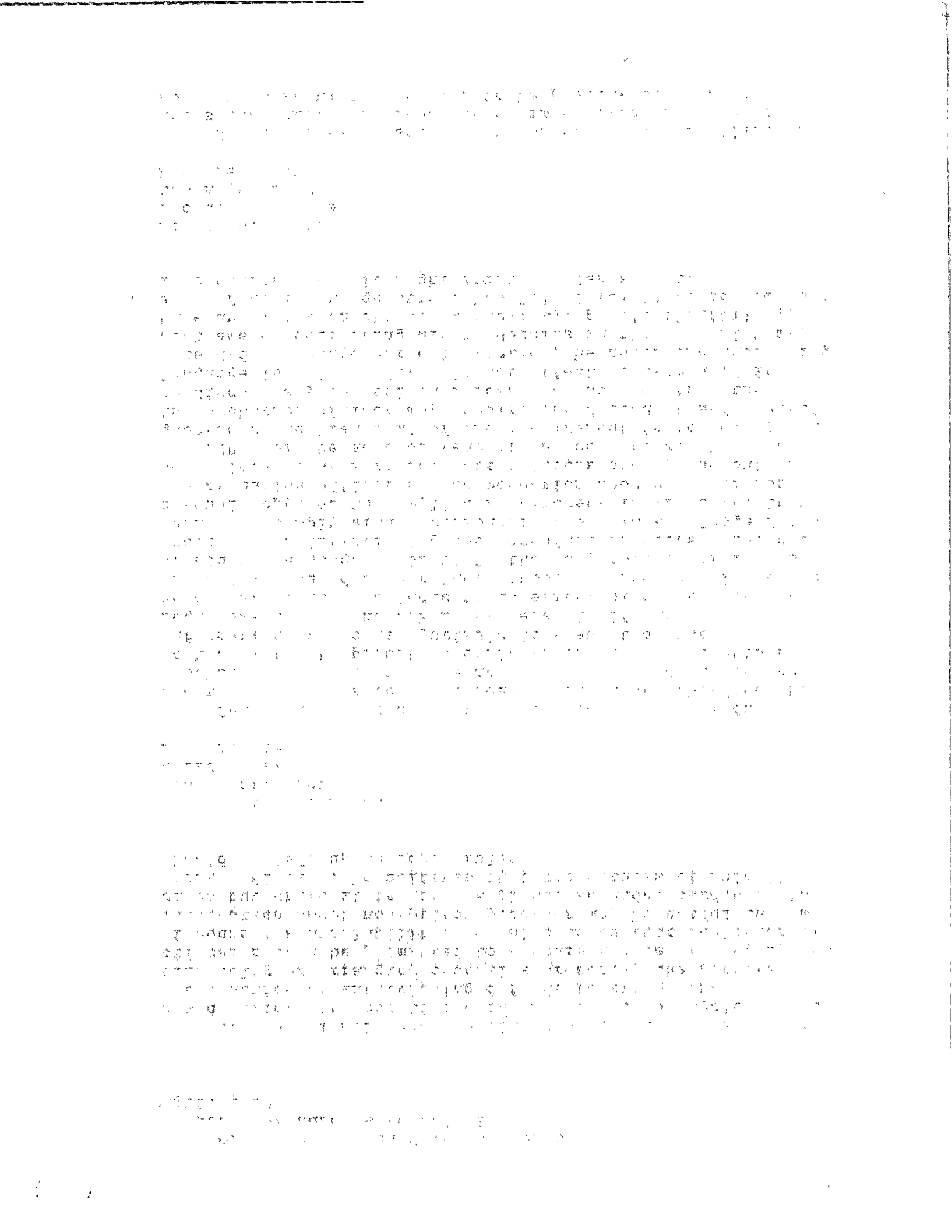
Mr. Hummel believes the time frames are too rigid. In his district, the courts are on a 45 or 60 day cycle. Given the practice of interviewing defendants twice, the difficulty of arranging counsel's presence, the probation officer should be permitted to prepare the report regardless of counsel's availability. He also notes that inclusion of information about non-prison programs may be useful in some cases but where it is not, it places an undue burden on the court. Finally, he believes that the details of Rule 32 should be left up to local rules.

Hon. George P. Kazen
U.S. Dist. Court
Laredo, Tex.
Feb. 18, 1993.

Judge Kazen strongly urges deletion of the 70-day time limit; he believes that defendants will argue that they have a substantive right to make an issue of it. He notes that in his district, probation officers often have to obtain information from other jurisdictions and that the requirement that the PSR be prepared in 35 days is totally unrealistic; he does indicate agreement with the time limits in (b)(6). He adds that there should be some consideration of adding language in 32(b)(2) that a probation officer may proceed with interviewing the defendant if counsel has not been able comply with a reasonable time limit. Judge Kazen strongly opposes the implied requirement in (b)(6)(A) that the probation officer's recommendation should be disclosed; he believes that more and more officers are opting out of the PSR field because of fear of the courtroom. He also questions the "realism" of the requirement in (b)(6)(B) that the probation officer may require the defendant and counsel to discuss any unresolved issues. He asks whether the language in (c)(1), "or will not affect sentencing," is intended to change current practice; he notes the increasing problems of correcting minute details in the PSR which may have an impact on choice of facility, parole eligibility, etc. Finally, he questions how Rule 32(c)(2) would work and is concerned that it might limit the Jencks Act.

Robert M. Latta
Probation Officer
Los Angeles, CA
Feb. 16, 1993.

Mr. Latta expresses concern about the 70-day limit; he notes that that rule requires optimum efficiency. He also notes that requiring counsel to be present creates an



adversarial process. He adds that requiring production of the PSR 35 days before sentencing has the most dramatic impact on the Probation office. Finally, he indicates that the time frame imposed by the rule has been used in his district and that in some cases the average guideline report takes seven days from dictation to disclosure; that leaves only three and one-half weeks for the entire investigation.

Hon. Sim Lake
U.S. Dist. Court
Houston, Texas
Feb. 24, 1993.

Judge Lake wholeheartedly concurs in the observations made by Judge Kazen, supra.

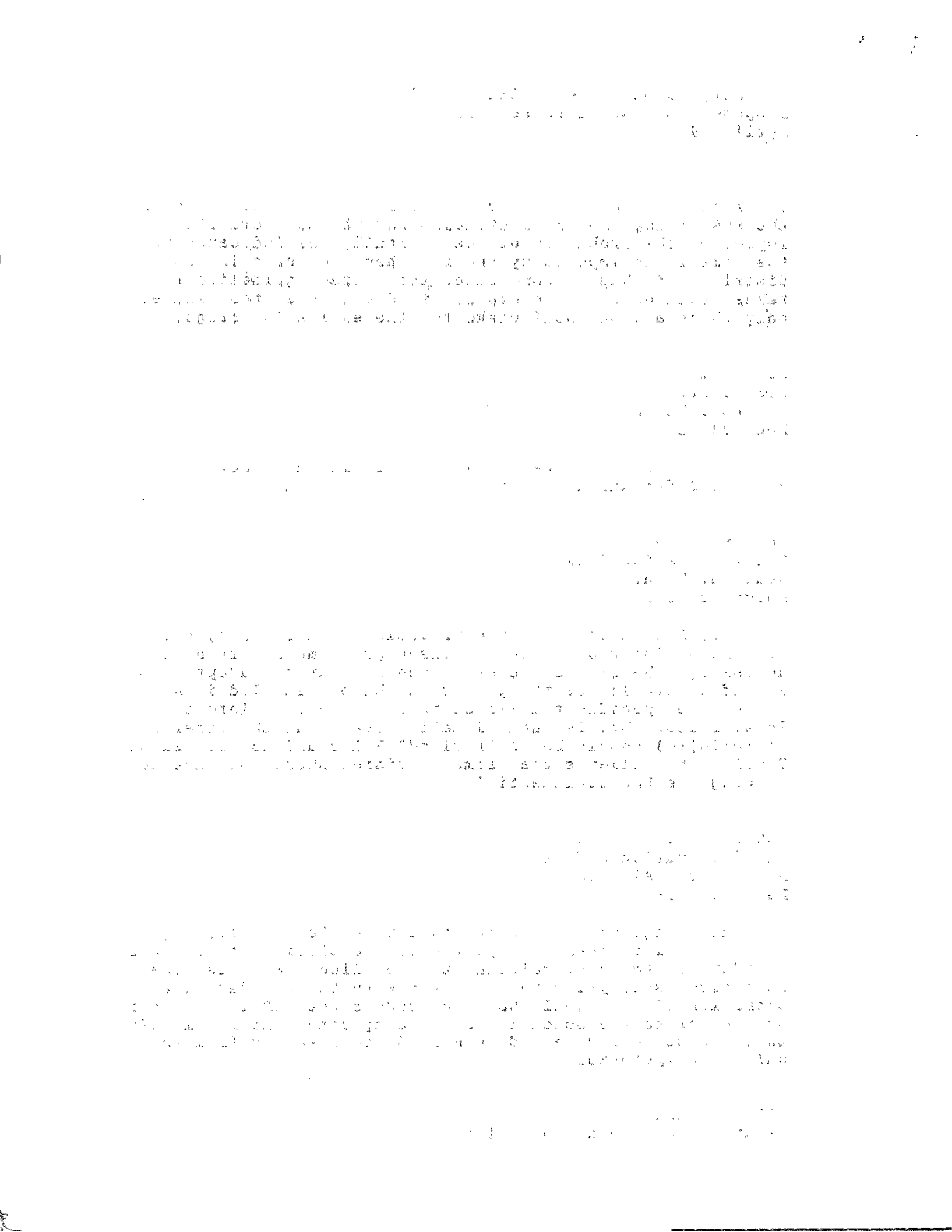
Robert B. Lee
Chief Probation Officer
Seattle, Wash.
March 23, 1993

Mr. Lee states that the provision in Rule 32(b)(4)(E) concerning information on nonprison programs is often not necessary. He also expresses concern about the adoption of specific time lines; the process might be detailed in Rule 32 but the specific timeliness issues should be left to local rules. Mr. Lee additionally notes that the reference in (b)(6)(C) should be to "revised" PSR's and not revisions. Finally, he believes that some provision should be made for keeping the PSR confidential.

Robert P. Longshore
Chief Probation Officer
Montgomery, Alabama
Feb. 10, 1993.

Mr. Longshore points out that under Rule 45(a), any time limit less than 11 days requires exclusion of weekends, holidays., etc in calculating the deadline. He notes that in a disclosure prior to a weekend with the holiday, the probation officer would have to produce the PSR 11 calender days prior to the scheduled sentencing date. He recommends that the seven day period in Rule 32 be exempted from the Rule 45 computation.

Allen L. Noble
Deputy Chief Probation Officer



Little Rock, Ark.
March 24, 1993

Mr. Noble recommends that the Committee reconsider the 70-day limit for preparation of the PSR. He notes that in his district they have 78 days and that that is often not enough time. He is concerned that if the 70-day limit is imposed his office will not enough time to prepare a quality PSR.

Hon. Justin L. Quakenbush
Chief Judge, US Dist. Court
Spokane Washington
Feb. 2, 1993

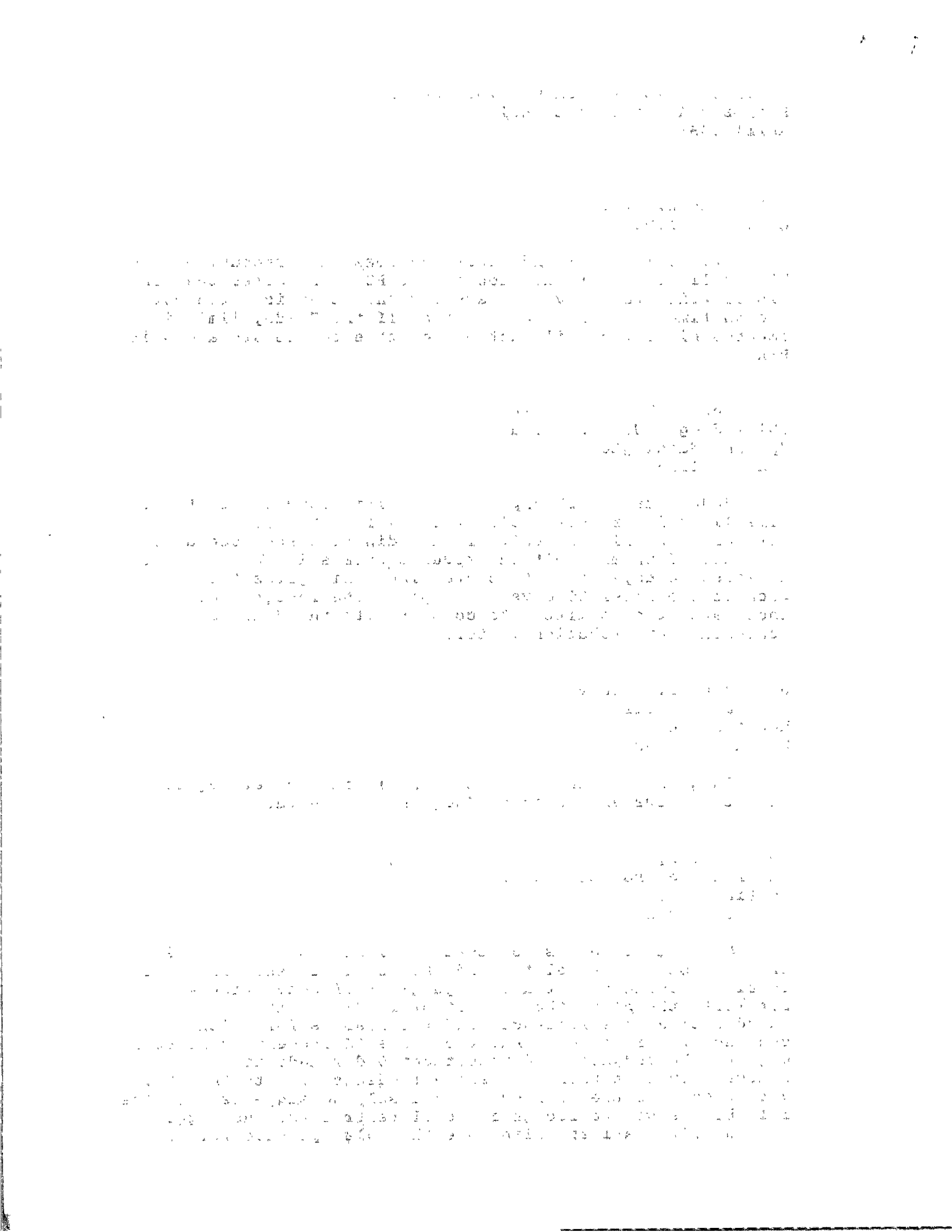
Judge Quakenbush expresses specific concern about the time limit in proposed Rule 32(b)(6) for the probation officer to submit the PSR. In his district they use a 70-day rule of thumb limit but require submission of the Report at least 20 days prior to sentencing; this gives the probation officer 50 days to complete the report. He encourages the Committee to consult with the Judicial Conference on probation matters.

Hon. John D. Rainey
U.S. Dist. Court
Houston, Texas
March 22, 1993

Judge Rainey indicates that he is in complete agreement with the views expressed by Judge Kazen, supra.

Lamont Ramage
Supervising Probation Officer
Austin, Tex.
Feb. 11, 1993.

Mr. Lamont points out that the last sentence in Rule 32(c)(1) should be deleted and the first sentence in (d)(1) should be changed to read, "A judgment of conviction must set forth the plea, the verdict or findings, the adjudication, the sentence, and the reasons for which the sentence was imposed." Addition of a "Statement of Reasons" page to the Judgment and Commitment Order made it unnecessary to attach a separate findings form to the PSI. With regard to the presence of counsel, he suggests that the rule be changed to recognize local restraints. He suggests several alternatives: eliminate the rule; provide for those



cases where defendants are in custody; or require US Marshals to produce defendants for the PSI interview. Finally, he notes that the production of statements provision seems inconsistent with the Jencks Act.

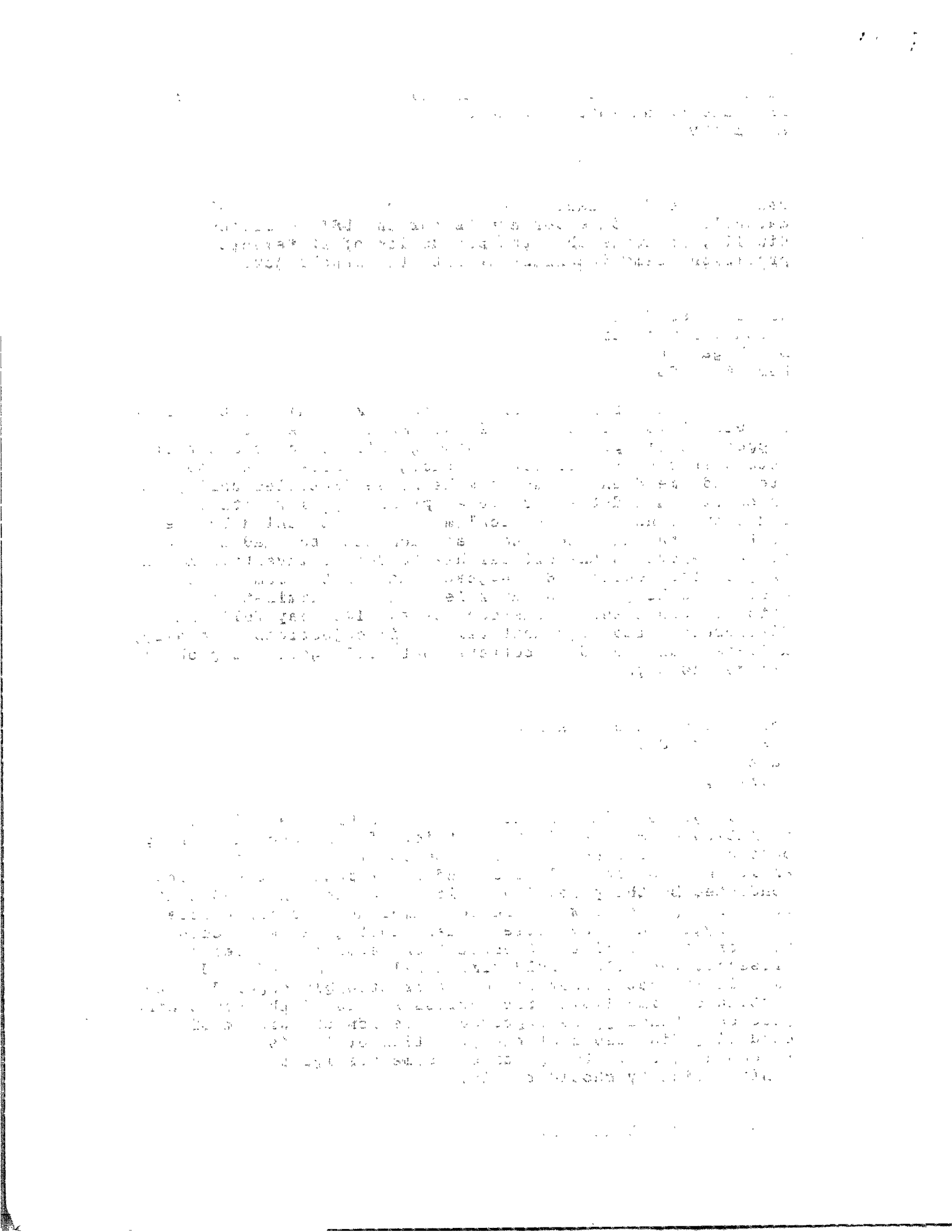
David F. Sanders
Probation Officer
Las Vegas, Nev.
Feb. 8, 1993

Mr. Sanders indicates that the time frame contemplated in Rule 32 for completion of the PSR is too short. In support of his position he catalogs all of the tasks that go into preparing the report. Although he notes that the proposed amendment seems to make sense "intellectually," the press of other duties, computer problems, slow witnesses, and busy counsel create problems. He is troubled by the fact that the attorneys have as much time to read and object to the report as the officer has to do the investigation and prepare the report. He suggests that if the Committee decides to keep the 70-day rule, that it eliminate the attorney conference. Instead, by the 14th day following disclosure, attorneys must file their objections. Ideally, a 90-day rule would be better; that would give the probation officer 40 days.

Hon. Frederick N. Smalkin
U.S. Dist. Court
Baltimore, Md.
April 7, 1993

Judge Smalkin, in his capacity as Chairman of the Probation Committee of the District of Maryland, is strongly opposed to two aspects of the amendment: First, the entitlement of counsel to attend interviews of the defendant conducted by the probation officer. He is concerned that counsel's presence will create a mini-adversarial proceeding and trigger the inevitable request that government counsel be present. Until the Constitution requires counsel's presence, the rule should remain silent. Second, Judge Smalkin indicates that the court is strongly opposed to the setting of time limits for various stages of the sentencing process. Finally, he expresses question the wisdom of condoning disclosure of the probation officer's recommendation to the parties. Some vestige of confidentiality should remain.

Joseph B. Steelman, Jr.



Deputy Chief Probation Officer
Winston-Salem, N.C.
April 9., 1993

Mr. Steelman recommends an overall time frame of 90 days rather than 70 days and that the rule specify whether the reference to 14 days refers to 14 calander days or 14 work/court days. He also indicates that the rule should be changed to reflect some additional flexibility in the 7-day time frame for submission to the court. Mr. Steelman also suggests that the rule reflect that defense counsel should not unduly delay the proceedings by not being available for conferences.

Thomas K. Tarr
Chief Probation Officer
Concord, N.H.
April 2, 1993

Mr. Tarr recounts his office's experiences with a local rule similar to the proposed Rule 32 time limits; in his court, however, the overall time limit is 90 days. Citing tremendous problems with workloads, etc., he recommends that the Committee allow at least 49 days, rather than 35 days, to complete the initial PSR. He also recommends an overall time frame of at least 84 or 91 days.

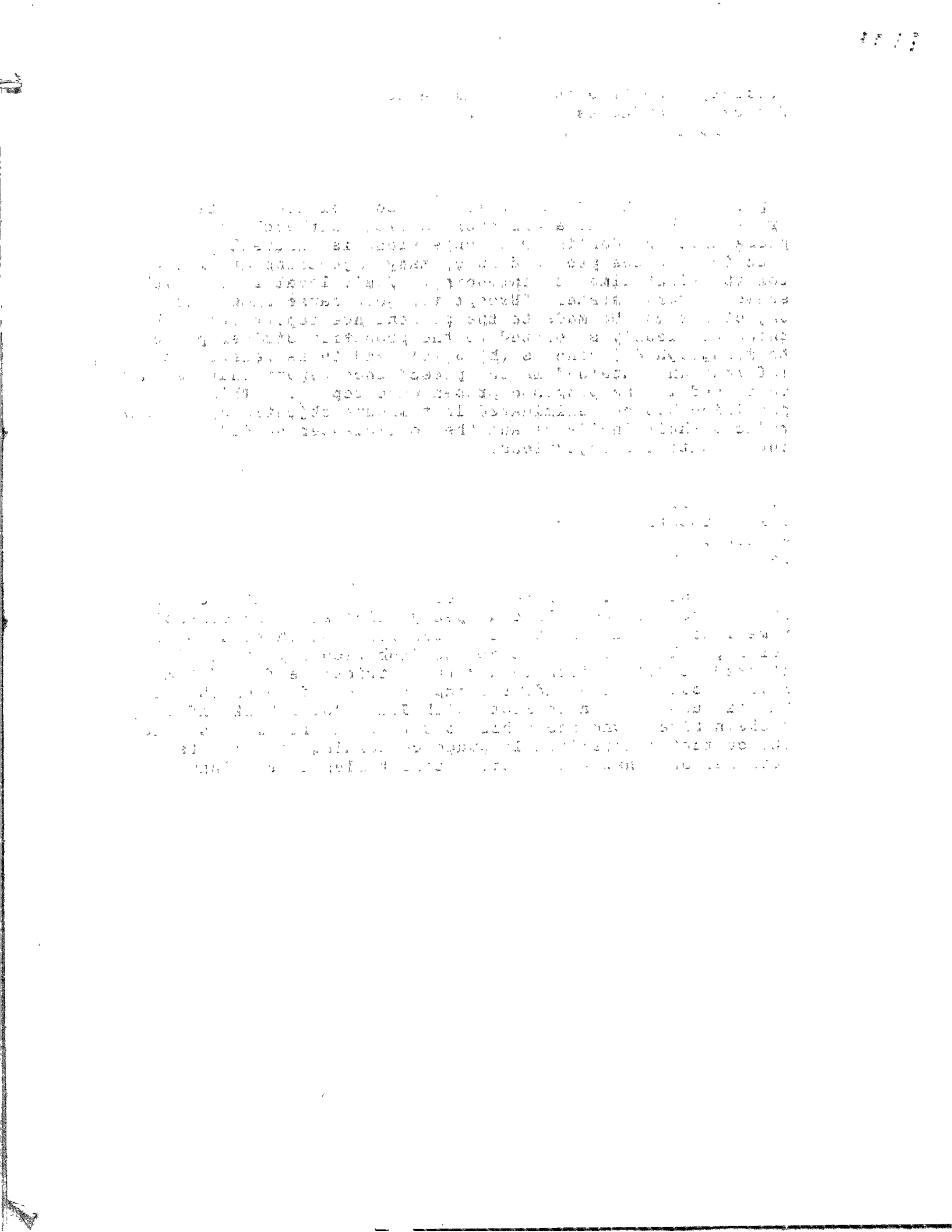
Charlie E. Vernon
Chief Probation Officer
Sacramento, California
Feb. 4, 1993

Mr. Vernon notes that his comments on the proposed amendments are based on his experiences in the Eastern Dist. of California, where the local rules contain time limits almost identical to those in the proposed rule. His chief complaint is with Rule 32(b)(2) which provides for presence of counsel; he urges the Committee to modify the language to require counsel's presence only where the defendant requests such. This would free the probation officer from attempting to locate elusive lawyers before making any contact with the defendant. He assumes that failure to have counsel present will result in suppression motions at sentencing. Turning to (b)(4)(B) he strongly endorses the proposed language which addresses the probation officer's advice regarding guideline classifications. He urges retention of the language. Finally, he expresses concern about the language in (b)(6)(D) regarding the ability of defense counsel to raising new objections at any time before sentencing. The

experience in his district is that counsel use the first draft of the PSR as a discovery device; although the procedures for dealing with objections is virtually identical to the proposed rule, many objections are raised for the first time at sentencing. Their local rule, which seems to work, states: "Except for good cause shown, no objections may be made to the presentence report other than those previously submitted to the probation officer pursuant to Paragraph 6 [ same as (b)(6)(B)] and those relating to information contained in the presentence report that was not contained in the proposed presentence report." This provision has not eliminated last minute objections, but has reduced their incidence and the continuances needed to investigate the objections.

G. Wray Ware
Chief Probation Officer
Roanoke, Va.
Feb. 19, 1993

Mr. Wray believes that because the amendments to Rule 32 will make it more like a speedy trial act, the control of time limits should rest with local rules which seem to be working well. He notes that the Probation Department is staffed at 79% of formula and that strictly enforced time limits would have an adverse impact. He indicates that he has discussed the amendments with Judge James Turk and Judge Jackson Kiser, who share his concerns. He recommends that the current generalized language concerning time limits be retained and that the specific time tables be eliminated.

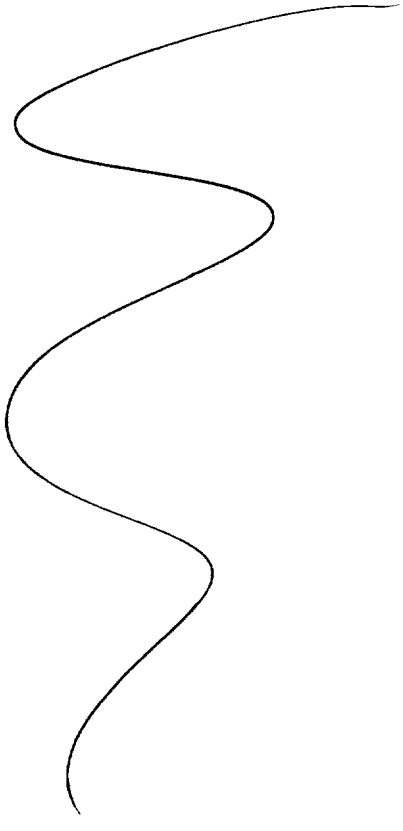


Supplemental

Agenda

Book

Materials



United States Court of Appeals
SECOND CIRCUIT

(203) 773-2353

CHAMBERS OF
RALPH K. WINTER
U.S. CIRCUIT JUDGE
55 WHITNEY AVENUE
NEW HAVEN, CT 06510

September 22, 1993

To: **Advisory Committee, Federal Rules of Evidence:**

| | |
|---|---|
| Hon. Jerry E. Smith | Hon. Fern M. Smith |
| Hon. Milton I. Shadur | Hon. James T. Turner |
| Hon. Harold G. Clarke | Prof. Kenneth S. Broun |
| Gregory P. Joseph, Esq. | James K. Robinson, Esq. |
| John M. Kobayashi, Esq. | Prof. Margaret A. Berger |
| Hon. Wayne D. Brazil | Prof. Stephen Saltzburg |

From: Ralph K. Winter, Chairman

Re: Agenda for September 30 - October 2 Meeting

The following is the agenda for our meetings on Thursday, September 30 through Saturday, October 2, 1993. The meetings on Thursday and Friday will begin at 8:30 a.m. and adjourn around 5:00 p.m. The Saturday meeting will begin at 8:30 a.m. and adjourn no later than 11:30 a.m.

A memorandum with accompanying materials was sent to you on June 22. You should bring both the memorandum and the materials to the meeting. Additional materials are included with this memorandum and agenda. The agenda is as follows:

1. **Carnegie Commission Report.**

This item was discussed in the June 22 memo, and materials relating to it accompanied that memo.

2. **Rules of Trial Management.**

This item was discussed in the June 22 memo, and materials relating to it accompanied that memo.

3. **Rules of Evidence and Sentencing Proceedings: Rule 1101.**

This item was discussed in the June 22 memo. No accompanying materials were sent.

4. **Updating or Modifying Commentaries.**

This item was discussed in the June 22 memo. No accompanying materials were sent. Professor Berger's memo on Rule 404 issues, which is included in this package, provides a concrete issue concerning the updating or modifying of Commentaries.

5. **Rule 803(6).**

This matter was raised in a letter to the Chair from Roger Pauley. That letter is among the materials accompanying this memo and agenda. Whether we should take up the merits of Roger's proposal at this meeting or hold it in abeyance until we address Article VIII is a threshold issue.

6. **Article IV: Rules 401-412.**

This item includes any outstanding policy or drafting issue regarding these rules. Accompanying this memo and agenda are memoranda from Professor Berger on Rules 404, 405, and 407. Also accompanying it is a draft law review article by Professor Reed

of Widener University School of Law that is waiting publication in the Texas Law Review. You will be receiving a draft of another law review article from John Rabiej. That article is by Professor Park of Minnesota Law School and will be published in the Minnesota Law Review.

**7. Other Items of Business.**

Other matters of business will be discussed at this time.

**8. Article VI: Rules 601-615.**

If we get to this item, it will include all policy and drafting issues regarding these rules.

To: THE ADVISORY COMMITTEE ON THE RULES OF EVIDENCE
From: JUDGE WINTER and PROFESSOR BERGER
Re: MEETING OF STANDING COMMITTEE; MISCELLANY; FUTURE AGENDA
Date: JUNE 22, 1993



1. Rule 412

We attended the recent meeting of the Standing Committee on Rules of Practice and Procedure which met on June 17-19. The Committee approved in somewhat different format most of the substance of Rule 412 as drafted by us. The version of Rule 412 and Committee Note that is to be submitted to the Judicial Conference is at Supplement A. The principal issue raised by the Standing Committee was whether the rule would prevent the prosecution from offering pattern evidence. The resultant draft thus provides for the admission of evidence of specific instances of sexual behavior by the victim with respect to the accused when offered by the prosecution. See subsection (b)(1)(B). The Standing Committee also adopted the view that pattern evidence offered by a plaintiff in a civil case must meet the balancing test of subsection (b)(2).

2. Carnegie Commission Report

The Standing Committee adopted a recommendation of its Subcommittee on Long-Range Planning that the Evidence Committee review the Carnegie Commission Report on Science and Technology in Judicial Decision Making. The recommendation of the Standing Committee's Long-Range Planning Subcommittee and the Carnegie Commission Report are at Supplement B.

3. Rules of Trial Management

The Standing Committee adopted the recommendation of its

Long-Range Planning Subcommittee that the Evidence Committee coordinate efforts among the Civil Rules Committee, the Criminal Rules Committee, and itself to study the concept of general rules of trial management. This recommendation was prompted both by the interest of the Standing Committee's Chair, Judge Keeton, and adoption by the ABA of Standards of Trial Management. Materials relating to the Long-Range Planning Subcommittee's recommendation and the ABA standards are at Supplement C.

4. Role of Advisory Committees

The Standing Committee also discussed its role and the role of the Advisory Committees with regard to the future. Most of this discussion concerned the workings of the Standing Committee and do not directly concern us. However, a couple of members of the Standing Committee expressed the view that far too many amendments to the various rules are being proposed by the Advisory Committees. Another member indicated to one of us at dinner that there has been considerable apprehension that the Evidence Committee would be a "troublemaker" and that that apprehension caused the delay in the creation of the Committee. None of this, of course, is to suggest that we fail to act when we conscientiously believe amendments should be proposed. We should be ready, however, to demonstrate the basis for our believing that particular amendments are necessary.

5. Expert Testimony

Justice Michael Zimmerman of the Utah Supreme Court (formerly a member of the Civil Rules Committee and a proponent

of amending Fed. R. Evid. 702) has sent Judge Winter a copy of an article in the ABA Journal concerning a "footprint expert" whose "expert" testimony had no basis in science or, apparently, common sense. At the trial court level, however, she appears never to have had her testimony excluded as lacking any basis, a rather scary fact. Because the article attributes the admission of her testimony to the adoption of the Federal Rules of Evidence, we are attaching a copy of the article at Supplement D.

6. Thoughts Regarding Future Agenda

A formal agenda will be sent out in early September. At its recent meeting, the Standing Comittee sent out for public comment provisions regarding "technical" amendments (and certain other matters) to all federal rules. If adopted, these provisions would be added to the Rules of Evidence (and the Appellate, Civil, Criminal and Bankruptcy Rules, as well). We will have to consider these matters soon, probably at our winter meeting. The provisions may be found at Supplement E.

Judge Winter believes that our review should generally proceed Article by Article because amendments to a particular rule may be informed by, or have ramifications for, other parts of an Article. For example, our discussion of Rule 412 raised questions concerning Rule 405. After considering the suggestions received from committee members and some reading of commentators who have called for our creation, Judge Winter has tentatively designated Article IV as the first to be considered, because there are numerous amendments suggested by members of the

Committee and commentators, and there are conflicts among courts as to the interpretation of the various rules in Article IV. Moreover, Congress is considering an amendment with regard to Rule 404 admitting pattern evidence in rape cases and may ask us to give expedited consideration to this issue. Once Article IV has been considered, we will probably take up Article VI. It is possible, however, that the Supreme Court's decision in Daubert may suggest that we consider amendments to Article VII, in which case we might take that up first.

There are other items that should also be considered at the next meeting. First, can we, and should we, propose amendments regarding the Rules of Evidence to govern sentencing proceedings? The Sentencing Commission may well regard that as its exclusive province. It has thus issued the following policy statement:

> §6A1.3. Resolution of Disputed Factors (Policy Statement)
>
> (a) When any factor important to the sentencing determination is reasonably in dispute, the parties shall be given an adequate opportunity to present information to the court regarding that factor. In resolving any reasonable dispute concerning a factor important to the sentencing determination, the court may consider relevant information without regard to its admissibility under the rules of evidence applicable at trial, provided that the information has sufficient indicia of reliability to support its probable accuracy.
>
> (b) The court shall resolve disputed sentencing factors in accordance with Rule 32(a)(1), Fed. R. Crim. P. (effective Nov. 1, 1987), notify the parties of its tentative findings and provide a reasonable opportunity for the submission of oral or written objections before imposition of sentence.

COMMENTARY

In pre-guidelines practice, factors relevant to sentencing were often determined in an informal fashion. The informality was to some extent explained by the fact that particular offense and offender characteristics rarely had a highly specific or required sentencing consequence. This situation will no longer exist under sentencing guidelines. The court's resolution of disputed sentencing factors will usually have a measurable effect on the applicable punishment. More formality is therefore unavoidable if the sentencing process is to be accurate and fair. Although lengthy sentencing hearings should seldom be necessary, disputes about sentencing factors must be resolved with care. When a reasonable dispute exists about any factor important to the sentencing determination, the court must ensure that the parties have an adequate opportunity to present relevant information. Written statements of counsel or affidavits of witnesses may be adequate under many circumstances. An evidentiary hearing may sometimes be the only reliable way to resolve disputed issues. See United States v. Fatico, 603 F.2d 1053, 1057 n.9 (2d Cir. 1979). The sentencing court must determine the appropriate procedure in light of the nature of the dispute, its relevance to the sentencing determination, and applicable case law.

In determining the relevant facts, sentencing judges are not restricted to information that would be admissible at trial. 18 U.S.C. § 3661. Any information may be considered, so long as it has "sufficient indicia of reliability to support its probable accuracy." United States v. Marshall, 519 F. Supp. 751 (D.C. Wis. 1981), aff'd, 719 F.2d 887 (7th Cir. 1983); United States v. Fatico, 579 F.2d 707 (2d Cir. 1978). Reliable hearsay evidence may be considered. Out-of-court declarations by an unidentified informant may be considered "where there is good cause for the nondisclosure of his identity and there is sufficient corroboration by other means." United States v. Fatico, 579 F.2d at 713. Unreliable allegations shall not be considered. United States v. Weston, 448 F.2d 626 (9th Cir. 1971).

The Commission believes that use of a preponderance of the evidence standard is appropriate to meet due process requirements and policy concerns in resolving disputes regarding application of the guidelines to the facts of a case.

> If sentencing factors are the subject of reasonable dispute, the court should, where appropriate, notify the parties of its tentative findings and afford an opportunity for correction of oversight or error before sentence is imposed.

The sole statutory basis for the Commission's statement that the Rules of Evidence do not apply to sentencing proceedings appears to be 18 U.S.C. § 3661. However, that provision is a rule of relevance and says nothing about exclusionary rules. It thus states:

> No limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence.

If the exclusionary rules are "limitations on information" then Section 3661 commands that nothing may be excluded in a sentencing hearing, and that seems ridiculous.

Our authority, on the other hand, is derived from 28 U.S.C. § 2072, which reads:

> (a) The Supreme Court shall have the power to prescribe general rules of practice and procedure and rules of evidence for cases in the United States district courts (including proceedings before magistrates thereof) and courts of appeals.
>
> (b) Such rules shall not abridge, enlarge or modify any substantive right. All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect.

Our authority to determine the evidentiary rules for sentencing proceedings thus seems fairly clear. Whether we should depart from the Sentencing Commission's approach is a

different question, however.

Second, some of the commentaries accompanying the Rules of Evidence may have been rendered obsolete by subsequent case law over the last eighteen years. Is there a method of updating or modifying commentary without amending the particular rule? The problem is that revision of the Advisory Committee Notes might be viewed as altering the meaning of the Rule in question without going through a process that includes review by the Supreme Court and a legislative veto by the Congress.

Finally, a number of you expressed a desire to take up privilege issues. Judge Winter has no objection to that but questions whether consideration of rules of privilege should have a high priority. Privilege rules cannot be adopted through the general rulemaking process, i.e., recommendation by the Supreme Court subject to legislative veto by both houses. Rather, they must be affirmatively promulgated by the Congress. See 28 U.S.C. § 2074(b). This creates a substantial danger that when the Committee takes up rules of privilege, it will engage in a lot of heavy lifting without result. We would be happy to hear different views on this question.

SUPPLEMENT A

Rule 412. Admissibility of Alleged Victim's Sexual Behavior or Sexual Predisposition.

(a) Evidence Generally Inadmissible. The following evidence is not admissible in any civil or criminal proceeding involving alleged sexual misconduct except as provided in subdivisions (b) and (c):

(1) evidence offered to prove that any alleged victim engaged in other sexual behavior; and

(2) evidence offered to prove any alleged victim's sexual predisposition.

(b) Exceptions.

(1) In a criminal case, the following evidence is admissible, if otherwise admissible under these rules:

(A) evidence of specific instances of sexual behavior by the alleged victim offered to prove that a person other than the accused was the source of semen, injury, or other physical evidence;

(B) evidence of specific instances of sexual behavior by the alleged victim with respect to the person accused of the sexual misconduct offered by the accused to prove consent or by the prosecution; and

(C) evidence the exclusion of which would violate the constitutional rights of the defendant.

(2) In a civil case, evidence offered to prove the sexual behavior or sexual predisposition of any alleged victim is admissible if it is otherwise admissible under these rules and its probative value substantially outweighs the danger of harm to any victim and of unfair prejudice to any party. Evidence of an alleged victim's reputation is admissible only if it has been placed in controversy by the alleged victim.

(c) Procedure to Determine Admissibility.

(1) A party intending to offer evidence under subdivision (b) must:

(A) file a written motion at least 14 days before trial specifically describing the evidence and stating the purpose for which it is offered unless the court, for good cause requires a different time for filing or permits filing during trial; and

(B) serve the motion on all parties and notify the alleged victim or, when appropriate, the alleged victim's guardian or representative.

(2) Before admitting evidence under this rule the court must conduct a hearing in camera and afford the victim and parties a right to attend and be heard. The motion, related papers, and the record of the hearing must be sealed and remain under seal unless the court orders otherwise.

## COMMITTEE NOTE

Rule 412 has been revised to diminish some of the confusion engendered by the original rule and to expand the protection afforded alleged victims of sexual misconduct. Rule 412 applies to both civil and criminal proceedings. The rule aims to safeguard the alleged victim against the invasion of privacy, potential embarrassment and sexual sterotyping that is associated with public disclosure of intimate sexual details and the infusion of sexual innuendo into the factfinding process. By affording victims protection in most instances, the rule also encourages victims of sexual misconduct to institute and to participate in legal proceedings against alleged offenders.

Rule 412 seeks to achieve these objectives by barring evidence relating to the alleged victim's sexual behavior or alleged sexual predisposition, whether offered as substantive evidence or for impeachment, except in designated circumstances in which the probative value of the evidence significantly outweighs possible harm to the victim.

The revised rule applies in all cases involving sexual misconduct without regard to whether the alleged victim or person accused is a party to the litigation. Rule 412 extends to "pattern" witnesses in both criminal and civil cases whose testimony about other instances of sexual misconduct by the person accused is otherwise admissible. When the case does not involve alleged sexual misconduct, evidence relating to a third-party witness' alleged sexual activities is not within the ambit of Rule 412. The witness will, however, be protected by other rules such as Rules 404 and 608, as well as Rule 403.

The terminology "alleged victim" is used because there will frequently be a factual dispute as to whether sexual misconduct occured. It does not connote any requirement that the misconduct be alleged in the pleadings. Rule 412 does not, however, apply unless the person against whom the evidence is offered can reasonably be characterized as a "victim of alleged sexual misconduct." When this is not the case, as for instance in a defamation action involving statements concerning sexual misconduct in which the evidence is offered to show that the alleged defamatory statements were true or did not damage the plaintiff's reputation, neither Rule 404 nor this Rule will operate to bar the evidence; Rule 401 and 403 will continue to control. Rule 412 will, however, apply in a Title VII action in which the plaintiff has alleged sexual harassment.

The reference to a person "accused" is also used in a non-technical sense. There is no requirement that there be a criminal charge pending against the person or even that the misconduct would constitute a criminal offense. Evidence offered to prove allegedly

false prior claims by the victim is not barred by Rule 412. However, this evidence is subject to the requirements of Rule 404.

Subdivision (a). As amended, Rule 412 bars evidence offered to prove the victim's sexual behavior and alleged sexual predisposition. Evidence, which might otherwise be admissible under Rules 402, 404(b), 405, 607, 608, 609, or some other evidence rule, must be excluded if Rule 412 so requires. The word "other" is used to suggest some flexibility in admitting evidence "intrinsic" to the alleged sexual misconduct. Cf. Committee Note to 1991 amendment to Rule 404(b).

Past sexual behavior connotes all activities that involve actual physical conduct, i.e. sexual intercourse and sexual contact, or that imply sexual intercourse or sexual contact. See, e.g., United States v. Galloway, 937 F.2d 542 (10th Cir. 1991), cert. denied, 113 S.Ct. 418 (1992) (use of contraceptives inadmissible since use implies sexual activity); United States v. One Feather, 702 F.2d 736 (8th Cir. 1983) (birth of an illegitimate child inadmissible); State v. Carmichael, 727 P.2d 918, 925 (Kan. 1986) (evidence of venereal disease inadmissible). In addition, the word "behavior" should be construed to include activities of the mind, such as fantasies or dreams. See Charles A. Wright & Kenneth A. Graham, Jr., Federal Practice and Procedure, 5384 at p. 548 (1980) ("While there may be some doubt under statutes that require 'conduct,' it would seem that the language of Rule 412 is broad enough to encompass the behavior of the mind.")

The rule has been amended to also exclude all other evidence relating to an alleged victim of sexual misconduct that is offered to prove a sexual predisposition. This amendment is designed to exclude evidence that does not directly refer to sexual activities or thoughts but that the proponent believes may have a sexual connotation for the factfinder. Admission of such evidence would contravene Rule 412's objectives of shielding the alleged victim from potential embarassment and safeguarding the victim against stereotypical thinking. Consequently, unless the (b)(2) exception is satisfied, evidence such as that relating to the alleged victim's mode of dress, speech, or life style will not be admissible.

The introductory phrase in subdivision (a) was deleted because it lacked clarity and contained no explicit reference to the other provisions of law that were intended to be overriden. The conditional clause, "except as provided in subdivisions (b) and (c)" is intended to make clear that evidence of the types described in subdivision (a) is admissible only under the strictures of those sections.

The reason for extending the rule to all criminal cases is obvious. The strong social policy of protecting a victim's privacy and encouraging victims to come forward to report criminal acts is

not confined to cases that involve a charge of sexual assault. The need to protect the victim is equally great when a defendant is charged with kidnapping, and evidence is offered, either to prove motive or as background, that the defendant sexually assaulted the victim.

The reason for extending Rule 412 to civil cases is equally obvious. The need to protect alleged victims against invasions of privacy, potential embarrassment, and unwarranted sexual sterotyping, and the wish to encourage victims to come forward when they have been sexually molested do not disappear because the context has shifted from a criminal prosecution to a claim for damages or injunctive relief. There is a strong social policy in not only punishing those who engage in sexual misconduct, but in also providing relief to the victim. Thus, Rule 412 applies in any civil case in which a person claims to be the victim of sexual misconduct, such as actions for sexual battery or sexual harassment.

Subdivision (b). Subdivision (b) spells out the specific circumstances in which some evidence may be admissible that would otherwise be barred by the general rule expressed in subdivision (a). As amended, Rule 412 will be virtually unchanged in criminal cases, but will provide protection to any person alleged to be a victim of sexual misconduct regardless of the charge actually brought against an accused. A new exception has been added for civil cases.

In a criminal case, subdivision (b)(1) may submit evidence pursuant to three possible exceptions, provided the evidence also satisfies other requirements for admissibility specified in the Federal Rules of Evidence, including Rule 403. Subdivisions (b)(1)(A) and (b)(1)(B) require proof in the form of specific instances of sexual behavior in recognition of the limited probative value and dubious reliability of evidence of reputation or evidence in the form of an opinion.

Under subdivision (b)(1)(A), evidence of specific instances of sexual behavior with persons other than the person whose sexual misconduct is alleged may be admissible if it is offered to prove that another person was the source of semen, injury or other physical evidence. Where the prosecution has directly or indirectly asserted that the physical evidence originated with the accused, the defendant must be afforded an opportunity to prove that another person was responsible. See United States v. Begay, 937 F.2d 515, 523 n. 10 (10th Cir. 1991). Evidence offered for the specific purpose identified in this subdivison may still be excluded if it does not satisfy Rules 401 or 403. See, e.g., United States v. Azure, 845 F.2d 1503, 1505-06 (8th Cir. 1988) (10 year old victim's injuries indicated recent use of force; court excluded evidence of consensual sexual activities with witness who testified at in camera hearing that he had never hurt victim and

failed to establish recent activities).

Under the exception in subdivision (b)(1)(B), evidence of specific instances of sexual behavior with respect to the person whose sexual misconduct is alleged is admissible if offered to prove consent, or offered by the prosecution. Admissible pursuant to this exception might be evidence of prior instances of sexual activities between the alleged victim and the accused, as well as statements in which the alleged victim expressed an intent to engage in sexual intercourse with the accused, or voiced sexual fantasies involving the specific accused. In a prosecution for child sexual abuse, for example, evidence of uncharged sexual activity between the accused and the alleged victim offered by the prosecution may be admissible pursuant to Rule 404(b) to show a pattern of behavior. Evidence relating to the victim's alleged sexual predisposition is not admissible pursuant to this exception.

Under subdivision (b)(1)(C), evidence of specific instances of conduct may not be excluded if the result would be to deny a criminal defendant the protections afforded by the Constitution. For example, statements in which the victim has expressed an intent to have sex with the first person encountered on a particular occasion might not be excluded without violating the due process right of a rape defendant seeking to prove consent. Recognition of this basic principle was expressed in subdivision (b)(1) of the original rule. The United States Supreme Court has recognized that in various circumstances a defendant may have a right to introduce evidence otherwise precluded by an evidence rule under the Confrontation Clause. See, e.g., Olden v. Kentucky, 488 U.S. 227 (1988) (defendant in rape cases had right to inquire into alleged victim's cohabitation with another man to show bias).

Subdivision (b)(2) governs the admissibility of otherwise proscribed evidence in civil cases. It employs a balancing test rather than the specific exceptions stated in subdivision (b)(1) in recognition of the difficulty of foreseeing future developments in the law. Greater flexibility is needed to accommodate evolving causes of action such as claims for sexual harassment.

The balancing test requires the proponent of the evidence, whether plaintiff or defendant, to convince the court that the probative value of the proffered evidence "substantially outweights the danger of harm to any victim and of unfair prejudice to any party." This test for admitting evidence offered to prove sexual behavior or sexual propensity in civil cases differs in three respects from the general rule governing admissibility set forth in Rule 403. First, it reverses the usual procedure spelled out in Rule 403 by shifting the burden to the proponent to demonstrate admissibility rather than making the opponent justify exclusion of the evidence. Second, the standard expressed in subdivision (b)(2) is more stringent than in the original rule; it raises the threshold for admission by requiring that the probative value of

the evidence substantially outweigh the specified dangers. Finally, the Rule 412 test puts "harm to the victim" on the scale in addition to prejudice to the parties.

Evidence of reputation may be received in a civil case only if the alleged victim has put his or her reputation into controversy. The victim may do so without making a specific allegation in a pleading. Cf. Fed.R.Civ.P. 35(a).

Subdivision (c). Amended subdivision (c) is more concise and understandable than the subdivison it replaces. The requirement of a motion before trial is continued in the amended rule, as is the provision that a late motion may be permitted for good cause shown. In deciding whether to permit late filing, the court may take into account the conditions previously included in the rule: namely whether the evidence is newly discovered and could not have been obtained earlier through the existence of due diligence, and whether the issue to which such evidence relates has newly arisen in the case. The rule recognizes that in some instances the circumstances that justify an application to introduce evidence otherise barred by Rule 412 will not become apparent until trial.

The amended rule provides that before admitting evidence that falls within the prohibition of Rule 412(a), the court must hold a hearing in camera at which the alleged victim and any party must be afforded the right to be present and an opportunity to be heard. All papers connected with the motion and any record of a hearing on the motion must be kept and remain under seal during the course of trial and appellate proceedings unless otherwise ordered. This is to assure that the privacy of the alleged victim is preserved in all cases in which the court rules that proffered evidence is not admissible, and in which the hearing refers to matters that are not received, or are received in another form.

The procedures set forth in subdivision (c) do not apply to discovery of a victim's past sexual conduct or predisposition in civil cases, which will be continued to be governed by Fed. R. Civ. P. 26. In order not to undermine the rationale of Rule 412, however, courts should enter appropriate orders pursuant to Fed. R. Civ. P. 26 (c) to protect the victim against unwarranted inquiries and to ensure confidentiality. Courts should presumptively issue protective orders barring discovery unless the party seeking discovery makes a showing that the evidence sought to be discovered would be relevant under the facts and theories of the particular case, and cannot be obtained except through discovery. In an action for sexual harassment, for instance, while some evidence of the alleged victim's sexual behavior and/or predisposition in the workplace may perhaps be relevant, non-work place conduct will usually be irrelevant. Cf. Burns v. McGregor, ___F.2d___ (8th Cir. 1993) (posing for a nude magazine outside work hours is irrelevant to isue of unwelcomeness of sexual advances at work). Confidentialty orders should be presumptively granted as well.

One substantive change made in subdivision (c) is the elimination of the following sentence: "Nothwithstanding subdivision (b) of Rule 104, if the relevancy of the evidence which the accused seeks to offer in the trial depends upon the fulfillment of a condition of fact, the court, at the hearing in chambers or at a subsequent hearing in chambers scheduled for such purpose, shall accept evidence on the issue of whether such condition of fact is fulfilled and shall determine such issue." On its face, this language would appear to authorize a trial judge to exclude evidence of past sexual conduct between an alleged victim and an accused or a defendant in a civil case based upon the judge's belief that such past acts did not occur. Such an authorization raises questions of invasion of the right to a jury trial under the Sixth and Seventh Amendments. See 1 S. SALTZBURG & M. MARTIN, FEDERAL RULES OF EVIDENCE MANUAL, 396-97 (5th ed. 1990).

The Advisory Committee concluded that the amended rule provided adequate protection for all persons claiming to be the victims of sexual misconduct, and that it was inadvisable to continue to include a provision in the rule that has been confusing and that raises substantial constitutional issues.

Action Item #1: The Subcommittee recommends that the Standing Committee request that the new Advisory Committee on the Rules of Evidence review the Report of the Carnegie Commission on Science, Technology, and Government, Science and Technology in Judicial Decision Making -- Creating Opportunities and Meeting Challenges (March 1993). The Advisory Committee should be asked to report back to the Standing Committee with recommendations for rules or procedures, if deemed appropriate. Additionally, the Advisory Committee might suggest how the Standing Committee, in turn, might respond to the Carnegie Commission Report more generally within the context of the committee structure of the Judicial Conference.

The Carnegie Commission on Science, Technology, and Government was formed in 1988 to address the changes needed in organization and decision-making at all levels of government to deal effectively with the transforming effects of science and technology. The next year the Commission formed a Task Force on Judicial and Regulatory Decision Making. The Task Force participated in the work of the Federal Courts Study Committee and its follow-on efforts culminated in the March Report. For general information on these long-term issues, a copy of the Executive Summary of the Report is attached as Appendix A.

One of the principal findings of the Carnegie Commission Report is "[a] judge has adequate authority under the present Federal Rules of Civil Procedure and of Evidence to manage [science and technology] issues effectively. . . ." p. 36. While this is the most relevant finding related to our task of federal rulemaking, the Subcommittee believes it is appropriate for the Standing Committee to undertake some comprehensive evaluation of the Carnegie Commission Report. The Report has a great deal to say about how the federal courts ought to approach issues of science and technology and the Standing Committee is the entity within the Third Branch that has the chief responsibility for proposing national practices and procedures. The Subcommittee also believes that the Advisory Committee on the Rules of Evidence is the appropriate forum for the initial review of the Carnegie Commission Report as well as any available background papers. Of course, consultation with the other Advisory Committees is appropriate and should be expected prior to the presentation of any proposal for consideration by the Standing Committee.

# SCIENCE AND TECHNOLOGY IN JUDICIAL DECISION MAKING

## CREATING OPPORTUNITIES AND MEETING CHALLENGES

SUPPLEMENT B

MARCH 1993

A Report of the

CARNEGIE COMMISSION
ON SCIENCE, TECHNOLOGY, AND GOVERNMENT

## EXECUTIVE SUMMARY
### BACKGROUND, FINDINGS, AND RECOMMENDATIONS

The courts' ability to handle complex science-rich cases has recently been called into question, with widespread allegations that the judicial system is increasingly unable to manage and adjudicate science and technology (S&T) issues. Critics have objected that judges cannot make appropriate decisions because they lack technical training, that jurors do not comprehend the complexity of the evidence they are supposed to analyze, and that the expert witnesses on whom the system relies are mercenaries whose biased testimony frequently produces erroneous and inconsistent determinations. If these claims go unanswered, or are not dealt with, confidence in the judiciary will be undermined as the public becomes convinced that the courts as now constituted are incapable of correctly resolving some of the most pressing legal issues of our day. There may be calls to replace the current system with new institutions and procedures that appear to be more suited to the demands of science and technology.

From the beginning of its work, therefore, the Task Force recognized

the importance of obtaining as much information as possible about the handling of S&T issues by our courts. Its focus was primarily on the federal judiciary because of the advantages of studying and interacting with one system rather than fifty, and because many of the most pressing problems raised by science-rich cases are readily apparent in the federal courts, which have often been the forums of choice for toxic tort litigation involving such substances as Agent Orange, asbestos, the Dalkon Shield, and Bendectin. The Task Force has, however, also discussed these issues with state judicial systems through such organizations as the State Justice Institute and the National Center for State Courts.

We hope that the activities of the Task Force will counter the current uneasiness about judicial decision making with regard to scientific and technological issues. Our investigations have shown that, although there are problems with the handling of complex S&T issues, these difficulties are manageable within the present adversarial process. Indeed, many of the criticisms directed at the operation of our court system arise -- quite understandably -- from misperceptions about the differing methodologies and goals of science and law, and from the consequent failure to comprehend the diverse roles and expertise of "judge," "juror," and "scientist."

## SCIENTIFIC "FACTS" AND THE JUDICIAL SYSTEM

Scientists view their work as a body of working assumptions, of contingent and sometimes competing claims. Even when core insights are validated over time, the details of these hypotheses are subject to revision and refinement as a result of open criticism within the scientific communities. Scientists regard this gradual evolution of their theories through empirical testing as the pathway to "truth." In the legal system, however, all of the players are forced to make decisions at a particular moment in time, while this scientific process is going on. Given the indeterminacy of science, how can the judicial system make the best use of a scientific "fact"? This question is at the core of the Task Force's efforts.

## RECENT DEVELOPMENTS

Recent developments in both law and science have conspired to bring increasingly complex scientific issues before the courts for resolution. In particular, the dramatic growth in toxic torts and environmental litigation has put new pressure on the legal system, which is simultaneously being asked



to adjudicate issues on the cutting edge of science and to develop theories of substantive law. This pressure is intense because of the large numbers of people that are involved and the profound social, economic, and public policy concerns that these new legal claims raise. The research of scientists working at the frontiers of human knowledge has become relevant in routine criminal cases; DNA testing, for example, has brought sophisticated science into the courtroom.

The growing prominence of science in the courtroom has exacerbated criticism of the courts' management and adjudication of S&T issues. Some allege that "junk science" is flooding the courtroom through the testimony of "experts," whose primary qualification is their willingness to testify in support of their client's position. As a result of these and similar concerns, there have been calls to remove certain categories of cases from the judicial system altogether. While some commentators believe that current legal procedures must be overhauled to deal with these abuses, others go even further in suggesting that the courts, dependent as they are on lay judges and juries, are incapable of properly resolving issues that turn on abstruse principles of epidemiology, toxicology, or statistics. Still others claim that the volume of litigation, as for instance in the cases arising from the use of asbestos, threatens the traditional model of individualized decision making. Given our judicial resources, it may be impossible to treat each case separately.

Our examination of the cases leads to the conclusion that, although such dissatisfaction does exist, many of the concerns expressed are greatly exaggerated. On the basis of reported decisions, it does not appear that the federal courts are being inundated with fringe science. Reported cases, of course, represent only the tip of the iceberg. The vast majority of cases terminate without opinion and without a trial, and there are few data available on how problems in handling S&T issues might have had an impact on settlements or discontinued suits. Misperceptions may become reality if settlements are driven by concerns about the courts' ability to reach consistent results. The Task Force's work to date and its recommendations, which seek to improve the system's ability to handle scientific evidence, should lead to better adjudications.

## IMPROVING THE SYSTEM: NEW PROCEDURAL AND EVIDENTIARY MECHANISMS, EDUCATION, AND INSTITUTIONAL SUPPORT

Science is entering the courtroom more and more every day, and we believe that the courts' ability to handle S&T issues can be improved. Many of the tools to assist the judiciary already exist -- it remains to encourage and assist

judges to use them. Greater understanding of process, both the process of science and the process of managing complex evidence, is key to this endeavor. Accordingly, judicial education and the creation and dissemination of an S&T reference manual for judges are the twin pillars of our process recommendations.

The lack of institutional support for the judiciary must also be addressed when assessing ways to improve the courts' ability to resolve S&T issues. Unique among the branches of government, the judiciary has no ready recourse to outside assistance in its attempts to understand issues of science and technology. The Task Force believes that this situation can be ameliorated by creating more extensive and formal institutional ties between the S&T and judicial communities. These institutional recommendations, designed with the needs of the adversarial system in mind, should encourage increased dialogue between judges and scientists, to help scientists gain an understanding of the legal system and to assist judges in their understanding of the objectives and process of science.

## THE FEDERAL JUDICIARY—OPPORTUNITY FOR INNOVATION

This is a particularly opportune moment to undertake an examination of judicial decision making on S&T matters in the federal judiciary and to suggest improvements. A sizable group of judges will undoubtedly be taking office within the year, so it is important to have S&T educational materials ready for incorporation into the initial judicial educational materials those new appointees will receive.

At the same time, new kinds of S&T cases are entering the courts in large numbers before science has adequately explored the issues involved. Recent developments, such as the FDA review of silicone implants, the allegations about repetitive stress injury, and the concern that cellular phones may cause brain tumors underscore the potential for the sudden emergence of new categories of mass tort cases. And any new mass tort boom is likely to fuel further public discontent with the judiciary's role in adjudicating S&T matters. Wisdom counsels action now.

## MAJOR FINDINGS OF THE TASK FORCE

The Task Force's efforts to study the courts, which are discussed in more detail below, have yielded some new insights into the judicial system's treatment of S&T issues. In the course of its investigation, the Task Force considered the data that are currently available, reviewed the literature of legal commentators, held discussions with members of the legal and scientific communities, and commissioned new studies. In order to appreciate the rationale for the recommendations which follow, it is useful to review the Task Force's major findings:



### LITIGATION PROCESS

- Although disparities abound in the way judges handle S&T issues, there is much less divergence in the actual results of cases. There is no one correct way of handling S&T evidence.

- Federal judges have adequate authority under the present Federal Rules of Civil Procedure and of Evidence to manage S&T issues effectively, and the rules of many state judicial systems are modeled on the federal rules.

- Increased attention to S&T issues at the pretrial stage makes cases more amenable to disposition by summary judgment, facilitates settlement, and leads to more focused, speedier trials.

- Expert testimony can be made more comprehensible to jurors

- Judges and jurors may need information or assistance in handling S&T information that the parties cannot furnish because of insufficient expertise, mismatched resources, or excessive partisanship.

- Trial courts need guidance from appellate courts on the legal standards that control S&T issues.

### JUDICIAL EDUCATION

- Because judges have little time available for judicial education, the challenge in designing an educational program is to produce materials on complex S&T issues to which a judge can turn when handling an analogous problem in an upcoming case. Thus, the ease with which judges can gain access to educational materials is as important as the quality of the materials.

- Appellate and trial judges and state and federal judges have differing educational needs that require different educational methods.

SUPPLEMENT C

Action Item #2: The Subcommittee recommends that the Standing Committee request that the Advisory Committee on the Rules of Evidence coordinate a joint effort among the various Advisory Committees to study Judge Keeton's concept of "Rules of Trial Management."

In his memorandum of September 1, 1992, Judge Keeton wrote Judge Pratt (Subcommittee on Numerical and Substantive Integration) and Professor Baker (Subcommittee on Long Range Planning) to suggest the idea of formulating "rules of proof" that would incorporate "rules of evidence" but would go beyond them to include other aspects of trial management. His suggestion was tied to the ABA Standards for Trial Management adopted in February 1992, although Judge Keeton has been an advocate of the approach at least as long as he has been the Chair of the Standing Committee. A copy of his memorandum is attached as Appendix B.

The Subcommittee suggests that the new Advisory Committee on the Rules of Evidence be asked to coordinate a joint effort with the Advisory Committee on the Civil Rules and the Advisory Committee on the Criminal Rules to study this idea and, if it is determined to have merit, to bring forward appropriate recommendations. This is a recommendation for study. The Subcommittee does not endorse or reject the concept of "megarules." The Subcommittee is persuaded, however, that one of the Advisory Committees ought to be designated to take the lead so that the proposal is not left to languish in rules limbo.

■ Science education programs, like all judicial education programs, are most effective if they are interactive, utilizing conversation, dialogue, and debate. Producing good-quality judicial S&T education programs requires the collaboration of lawyers who understand science and scientists who understand the needs of the courts.

■ The financial resources of the state and federal judiciaries are severely limited. While private foundations have funded the development of innovative education programs, they tend to withdraw support once the pilot program is completed. Funding for continuation even of those programs that have proven to be effective is rarely available.

## RECOMMENDATIONS

■ **Judges should take an active role in managing the presentation of science and technology issues in litigation whenever appropriate.**

Many tools are available to state and federal judges to manage the presentation of S&T issues in litigation. The judicial reference manual and protocols, which are being developed by the Task Force in collaboration with the Federal Judicial Center, are two key elements of the effort to facilitate greater use of these tools.

The reference manual outlines the wide range of techniques that judges have used to manage S&T issues in litigation. It focuses on process and on the encouragement of judicial control. The manual presents judges with a range of options available to resolve a given issue and refers judges to S&T cases where those options have been used; it does not suggest substantive outcomes on contested science and technology issues.

Using the protocols, which are being developed jointly with members of the S&T community, will enable judges to identify and employ techniques that will permit quicker and more effective rulings on challenges to expert testimony, whether those challenges are based on the qualifications of experts, the validity of the theory on which the expert is relying, the reliability of the data underlying the theory, or the sufficiency of the expert's opinion to sustain a verdict.

In order to ensure that these tools continue to be useful, they must be updated systematically to reflect the most current scientific and legal developments. They will be even more valuable if references to state law are incorporated.



■ **Scientific and technical issues should be integrated into traditional judicial education programs, "modules" should be developed that can be appended to existing programs, and intensive programs should be supported.**

Judicial education programs play an important role in introducing judges to scientific methodology, which is an essential element in reducing misunderstandings about S&T evidence and in increasing judicial willingness to take an active role in managing that evidence. Because of the severe time constraints faced by judges, education about scientific methodology should be integrated into traditional judicial education programs. Existing judicial education programs should be expanded to include S&T "modules." For instance, a videotape could be produced that illustrates DNA analysis. Existing programs devoted exclusively to S&T issues should be identified, and others should be developed. These programs offer the greatest opportunity to give judges extensive, hands-on experience in dealing with the difficult S&T issues they may encounter in court.

■ **Institutional linkages between the judicial and scientific communities should be developed.**

Sustained improvement of judicial decision making on matters of science and technology requires the establishment of institutional ties to encourage greater dialogue and cooperation between the judicial and scientific communities.

■ The federal and state judiciaries should create S&T resource centers to provide judges with access to the collective experience of their colleagues in case management techniques for S&T issues and to educate judges on scientific methodology. Each resource center would also act as a clearinghouse for substantive scientific information compiled by the scientific community, monitor the impact of S&T issues on the courts, and serve as a bridge for cooperation with the scientific community. Each resource center should provide empirical data on the impact of S&T issues in various types of cases and use the results of that research to assist in long-range planning for the treatment of S&T issues in the judiciary.

■ The scientific community should create a resource center as a counterpart to the proposed judicial S&T resource centers in order to facilitate cooperation among the professional societies and to explore the benefits of continued interaction between the judicial and scientific communities.

■ A judicial S&T education clearinghouse should be established to collect and distribute curricula and other materials on science education

for judges. An advisory committee of leading experts from various scientific disciplines, judicial educators, and representatives of the judiciary should be established to consider what judges need to know about science. It should also collaborate with academic communities in the fields of law and science to improve S&T programs and materials. The judicial S&T education clearinghouse should "package" high-quality science education programs for easy use and access.

- An independent nongovernmental Science and Justice Council of lawyers, scientists, and others outside the judiciary should be established to monitor changes that may have an impact on the ability of the courts to manage and adjudicate S&T issues; it should also initiate improvements in the courts' access to and understanding of S&T information, including judicial education and communication between the judicial and scientific communities.

A continuing examination of the interaction between science and the courts is essential to efforts to improve judicial decision making concerning S&T issues. An interdisciplinary "Science and Justice Council" similar in mission to the Task Force should be created to continue the initiatives that the Task Force has begun.

Located outside existing institutions, the Council would be able to offer more strategic and long-range criticism and suggestions than existing groups with defined roles. The Science and Justice Council should also monitor changes in law, in science, and in society generally that may have an impact on the ability of courts to handle S&T issues.

Some judges are frustrated by their inability to obtain timely, nonadversarial explanations of the scientific and technical matters at issue in a case. Unlike the judiciary, when faced with unclear S&T information, Congress can consult the Office of Technology Assessment, and the Executive can consult the Office of Science and Technology Policy. The Council should undertake further study on the host of issues raised by the Task Force's proposal to create an institutional support mechanism for the judiciary, the form that such an advisory institution should take, sources of compensation for those providing assessments to the court, and permissible use of the information generated for the court.

Other areas that the Council might explore include data collection and alternatives to judicial resolution. Long-range efforts to improve the quality of judicial decision making with regard to S&T issues are hampered by the lack of adequate data about the incidence and management of scientific issues in the courts. Information is also necessary for appropriate allocation of judicial resources. In addition, little empirical information is currently available about the costs of handling S&T issues. And further study of how the judicial system copes with S&T issues and a comparison with



administrative schemes such as the National Childhood Vaccine Injury Act would provide valuable information about the desirability and feasibility of pursuing the use of alternative forums.

We live in an ever-changing world to which a dynamic judicial system must be responsive. Unless reliable data are obtained so that changes can be anticipated, monitored, and evaluated, the ability of the courts to handle complex scientific and technological issues is compromised. The kinds of cases in which S&T issues occur are often those of the utmost social significance, and the decisions in them have major consequences for many people's lives. The way in which our society in general and the judiciary in particular will respond to the S&T issues of the future is of concern to many different constituencies whose views can best be heard, evaluated, and integrated at meetings of a broad-based heterogeneous group that is free of formal political ties. The Task Force believes, therefore, that it is important that an independent group, like the proposed Science and Justice Council, be created to monitor and develop further the recommendations outlined in this report.

## CONCLUSION—A NOTE OF OPTIMISM

Unlike some recent critics, we end our survey of science in the courts on a note of optimism. The Task Force found that numerous innovative, highly motivated, and highly skilled judges and lawyers are working hard to improve judicial decision making with regard to S&T issues. That many problems remain is hardly remarkable, considering the magnitude of the legal and scientific issues that are presented to American courts for resolution. While the difficulty and novelty of the questions these cases pose preclude an instantaneous magical cure, we observe that the legal system is actively pursuing solutions.

Nevertheless, the Task Force believes that the handling of S&T evidence would be improved if more data were available on how the system works, if information about successful innovations were more widely disseminated, if judges were given more educational and institutional support, and if scientists, judges, and lawyers had greater opportunities to communicate with each other. At the moment, the parallel paths of scientists and lawyers usually obey the rules of Euclidian geometry—they do not intersect—even though both disciplines not infrequently ponder the same subjects. And when their paths do cross, the result is often misunderstanding, rather than constructive communication. At the very least, we hope that the Task Force's work will provide a starting point for a more fruitful interaction between the worlds of science and the law.

SUPPLEMENT C

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



# MEMORANDUM

TO: Judge Pratt
Professor Baker

DATE: September 1, 1992

SUBJECT: Providing a Place in a Unified Numbering System for Rules of Trial Management

Attached is a copy of an article by Susan Abbott-Schwartz, Associate Editor of Litigation (A Publication of the ABA Section of Litigation), "ABA Adopts Nine Standards for Trial Management," published in Vol. 17, No. 5, June 1992, p. 11.

Also attached is a copy of "ABA Trial Management Standards," which I obtained from ABA headquarters in Chicago.

As you will recall, I have been interested in the possibility of formulating "rules of proof" that incorporate "rules of evidence" but go beyond them to include other matters trial judges control in practices that are less formal and probably less consistent than rulings on objections to evidence. There is a considerable overlap between the subject matter of "rules of proof" as I have been thinking of them and the ABA "Trial Management Standards."

Might your respective subcommittees consider whether we should be thinking about (1) reserving a place in any unified numbering system for Rules of Trial Management (broadly conceived to include rules of proof, rules about time management, and other things included in the ABA "standards," as well as rules of evidence), and (2) whether and when one or more Advisory Committee(s) should be asked to undertake drafting or a study of part or all of this subject matter?

Will Bryan Garner insist that we call them "Trial Management Rules" to get rid of another prepositional phrase?

Enclosure

Robert E. Keeton

cc: Members and Staff of the Standing Committee

# ABA Adopts Nine Standards for Trial Management

by Susan Abbott Schwartz
*Associate Editor*

New Trial Management Standards, supported by the Section of Litigation, focus on the fair and efficient administration of justice in the trial court.

The standards recognize "that trial time is the court's most valuable and scarce resource," says Judge Robert M. Summitt, Chattanooga, TN, Chair of the ABA National Conference of State Trial Judges, which proposed them.

The ABA's adoption of the Trial Management Standards effectively acknowledges that a vast number of lawyers are in favor of more active judicial participation in the trial process. "For a long time, the judges have felt the need to bring time management and control into the courtroom. The passing of these standards shows that the lawyers want it as well," says Summitt.

"I am heartened by the passing of these standards," said Judah Best, Washington, DC, former Section Chair and one of the Section's delegates to the House of Delegates. "They will result in a heightened awareness that the ABA and the Litigation Section encourage our trial judges continuously to seek ways to fulfill their responsibility for the efficient administration of justice in this country."

The nine standards are:

1. *The trial judge has the responsibility to manage the trial proceedings. The judge shall be prepared to preside and take appropriate action to ensure that all parties are prepared to proceed, the trial commences as scheduled, all parties have a fair opportunity to present evidence, and the trial proceeds to conclusion without unnecessary interruption.*

This standard encourages the judge to be a trial manager. It acknowledges the judge's wide exercise of discretion, but encourages direct communication in advance of trial regarding the court's expectations and procedures.

2. *The trial judge and trial counsel should participate in a trial management conference before trial.*

Perhaps the most innovative feature of these standards is the trial management conference. The purpose of this conference is not to settle the case, but to prepare the counsel for trial and the judge to preside. It is suggested the court hold this conference 10 to 20 days before trial to resolve all issues relating directly to the trial itself.

3. *After consultation with counsel, the judge shall set reasonable time limits.*

4. *The trial judge shall arrange the court's docket to start trial as scheduled and provide parties the number of hours set each day for the trial.*

Interestingly, studies have shown there is a discrepancy between the time the court believes it devotes to trial and the hours actually spent. This standard encourages the judge to determine exactly what time he or she will devote to trial alone and to manage his or her court so that the judge may delegate or otherwise manage the caseload.

5. *The judge shall ensure that once trial has begun, momentum is maintained.*

This standard encourages the court to develop protocol and rules to govern the efficient use of time during trial, including such matters as keeping witnesses on call and limiting interruptions in examination.

6. *The judge shall control voir dire.*

This standard does not endorse or reject the common federal system practice where the judge "does it all." Rather, the concept is to manage voir dire effectively and fairly. A divided voir dire approach is gaining popularity in which the judge conducts "standard" questioning and allows counsel to question on issue-oriented matters or for a specific time period. It is believed that some judicial control over the voir dire process results in more focused juror questioning.

7. *The judge's ultimate responsibility to ensure a fair trial shall govern any decision to intervene.*

Arguably, this standard is capable of being misunderstood. It is given that lawyers have discretion in presenting evidence and argument to a jury. However, the trial judge does have a responsibility to ensure a fair trial and the judge should not hesitate to intervene during counsel's presentation when necessary to meet that goal. This standard encourages the court not to act as a referee who sits back and waits until a party requests a ruling, but to participate actively in the trial if, in his or her judgment, it is necessary to promote

8. *Judges shall maintain appropriate decorum and formality of trial proceedings.*

This standard notes the importance of formality and decorum in maintaining the court's ability to exercise authority to control the conduct of spectators, witnesses, parties or counsel.

9. *Judges should be receptive to using technology in managing the trial and the presentation of evidence.*

For additional information about the Trial Management Standards contact Stephen Goldspiel, Staff Director for the National Conference of State Trial Judges, ABA, 750 N. Lake Shore Dr.,

# ABA
# Trial Management Standards

American Bar Association
Judicial Administration Division

## The Court Delay Reduction and Discovery Reform Committee of the National Conference of State Trial Judges




Judicial Administration Division
American Bar Association
750 North Lake Shore Drive
Chicago, Illinois 60611





Produced by the ABA/JAD
National Conference of State Trial Judges

# Trial Management Standards

**Recommended by**
**National Conference Of State Trial Judges**
**American Bar Association**
**Judicial Administration Division**

**February, 1992**

___ Approved by the House of Delegates of the American Bar Assn.

## Introduction

This proposal complements the ABA *Court Delay Reduction Standards* which focus on court management of the pretrial phase. It recognizes that trial time is the court's most valuable and scarce resource, and is premised on the belief that an effective and efficient presentation of admissible evidence and applicable law is the responsibility of both bench and bar.

These proposed *Trial Management Standards* address presenting an "effective" trial without diminishing the fairness or the perceived fairness of the trial. One of the major features or basic premises of this proposal is the concept of a "Trial Management Conference" which is designed to prepare both a judge and attorney to participate in the trial.

These recommendations have been distilled from numerous sources as further discussed in the following preface, but mainly are the reflection of what trial judges have put into practice in courts across the country.

*Respectfully submitted,*

*Phillip R. Roth*
*Chair 1990-91*
*National Conference of*
*State Trial Judges*

# Preface / Acknowledgement

Chairman Roth has distinctly stated the purpose and importance of these proposed standards. It is difficult to give credit or recognize the many persons who have contributed to this work. For example, the word "effective" was chosen carefully to describe the type of trial that was deemed appropriate by a group of lawyers, judges and educators who developed a course under a grant from the State Justice Institute. Effective connotes quality rather than an approach emphasizing efficiency for the purpose of speeding up the trial process. The title of that course is "*Managing Trials Effectively*" and has been presented both at the National Judicial College and in numerous states by the Institute for Court Management/National Judicial College with proven success. While the materials developed for that course are reflected in the standards, the response and input of judges who participated in those programs have had an equal impact on this work.

The motivation for this project and the other publications and studies in the area of trial management was the work of the National Center for State Courts as reflected in its publication: *On Trial: The Length of Civil and Criminal Trials*. This research for the first time examined what actually was occurring in trial courts and concluded that: "trial length can be shortened without sacrificing fairness by increasing continuity in trial days and by judicial management of each phase of the trial". These standards not only cite the conclusion or opinions of *On Trial* and its principal author Dale Sipes, but draw upon the wisdom of Monterrey, California Superior Court Judge Richard Silver, Dean V. Robert Payant of the National Judicial College, Professor Ernest C. Friesen and Barry Mahoney / Linda Ridge of the National Center for State Courts, Institute for Court Management.

Another resource was the work of the ABA Lawyers Conference Modernizing Trial Techniques Committee which is summarized in an article by Harry J. Zeliff: "Hurry Up and Wait: A Nuts and Bolts Approach to Avoiding Wasted Time in Trial", published in the summer of 1989, *The Judges' Journal*. Also the Fall 1990 issue of *The Judges' Journal* discusses trial management from varying viewpoints and explains the importance of judicial management.

As you read the standards, you will note the importance of the judge and attorneys who actually try the case participating in a Trial Management Conference. While numerous persons have contributed ideas to this concept, credit must be given to Professor Ernest C. Friesen, who has published numerous articles addressing the importance of pretrial preparation by both the judge and the lawyer.

The timeliness and the need to adopt these standards is appropriately described by the following excerpt from the conclusion of *On Trial*:

> The time has arrived for judicial management of all phases of trial. Judicial control is the single factor that distinguishes courts in which similar cases are tried more expeditiously than elsewhere. Attorneys desire, and may in the foreseeable future demand more judicial control of the trial process. The following statement is in our judgment a fair reflection of current citizen expectation:
>
> Nobody wants summary justice. That, however, need not be the alternative. The alternative should be reasonable dispatch, without dilatory tactics and self-indulgence by lawyers, and with judges who are able—and want to—keep things moving. Why is that too much to ask for? It ought to be taken for granted.

Our endorsement of trial management by judges rests first upon the demonstrated effectiveness of judicial management in expediting case processing at both the pretrial and trial states and the fact that all steps in the trial process are amenable to some judicial control. The conclusion is further supported by the favorable effect upon time consumed in trial which courts protect trial continuity; define areas of dispute in advance of the trial; conduct the examination of prospective jurors; set reasonable time limits; and prohibit evidence that is repetitive, cumulative, unnecessary, or needlessly lengthy. And greater judicial control does not appear in fact or perception to impair the fairness of trials.

*William F. Dressel*

*Chair Court Delay Reduction Committee*
*National Conference State Trial Judges*

# Trial Management Standards

**1. Judicial trial management – general principle: the trial judge has the responsibility to manage the trial proceedings. The judge shall be prepared to preside and take appropriate action to ensure that all parties are prepared to proceed, the trial commences as scheduled, all parties have a fair opportunity to present evidence, and the trial proceeds to conclusion without unnecessary interruption.**

Commentary: Trial time on a court's docket is its most valuable and scarce resource. It is the *joint* responsibility of bench and bar to use that time wisely and effectively! The objective of "managing" a trial is to effectively and efficiently present to the trier of fact the admissible evidence and applicable law relevant to the issues to be decided. The goal is not simply to reduce the number of trial hours or make a trial move faster, although very often trials do conclude in fewer hours when managed.

A trial is the ultimate event in our system of justice, and certainly is one of the most visible and expensive for all concerned. It is thus important that trial proceedings be conducted without unnecessary delay or disruption and kept focused on the legitimate purpose of the trial. While a trial may be sought for political, economic or unrelated personal reasons, the trial should be maintained as the opportunity for litigants to present evidence upon which the trier of fact decides specific issues. The trial judge is the individual in the best position to see that this occurs. Counsel's role is that of advocate and, while counsel are officers of the court, they do act in an adversary role and often have other objectives or priorities. The time when the judge acted the role of a referee who sat back and waited until someone asked for a ruling is past. The judge is responsible for determining not only the appropriateness but the extent of the evidence presented to the trier of fact. Judges not only have the authority and the responsibility to manage individual trials, but the responsibility to those who desire access to the court to have an opportunity to present their case. Also, the availability of trial time is often a variable that moves a case toward resolution.

The 7th Circuit Court of Appeals in *MCI Communications v. American Tel. & Tel. Co.*, 708 F.2d 1081 (certiorari denied by the U.S. Supreme Court) in 1983 on the subject of the trial judge's ability to impose limits on evidence presented for time allowed stated:

> Litigants are not entitled to burden a court with an unending stream of cumulative evidence.... As Wigmore remarked, "it has never been supposed that a party has an absolute right to force upon an unwilling tribunal an unending and superfluous mass of testimony limited only by his own judgment and whim.... The rule should merely declare the trial court empowered to enforce a limit when in its discretion the situation justifies this." Accordingly, Federal Rule of Evidence 403 provides that evidence, although relevant, may be excluded when its probative value is outweighed by such factors as its cumulative nature, or the "undue delay" and "waste of time" it may cause. Whether the evidence will be excluded is a matter within the district court's sound discretion and will not be reversed absent a clear showing of abuse.... The circumstances of each individual case must be weighed by the trial judge, who is in the best position to determine how long it may reasonably take to try the case. (p.1171)

The trial judge, in performing the responsibility of a trial manager, is not only responding to the public's expectations, but to the litigants'. There is no rule or formula that applies to all trials. The judge must exercise discretion addressing the

specific needs or issues of each case which requires consultation with counsel. The judge must know the factual basis of the case, understand the issues to be determined, and be prepared to apply the law. However, while each case may be different, all cases require management in some respects, and certain concepts can be appropriately modified and applied to each case, as discussed herein. It is also important that the judge communicate in advance of trial his or her expectations regarding trial procedures to counsel and consider counsel's expectations and needs in determining how best to manage the trial.

There is no doubt that it is the judge's responsibility to see that all parties receive a "fair" trial. The following excerpts from *On Trial* address *fairness*:

> The major conclusion is that trial length can be shortened without sacrificing fairness by increasing continuity in trial days and by judicial management of each phase of the trial.
>
> Assessing whether fairness suffers on the way to expedite trials is complicated by the fact that fairness in this context is in the eye of the beholder. Unlike the overall pace of litigation, there are no national norms of reasonable time for trial duration.

In this study, we learn that the great majority of judges and attorneys perceive neither lack of fairness nor injustice in those courts where trials are conducted more rapidly than elsewhere. . . The time has arrived for judicial management of all phases of trial. Judicial control is the single factor that distinguishes courts in which similar cases are tried more expeditiously than elsewhere. Attorneys desire, and may in the foreseeable future demand, more judicial control of the trial process. The following statement is in our judgment a fair reflection of current citizen expectation:

> Nobody wants summary justice. That, however, need not be the alternative. The alternative should be reasonable dispatch, without dilatory tactics and self-indulgence by lawyers, and with judges who are able—and want to—keep things moving. Why is that too much to ask for? It ought to be taken for granted. (Edwin Newman "The Law's Delay," San Francisco Chronicle, June 3, 1987).

Our endorsement of trial management by judges rests first upon the demonstrated effectiveness of judicial management in expediting case processing at both the pretrial and trial stages and the fact that all steps in the trial process are amenable to some judicial control. The conclusion is further supported by the favorable effect upon time consumed in trial when courts protect trial continuity; define areas of dispute in advance of the trial; conduct the examination of prospective jurors, set reasonable time limits; and prohibit evidence that is repetitive, cumulative, unnecessary, or needlessly lengthy. And greater judicial control does not appear in fact or perception to impair the fairness of trials.

## 2. The trial judge and trial counsel should participate in a trial management conference before trial.

Commentary: There is no one agreed upon and preferred method for insuring that a case is ready to be tried. A simple case with two experienced counsel may require nothing more than the setting of a trial date. A more complex case will require a series of conferences or hearings addressing a variety of legal or factual issues as well as lengthy formal conferences. In between these two examples are the bulk of cases whose trial readiness can be addressed through what can best be called a "trial management conference". It is the purpose of the trial management conference to insure that counsel are prepared, but the conference also allows the trial judge to prepare to preside.

*Optimally, the trial management conference should be held 10 - 20 days before trial commences.* Counsel should have prepared their case for trial by this time, and this conference gives counsel additional incentive to prepare for trial. Given this lead time if problems do arise, court and counsel have the time to fashion appropriate remedies or take steps at the conference to resolve conflicts. It is understood that some judges and lawyers believe there is no need for such a conference in a simple case, which may be true. However, in those cases which are indeed totally prepared for trial, the conference will only take a few minutes and is an opportunity for both the court and counsel to review trial procedures and assure trial readiness.

The order setting a trial management conference shall require counsel to confer before the conference to review the matters that will be

covered and accomplish certain tasks. This reduces the time needed for a conference and allows court and counsel to confirm those subjects not in controversy and address matters requiring the court's attention.

Some have voiced concern that such a conference is not feasible for a master docket, a judge that "rides a circuit" holding trials in various locations, or a court that sets a large number of cases for trial and chooses a "trial date" on the day of trial.

Courts utilizing "master dockets" have adopted procedures for assigning cases to the trial judge in advance of the scheduled trial date, so that a trial management conference can be scheduled and held. Some master docket courts have adopted systems whereby a number of cases are assigned to a particular judge a month ahead of the anticipated trial date to accommodate case and trial management. In those courts that set a number of cases for trial on a particular day, pretrial procedures can help determine which case will go to trial. Often it is a "review" or the setting of a trial management conference that resolves the case. If a "trial case" must be chosen the morning of trial, it is recommended that the trial be scheduled to start later in the morning so that the trial management conference may be held. Circuit riding judges can hold the conference in a convenient location, at a time close to the trial, or (while not preferred) by telephone conference with counsel at the courthouse.

Each jurisdiction has its own form of a document litigants must file to disclose issues, witnesses, exhibits, etc., (pretrial statements, trial readiness certificates or trial disclosure statements), and those documents often set the framework for this conference. It is critical to emphasize that the trial management conference is not a "settlement conference." It is a conference devoted to trial issues. While any opportunity to achieve or encourage a settlement should not be ignored, counsel must understand that negotiation should be consummated before the conference.

"Hurry Up and Wait; a Nuts and Bolts Approach to Avoiding Wasted Time in Trial" by Harry Zeliff published in the Summer, 1989 *The Judges' Journal*, discusses the concept of a trial conference and the subjects to be covered. The following are examples of important matters:

- (1) EXHIBITS: confirm that they have been appropriately marked, each counsel has reviewed, stipulations as to authenticity and admissibility obtained; verify that the exhibits are appropriately organized to be presented at trial; and discuss how they will be used and presented to the jury during trial;
- (2) WITNESSES: review the scheduling of witnesses to insure that there will not be a break in the presentation of testimony; address any legal problems or conflicts with the potential witnesses; review the nature of the testimony to avoid duplication or determine what can be presented by stipulation, offer of proof, etc.;
- (3) ISSUES: determine what issues of law or fact are really in dispute and those which are not a part of the litigation;
- (4) TIME LIMITS: review time needed for each segment of the trial and set such time limits as appropriate after consultation with counsel to allow preparation within limits set;
- (5) PENDING MOTIONS: review all pending motions and make formal rulings as appropriate or defer until trial those which require evidence, etc.;
- (6) JURY INSTRUCTIONS AND VERDICT: review to determine which instructions the parties agree are appropriate; rule on any objection to those which deal with matters of law; and clarify the parties' position on those instructions which will have to be ruled upon after evidence has been received. Judges who have followed this procedure indicate that most of the instructions can be settled at this conference, leaving the trial judge free to concentrate on those which pose questions of fact or law. The same is true for the form of the verdict, leaving only the determination of whether to include or exclude a few issues;
- (7) SPECIAL TRIAL NEEDS: this is the time to determine whether or not an interpreter is needed, how to utilize technology and who will supply the necessary equipment, whether written or video depositions are appropriately edited, whether offers of proof or stipulations to be submitted have been reduced to writing, and determine any issues that need to be addressed in an en camera hearing or special proceeding that need to take place during trial, including how and when such hearings will be held;
- (8) VOIR DIRE: the procedure to be followed during voir dire can be reviewed, along with questions the court will ask and any special

areas that counsel wish to review so court can determine the appropriateness of such questions, etc.; and

- (9) MISCELLANEOUS: while this is not a settlement conference, it is an opportunity to determine the status of settlement negotiations, insuring that all appropriate methods or approaches to resolution have been pursued, and determine whether or not the parties still wish to proceed to a jury trial and obtain a waiver of jury if appropriate, and to verify that the number of hours set for the trial are sufficient.

This conference is the opportunity for the trial judge to discuss with counsel how the judge conducts the trial, particular procedures and expectations regarding counsel's conduct as well as any concerns of counsel regarding potential trial problems. The length of the conference depends on the particular case and the various areas that need to be addressed. Those judges who are fortunate enough to have "law clerks" or other qualified staff can delegate to him or her certain portions of the trial conference (marking of exhibits, review of courtroom and procedures, use of technology in the courtroom, etc.).

A trial management conference is not only for a jury trial. In a trial to the court, in addition to the benefits discussed above, the trial management conference allows the judge to identify the issues to be covered in the court's opinion. Some judges require counsel to submit "verdict forms" or "proposed findings of fact and law" at the conference. This prepares the judge to rule from the bench at the conclusion of the trial in some cases or provides the groundwork for issuing a timely written opinion.

Lastly, it may be helpful to have the judge's "protocol" or statement of trial procedures reduced to writing and provided to counsel before the trial management conference, as this can shorten the conference and give counsel an opportunity to seek clarification.

### 3. After consultation with counsel the judge shall set reasonable time limits.

Commentary: The purpose of time limits is to set expectations and determine the appropriate time needed for various segments of trial. Time limits allow the court to plan the trial date and allow counsel to plan their presentations. While time limits are often interpreted negatively as a limit on counsel rights, one could substitute "expectations" for "limits" and perhaps avoid the concern. However, trial time is scarce, and time limits are useful in determining how that time is allocated. Further, the judicial system operate on the concept of "time limits". Statutes of limitations define the time period in which a type of action can be brought. Rules of procedure set forth times in which lawyers must file certain documents, and setting the trial involves a time limit as the case is placed on a calendar for a certain number of days.

Many courts already informally impose such limitations by discussing their expectations with counsel or by subtle references to how long it usually takes for a certain presentation and obtaining counsel's agreement.

The *On Trial* research found support for imposing limits on the time allowed for various segments of trial as long as they were based upon the particular case, made in advance of trial to allow for preparation, and sufficiently flexible to allow for exceptional circumstances.

There are a number of appellant decisions analyzing the use of time limits in which the following general statements are made:

- TRIAL LENGTH: The circumstances of each individual case must be weighed by the trial judge, who is in the best position to determine how long it may reasonably take to try the case.... The time limits should be sufficiently flexible to accommodate adjustment if it appears during the trial that the court's initial assessment was too restrictive.
- VOIR DIRE: The trial court may impose reasonable restrictions on the exercise of voir dire examination.... The trial court has broad discretion to determine the scope of voir dire. The trial court should not unreasonably and arbitrarily impose limitations without regard to the time and information reasonably necessary to accomplish the purposes of voir dire. Limitations in terms of *time* or *content* must be reasonable in light of the total circumstances of the case.
- ARGUMENT OF COUNSEL: The trial judge has considerable discretion to set limitations

on arguments in the management of a trial. (1) In a relatively simple prosecution it is not unreasonable for counsel to anticipate that the trial judge will assume, unless advised to the contrary, that an extended closing argument is not required. Obviously it would be preferable for the trial judge to alert counsel as early as possible of any time limitations on closing argument. In the absence of such warning, counsel may be at a disadvantage if unable to change plans instantly, and therefore unable to make as effective an argument to the jury. (2) It is a generally recognized principle of law that the trial court has the power, *in its discretion*, to limit counsel's time for argument. No rule or formula can be applied to all cases. Each case must turn on its own facts. The following factors generally determine the appropriateness of a given time limitation: length of trial, number of witnesses, amount of evidence, number and complexity of issues; instructions, amount involved, gravity of the offense, etc.

Judges are encouraged to review court rules, rules of evidence and case law in their particular state, as it appears that most states have addressed in some form or another the authority or discretion of the trial judge to impose limits. It should be kept in mind that the judge does need information and input from counsel, and the limitation must be reasonable, related to the particular case, and *adjusted to meet circumstances which may arise*. The judge can address concerns as well as protect the record by simply stating in setting time limits that "additional time will be granted if the need arises".

It is also important that the judge "fairly" enforce the limitations and require that all parties comply. Time limits are not a cure-all for lengthy trials but (1) a tool for setting expectations on how a trial will be conducted, (2) emphasize the importance of maintaining momentum, (3) avoid unnecessary and inappropriately long presentations, (4) encourage self-imposed limits on cumulative witnesses or evidence, (5) discourage other "delay", and (6) instills the attitude that the trial will be efficiently presented on the part of both court and counsel.

As discussed in standard six on momentum, it is important that judge and counsel periodically review the progress of the trial to note whether presentations will indeed be made within the limitations set or if there is a need for imposing limitations. During a trial it may be appropriate to set time or subject matter limitations on presentations to address a variety of situations (i.e.: failure of counsel to respond to court orders, repetitive or irrelevant questioning, inappropriate behavior, witness availability problems, etc.).

It is also very useful and appropriate to advise the jury of the time "agreed upon" and set. For example, after the judge concludes his or her voir dire, the court should advise the jury of the amount of time that each counsel will have for questions. A similar approach can be followed before opening or closing statements and other segments of the trial when limitations have been imposed.

### 4. The trial judge shall arrange the court's docket to start trial as scheduled and provide parties the number of hours set each day for the trial.

Commentary: *On Trial* noted the difficulty of getting a trial started on time. Other matters on the court's docket, getting prospective jurors to the courtroom, obtaining the presence of defendants in custody, addressing last minute "problems" and a variety of other reasons or excuses are often cited. The real problem may be the judge's calendar or unrealistic expectations as to when the court or parties can be ready to start. If the problem rests with another entity (sheriff or local official), then the judges in that circuit or district need to raise the matter with the responsible party. The trial conference, as discussed in these standards, is a good opportunity to anticipate, review and address these potential problems and set the expectations that the trial will begin at the scheduled time. Once the expectations have been set and the case called for trial, the judge must accept his or her responsibility to "deliver" and start the trial on time and provide the appropriate hours.

Judges, counsel and court personnel believe there is usually a minimum of 5 hours devoted each day to a trial. The *On Trial* study revealed that often only 3 to 3 1/2 hours were actually being devoted to trial. There are many reasons for the differences in perception and reality, and these can often only be determined after a judge analyzes how time is actually spent. Judges are urged to keep track of the hours *actually* devoted

to a trial and note events which take time away from a trial. A judge must be cognizant of the various demands on time and willing to monitor what actually occurs if trial time expectations are to be met.

It is important that the judge communicate expectations to court staff as to what will occur during each court day. Court staff can assist the judge in maintaining the desired schedule.

If a court has difficulty in either beginning at a certain time or providing the desired number of hours, the judge needs to review the method of scheduling matters on the calendar. Usually the problem arises when a judge attempts to do too much or does not analyze the types of matters to be handled and adjust the calendar accordingly.

Finally, the responsibility of counsel is not being ignored but the judge must communicate to counsel when court sessions will be held and respond appropriately if counsel fail to comply. While one immediately thinks of imposing sanctions, it is submitted that other "subtle" responses such as having the parties in court and waiting for the "tardy" counsel to arrive will suffice.

### 5. The judge shall ensure that once trial has begun, momentum is maintained.

Commentary: Standards four and five are related but really address different situations. Standard four stresses starting on time and providing a certain number of hours, whereas maintaining momentum means managing what is done during those hours.

"Momentum" is consistently acknowledged as the most important concept in trial management. It involves and incorporates part or all of each of the standards set forth herein: such matters as having court staff handle or defer requests for conferences with the judge; cooperation by a multi-judge court to take hearings or handle other matters when needed; the clerk's responsibility for the length of recesses, advising the jury to be ready to return to court, getting counsel back in court, and advising the judge that it is time to reconvene.

However, momentum addresses more than these matters. During a trial, a judge should periodically review with counsel the progress of the case, availability of witnesses, etc. While no one likes to inconvenience witnesses, it is often better to have witnesses waiting and available when needed than to have the jury, parties and counsel in court wait. When necessary, witnesses can be taken out of order or parties can even present their cases out of order.

When they begin their questioning, counsel should be instructed and prepared to proceed to conclusion. Excessive requests for time to consult with co-counsel, parties, or other such interruptions should not be tolerated. The court can address such problems through a friendly suggestion or brief side-bar conference, or if need be, at a recess on the record with clear instructions from the court on how to proceed in the future. If at all possible, the court should set recesses at the conclusion of the examination of a witness and advise the jury what will occur when court reconvenes after the recess (i.e., counsel will call new witness, counsel has finished direct examination and opposing counsel will commence their cross, etc.). If the examination is going to carry over after the recess, the court should confirm the next area of questioning and upon reconvening remind the jury where the questioning had ceased, announce the next area of inquiry and instruct counsel to proceed with questions in that area. This prevents counsel from repeating previous questions and once again reminds counsel of what is expected.

Objections by counsel are often a source of interruption, but are a legitimate activity that requires a prompt ruling by the court. Counsel should be aware of the court's requirement that objections be concise and in appropriate legal terms so that the court can summarily rule. It is submitted that there is no need for frequent side-bar conference or recess to argue matters outside the presence of the jury, as counsel often request. If the judge believes he or she is sufficiently informed on the issue, the ruling can be made, giving counsel the opportunity to supplement their record at the next recess.

There should be a designated place in the courtroom for exhibits. Counsel should be requested to obtain the exhibits they need for the upcoming presentations and then return them after they are used. If counsel is going to use a number of exhibits with a witness, they should appropriately arrange all the exhibits and place

them before the witness. This prevents counsel from perpetually pacing up to the witness stand and back each time he wishes to have a witness review an exhibit. It is important that at the trial management conference, the use of exhibits during the trial be reviewed with appropriate instructions to counsel. Large exhibits should be located where the jurors can see them, and instead of taking the time to view individual exhibits during the presentations, the jury can review them during a recess, under direction not to discuss the exhibits among themselves. If counsel has prepared individual packets of exhibits for jurors, the jurors should be told when to pick up the packet and directed to review the specific exhibits and, when finished, close their exhibit books and put them down so as not to distract the jurors during presentation.

## 6. The judge shall control voir dire.

Commentary: This standard does not endorse or reject the idea that the trial judge should exclusively conduct the voir dire, as is common to federal courts. The trial judge should analyze the purpose of voir dire and determine how best to conduct it. The approach that appears to be finding favor with most courts has the judge conduct a substantial part of the questioning, covering many standard areas of inquiry, while counsel is either granted a certain period of time or allowed to question on certain issues. Many courts at the trial management conference do review with counsel special areas of inquiry, and often counsel will request the court to cover certain subjects, and the court can then decide not only the length but the content of the voir dire. Some judges believe that time limits of 15 to 30 minutes for each side does control content and results in "focused" voir dire examinations.

It is the judge's duty to ensure that voir dire does elicit information from the prospective jurors whereby challenges for cause can be identified and ruled upon; and that counsel obtain information to exercise their peremptory challenges. Counsel may have other goals and should be reminded that the purpose of jury selection is to seat the required number of persons to act as fair and impartial jurors. Questioning is appropriate to discover and discuss effects of any bias, prejudice or experience of the proposed jurors. The judge's voir dire should not only develop expectations on the part of jurors but orient them to the trial process and obtain their commitment to follow the instructions of law and court's admonitions.

Judges should also be aware that there are different methods of calling and seating jurors. In a civil case to a jury of six, courts usually call a sufficient number of jurors that after passing for cause each side can exercise its challenges, leaving the appropriate number of jurors (e.g., 14 where each side has 4 challenges). This method has been gaining favor in criminal cases. For example, to pick a 12-person jury for which each side has five pre-emptories, 22 jurors would initially be seated. If any of the jurors are excused for cause, then a replacement juror is brought into the panel. If an alternate is being chosen and additional challenges are granted, then three additional jurors would be seated. At the conclusion of the questioning, the prosecution would exercise the challenge to the first twelve seated, and the thirteenth member would then become a part of the initial twelve, with defense counsel making its challenge. This process would be repeated until the parties either pass twelve or the challenges are exhausted. Following this procedure, one can see how a jury could be picked easily in an hour and a half. It is important that the method, whatever it may be, is discussed prior to trial and a record made, especially if the court agrees or stipulates to a lesser number of jurors or an unusual procedure. A judge should determine what the rules or procedures on this subject are in their particular state or jurisdiction. Some of these rules are mandatory, and others are only suggested. It does appear that unless judges become directly involved and begin controlling the voir dire process that legislatures will legislate control on voir dire, as recently occurred in the state of California. While some judges believe that this is an area of the trial that should be strictly left to counsel's prerogative, it is submitted the Court has a responsibility beyond merely listening to counsel's questions. The court can participate in the voir dire process in a manner that leaves sufficient flexibility and discretion to counsel to pursue relevant areas of questioning.

The use of questionnaires and juror orientation before voir dire have become increasingly popular. Most courts have some form of video or slides to show to prospective jurors before trial. It may also be appropriate for a court to develop a

written introduction for the jury panel to read when it arrives at the courtroom to further orient the prospective jurors as well as to occupy the few minutes that pass between a jury being seated and proceedings beginning.

Questionnaires are usually of two types. One seeking basic information can be sent to all jurors along with a summons to report or filled out as they report for service. The second is a special questionnaire related to a specific trial, one usually involving sensitive issues or a serious criminal case. If these questionnaires are going to be used, it is imperative that they be completely reviewed at the trial management conference and decisions made as to the questions to be included, when the jurors will fill out the questionnaires, and when counsel will have access to the responses. Some courts will review the completed questionnaires with counsel and, upon stipulation, excuse certain jurors. The questionnaires may also be used to determine which jurors may need to be questioned out of the presence of the others. If this type of questionnaire is used, counsel should be required to return their copies to the court with the originals appropriately sealed for any required appellate review and the jurors so advised that their answers will not be disseminated for any other use than in the voir dire process. However, there are some states, such as California, that hold that such questionnaires are a matter of public record and available for inspection. In those jurisdictions, court and counsel should consider drafting questions that have prospective jurors identify areas of concern and not require a juror to put in specific information and then conduct appropriate en camera questioning of jurors who have identified concerns. The court will have to determine how to advise the jury about public disclosures of the information provided. Whether or not the questionnaires promote a better voir dire by eliciting more information or even shorten the process is open to debate. It is one method to consider, depending upon the particular case.

It is important that not only each judge but judges within a district and state evaluate how jury selection occurs and whether or not there can be an agreed upon common system or similar approaches to voir dire.

## 7. The judge's ultimate responsibility to ensure a fair trial shall govern any decision to intervene.

Commentary: This standard has invoked considerable debate and has the potential to be misunderstood. It is *understood* that counsel have discretion in presenting evidence. The court should defer to counsel's belief as to the type of evidence and manner of presenting evidence to the trier of fact. Likewise, it is agreed that the trial judge does have a responsibility to insure a fair trial and should not hesitate to intervene during counsel's presentation when necessary. It is defining "When Necessary" that fosters debate. It may well be a standard that "speaks for itself" and is not subject to further definition other than in the context of a specific fact situation.

If a judge decides to intervene, he or she should do so in a manner that does not indicate any bias for or against any party or issue in the case.

There are some judges and lawyers who believe that judges should not intervene except in response to an objection by a lawyer. While counsel have the responsibility to object, often strategy considerations, lack of ability, etc., may prevent them from objecting or requesting direction from the court. If one accepts the premise that a judge presides over a trial and is not a referee who sits back and waits until a party requests a ruling, there are situations which call for a judge to intervene, and, after appropriate inquiry, limit counsel's presentation or direct counsel to proceed in a certain way. This is not to imply that a judge should be advising counsel how to try their case or present their evidence; but that the judge does have a role in insuring that both parties receive a "fair trial." Thus, there are those who believe that a judge, after careful consideration, should intervene to address inappropriate conduct, repetitive questioning, introduction of unnecessary or unduly repetitive evidence, or other abuses by counsel. It is further submitted that such activity needs to be addressed before the trial judge is faced with a mistrial or several years later receives an appellate decision determining that a party did not receive a fair trial or due process. Of course some appellate courts might find a denial of due process due to the judge's intervention, which makes this is one of the most difficult areas of trial management. However, the responsibility to address inappropriate activity or proceedings

is placed squarely on the shoulders of the trial judge and cannot be ignored!

This is an area in which judges could benefit from appropriate "judicial education." Certainly this subject ought to be placed before a bench-bar committee. If a bench-bar committee does undertake analysis of this area, a good starting point would be the report of the American Bar Association Committee on Professionalism chaired by former ABA President Justin Stanley. Regrettably, this standard may raise more questions than it gives answers or guidance, but it is also an area that a judge must be prepared to address

## 8. Judges shall maintain appropriate decorum and formality of trial proceedings.

Commentary: Formality lends credibility to the proceedings and emphasizes to counsel and jurors the important functions they perform. This is not to say that humor does not have its place in the courtroom, but to emphasize that the judge may be called on to exercise authority to control the conduct of spectators, witnesses, parties or counsel. There isn't a judge or attorney who, at some time during court proceedings, has not witnessed inappropriate behavior. The judiciary and bar alike are concerned by the "decline in professionalism," and the A.B.A. and individual states alike continue to seek solutions. It has been noted that the "perception of what occurs during the trial" is as important as what actually occurs. Hence the dignity of the proceedings and appropriate behavior on the part of both court and counsel are of paramount importance. Judges should heed how they are perceived and perhaps discuss this matter with other judges, counsel or other individuals within the legal community. The trial management conference, once again, is an appropriate time to review the court's concern, especially if the court has developed "trial procedures or guidelines" that not only cover trial matters but also discuss behavior of counsel. It is submitted that judges do have a responsibility to address counsel's behavior. One only has to read the decision in *Dondi Properties Corp. v. Commerce Sav. & Loan Ass'n*, 121 F.R.D. 284 (N.D. Tex. 1988), to understand this concern. Individual judges, districts or states may well wish to adopt the "standards of practice" that this court felt should be observed by attorneys. While all of the "standards of practice" are important, the following specifically apply to this discussion:

(A) In fulfilling his or her primary duty to the client, a lawyer must be ever conscious of the broader duty to the judicial system that serves both attorney and client.

(B) A lawyer owes to the judiciary candor, diligence and utmost respect.

(C) A lawyer owes to opposing counsel a duty of courtesy and cooperation, the observance of which is necessary for the efficient administration of our system of justice and the respect of the public it serves.

(D) A lawyer unquestionably owes to the administration of justice the fundamental duties of personal dignity and professional integrity.

(E) Lawyers should treat each other, the opposing party, the court, and the members of the court staff with courtesy and civility and conduct themselves in a professional manner at all times.

(F) A client has no right to demand that counsel abuse the opposite party or indulge in offensive conduct. A lawyer shall always treat adverse witnesses and suitors with fairness and due consideration.

(G) In adversary proceedings, clients are litigants and though ill feelings may exist between clients, such ill feeling should not influence a lawyer's conduct, attitude, or demeanor towards opposing lawyers.

(H) Lawyers should be punctual in scheduled appearances and recognize that tardiness is demeaning to the lawyer and to the judicial system.

(I) Effective advocacy does not require antagonistic or obnoxious behavior, and members of the bar will adhere to the higher standard of conduct which judges, lawyers, clients, and the public may rightfully expect.

## 9. Judges should be receptive to using technology in managing the trial and the presentation of evidence.

Commentary: There have been numerous technological advances available to assist court and counsel in the effective and expeditious presentation of evidence. Testimony can be presented by video tape, witnesses can testify by telephone or microwave television hookups, and exhibits can likewise be produced in court through electronic means! Future technology will be able to assist in presenting complicated testimony and hopefully solve many problems of witness availability as we know them today. Computer aided transcript displays testimony on a screen which can be read by a "deaf" party, juror, or witness. Similar equipment can be used to translate testimony into a foreign language or allow a handicapped individual to present testimony. Translators perform "simultaneous translation," which is transmitted to many individuals. The court can often delegate to counsel in advance of trial the responsibility of obtaining the necessary equipment.

There is no doubt the The method or manner of recording trial proceedings will change. Judges should insist that any changes or advances enhance their ability to conduct trial proceedings and give them appropriate flexibility in being able to conduct trial proceedings.

—— There are judges who are computer literate and use computers in the courtroom to take notes, obtain legal research, and access jury instructions from other courts. In the future more and more judges will be able to use computers and other equipment to advance the purpose of a trial and the role of a judge as a trial manager in ways not imagined at this time.

It is difficult to describe particular equipment, uses or even predict advances that may occur in the future. It is important, however, that as such developments occur, the technology serve the purpose of conducting an effective trial. Evolving technology will require continuous review and exchange of information among judges; and may become one of the most important areas of judicial education.

Another area of concern is "evidence" that is being artificially produced through the use of technology. Judges will have to become informed in order to make decisions as to the reliability or admissibility of this evidence. Thus, while technology may provide some options to solve court problems, there is no doubt it will also create new and different issues for the court to address in the future.

# Believe It or Not

## By Mark Hansen

Louise Robbins had but one claim to fame: She could see things in a footprint that nobody else could see.

Give her a ski boot and a sneaker, for instance, and Robbins contended that she could tell whether the two shoes had ever been worn by the same person.

Show her even a portion of a shoeprint on any surface, Robbins maintained, and she could identify the person who made it.

It might sound amusing, coming as it did from an anthropology professor who once astounded her colleagues by describing a 3.5 million-year-old fossilized footprint in Tanzania as that of a prehistoric woman who was 5½ months pregnant.

It might also be considered harmless, had it remained a subject of academic speculation at the University of North Carolina at Greensboro, where Robbins taught anthropology courses and collected footprints from her students for comparison.

By 1976, however, Robbins had taken her quirky ideas out of the classroom and into the courtroom, where her amazing feet-reading abilities seemed to dazzle juries and made her something of a celebrity on the criminal trial circuit. Newspapers called her a female "Quincy." She was profiled in the *ABA Journal*. Her techniques were even touted in the pages of *Time* magazine.

By her own account, Robbins appeared as an expert, mostly for the prosecution, in more than 20 criminal cases in 11 states and Canada over the next 10 years until a losing battle with brain cancer finally forced her off the witness stand. She died in 1987 at the age of 58. By then, her testimony had helped send at least a dozen people to prison. And it may have put one man on death row.

There's just one catch. Robbins was the only person in the world who claimed to do what she said she did. And her claims have now been thoroughly debunked by the rest of the scientific community.

Melvin Lewis, a John Marshall Law School professor who keeps track of more than 5,000 expert witnesses, dismisses Robbins' work as "complete hogwash."

"It barely rises to the dignity of nonsense," he said.

And FBI agent William Bodziak, one of the world's leading authorities on footprints, said that Robbins' theories were totally unfounded.

"Nobody else has ever dreamed of saying the kinds of things she said," he explained.

Robbins' story, as reported last year by the CBS news program "48 Hours," provides a graphic illustration of how far some prosecutors and defense lawyers are willing to go to find an expert witness to bolster a case. It also shows how easily one self-proclaimed expert with little or no credence in the scientific community can make a mockery out of the criminal justice system.

"It's frightening to me that something like that could go as far as it did," said Lewis, who runs a school-sponsored referral service that puts lawyers in touch with qualified experts. "Her so-called evidence was so grotesquely ridiculous, it's necessary to say to yourself, if that can get in, what can't?"

Today, nearly six years after her death, some of the legal ramifications of Robbins' testimony are still being felt.

Stephen Buckley, who spent three years in an Illinois jail awaiting trial for the 1983 murder of a 10-year-old Chicago-area girl, is suing prosecutors for allegedly violating his civil rights.

Buckley's first trial, in 1985, ended in a hung jury, despite Robbins' testimony that a bootprint left on the victim's kicked-in front door had been made by him. He was freed in 1987, but only because Robbins was then too sick to testify at his retrial.

Dale Johnston is also suing prosecutors after spending six years on Ohio's death row, due at least in part to Robbins, for the 1982 murders of his teen-age stepdaughter and her fiancé.

Robbins testified at Johnston's 1984 trial that a muddy impression in the cornfield where the victims' dismembered bodies were found came from the heel of Johnston's cowboy boot. He was released from prison in 1990 after an appeals court ruled that the boots on which Robbins based her testimony couldn't be used against him.

Yet Buckley and Johnston might consider themselves lucky, in light of what has happened to Vonnie Ray Bullard.

Bullard is still serving a life sentence in a North Carolina prison for the 1981 murder of another man after Robbins testified that a bare footprint outlined in the victim's blood was his. Having exhausted his appeals, based largely on Robbins' testimony, Bullard won't be eligible for parole until the year 2001.

*Mark Hansen is a reporter for the* ABA Journal.

## How much of an expert does an expert witness have to be?

Other experts can match feet with footprints or shoes with shoeprints, provided that the two samples being compared share enough of the same ridge details or random characteristics. But Robbins was alone in claiming that she could tell whether a person made a particular print by examining any other shoes belonging to that individual.

Robbins built her reputation on the theory that footprints, like fingerprints, are unique. It was her contention that, because of individual variations in the way people stand and walk, everyone's foot will leave a distinct impression on any surface, including the inside sole of his or her shoe. Those impressions, she contended, show up as "wear patterns" on the bottom of every shoe.

"Footprints are better indicators for identifying people than fingerprints," Robbins told the *ABA Journal* in July 1985. "With a footprint, you use the entire bottom surface of the foot. With the fingerprint, you only use the tip of the finger."

Robbins' claims were hotly contested from the moment she first set foot in a courtroom. Shortly before her death, a panel of more than 100 forensic experts concluded that her footprint identification techniques didn't work. In hindsight, her theories may seem patently absurd.

In fact, many of her colleagues have been saying as much since 1978, when Robbins joined a scientific expedition at Laetoli, Tanzania, then the site of one of the most important archaeological discoveries ever made. During that expedition, according to her colleagues, Robbins misidentified one set of prehistoric human footprints as belonging to an antelope and concluded that another set of footprints had been made by the prehistoric woman who was 5 1/2 months pregnant. She also claimed to have found fossilized cobwebs that other members of the expedition said did not exist.

Tim White, an anthropology professor at the University of California at Berkeley who was also a member of the expedition, said it was hard enough to determine that the footprints they found were indeed human. But it was impossible to tell if any of the prints had been made by a woman, let alone one who was 5 1/2 months pregnant, he said.

"Her observations were unreliable, she was overly imaginative and she was incredibly suggestible regarding the interpretation of evidence," White said. "She kept saying things that could not be documented, and for very good reason. It was all in her mind."

"It truly reveals her as someone who was willing to go to any extremes to come up with an interesting story," said University of Chicago anthropology professor Russell Tuttle, who has studied Robbins' work and appeared opposite her in court. "She'd say anything anybody wanted her to say."

But that didn't keep Robbins from being qualified as an expert, with no known exceptions, from the time she first testified for the prosecution in the arson trial of a Pennsylvania man in 1976 until her last known appearance in court, once again as a prosecution witness, at the 1986 murder trial of a Chicago man.

In some cases, like Bullard's, her testimony may have been cumulative. In other cases, like Buckley's and Johnston's, it constituted the only physical evidence linking the defendant to the crime.

Prosecutors usually succeeded

William Bodziak says Robbins' ideas were totally unfounded.

ABAJ/LISA BERG

in getting her testimony admitted by portraying Robbins as a pioneer in a new field of science and by putting on testimonials as to her character and credentials from one or two of her peers. One prosecutor noted that it took 400 years for Galileo's theories to win acceptance. Another pointed out that fingerprint evidence also was considered a new science just 80 years ago.

Since Robbins had no competition, her testimony was difficult to refute. But defense lawyers depicted her variously as a fraud, a charlatan, an opportunist and a hired gun. And they presented other experts who testified that there was no scientific basis for any of the claims she made.

By her own admission, Robbins never took or taught a course on shoeprint identification techniques or the wear patterns of shoes. She never conducted a blind test of her abilities, published her findings in a scientific journal or submitted her work to peer review. And she never accounted for such things as manufacturing differences in shoewear construction, dynamic changes in a person's foot or the effect of various surfaces on the quality of a shoeprint.

"She may well have believed what she was saying," said C. Owen Lovejoy, an anthropology professor at Kent State University who testified on behalf of Buckley, "but the scientific basis for her conclusions was completely fraudulent."

Tuttle said he concluded after hearing her testify at a 1983 murder trial in Winnipeg that Robbins was "either a crook or a self-deluded quack."

Robbins didn't always testify for the prosecution and her testimony didn't always win the case for the side that hired her. On the other hand, she was always willing to make a positive identification that nobody else was willing or able to make, and her conclusions consistently supported the case of the side for which she was testifying.

Several lawyers cite her testimony on behalf of the defendant in a North Carolina murder trial in 1985 as one of the most telling examples of her work. Other witnesses had testified that they saw the defendant go into a dry cleaning store where a clerk was murdered and come out a few minutes later. And the state's own experts had matched two bloody shoeprints in the store with the defendant's shoes.

But Robbins testified that the shoeprints had been made by two people other than the defendant, both of whom were wearing the same size shoes as the defendant.

The defendant was subsequently convicted and sentenced to death, but was awaiting resentencing in May as a result of a 1990 ruling by the U.S. Supreme Court holding that North Carolina's capital sentencing scheme was unconstitutional. *McKoy Jr. v. North Carolina*, 110 S. Ct. 1227.

Bodziak never saw those prints. But he did examine the same evidence as Robbins in two cases. And both times, the FBI expert concluded that Robbins was flat out wrong.

In Johnston's case, Robbins and Bodziak both compared three plaster casts of bootprints taken at the scene of the murders with three pairs of cowboy boots belonging to the defendant. Both agreed that two of the prints could not have been made by the defendant's boots.

The third print was unidentifiable to Bodziak, who said he couldn't even determine through computer enhancement if the impression had been made by a boot or a bare foot. Yet Robbins positively identified the print as having come from the left heel of one of Johnston's boots.

"There was nothing there," Bodziak said. "There was no evidence whatsoever of any recognizable portion of a boot. It literally looked like they had poured plaster over a bunch of rocks."

In Buckley's case, Bodziak and Robbins both compared the defendant's boots with the bootprint left on the victim's front door. Robbins said the print was definitely Buckley's. Bodziak says it definitely was not.

"They're different in a lot of ways," Bodziak said of the two samples. "They don't even come close" to matching.

To this day, Robbins still has at least one supporter who backs her work unequivocally.

Thomas Knight, a former Illinois prosecutor who used Robbins as an expert in the case against Buckley, describes her as one of the least controversial experts he has ever encountered. The fact that she alone could do what she did, he says, is a testament to her ability, dedication and hard work.

"I would rank her credibility as a witness and her integrity as a scientist right at the top," he said.

Knight, who now has a private civil practice outside of Chicago, also

Stephen Buckley was freed after spending three years in jail.

ABAJ/DAVID PADWIN

contends that Robbins has been made a scapegoat by a collection of people with ulterior motives, primarily those who hope to discredit her testimony as a means of getting the convictions she helped secure overturned.

Bodziak has his own ax to grind, Knight suggests, because Robbins was able to identify footprints that he couldn't identify, an assertion that the FBI expert flatly denies.

"She was a terrific person who's been terribly maligned by some of the things that have been said about her," Knight said. "I think it's really sad, and I intend to do whatever I can to set the record straight."

"I don't think he has any other choice" but to defend Robbins,

Bodziak responded. "Maybe he really believes her."

Even some of Robbins' once-staunchest defenders now express doubts about the validity of her work.

Ellis Kerley, a retired professor of anthropology at the University of Maryland who used to vouch for Robbins' abilities on the witness stand, today concedes that he was "a little surprised" by some of the things she said in court.

"The question you have to ask in any scientific examination is whether the interpretation has gone beyond the underlying data," he said. "It strikes me that that must be what happened in Louise's case."

Courts have different standards for the admission of scientific evidence. Many state and federal courts still follow the so-called Frye rule, named after a landmark federal appeals court decision in 1923 barring the use of results from an early form of lie detector test against a criminal defendant. *Frye v. U.S.*, 293 F. 1013.

Under the Frye rule, expert testimony must be based on a well-recognized scientific principle or discovery that has "gained general acceptance in the particular field in which it belongs" in order to be admitted.

Since 1975, however, when Congress enacted new rules of evidence, several state and federal courts have liberalized the standards governing the use of expert witnesses. Those rules essentially permit any expert who is qualified in his or her field to testify in a case, as long as the testimony is relevant and it helps the jury understand the evidence or determine the facts.

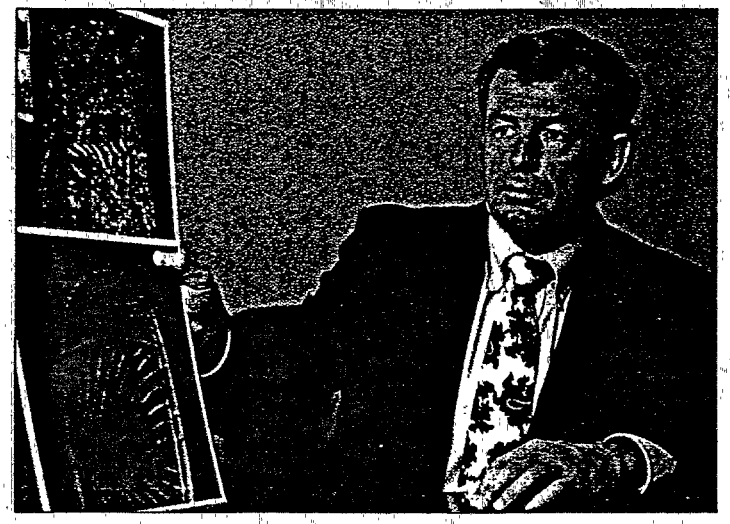
Critics of the 1975 rules contend that what they call the "let it all in" approach to the admission of expert testimony has allowed the courts to become mired in all sorts of unsubstantiated scientific claims and dubious forms of expertise. They say that judges and juries are too easily swayed by the likes of someone like Robbins, a grandmotherly professor with the right academic credentials, a scientist's demeanor and a matter-of-fact delivery on the witness stand.

But proponents of the more flexible standard argue that much of the evidence needed to prove a scientific claim in court is generally regarded as being on the cutting edge of science. They point out that much of what is universally accepted as science today was once considered to be outside of the scientific mainstream. And they suggest that judges and juries are fully capable of making the distinction between a legitimate scientific claim and an unfounded one.

The appellate record on Robbins is mixed.

In 1980, a California appeals court upheld the conviction of a man whom she linked to the rape, robbery and assault of three elderly women through shoeprints left at the scene of the crimes, finding that Robbins was an expert in her field. *People v. Barker*, 113 C.A.3d 743.

Bullard's conviction also was affirmed in 1984 by the North Carolina Supreme Court. It held that new scientific methods are admissible if they are reliable, which it said was the case with respect to Robbins' techniques. Any rebuttal testimony, the court said, goes to the weight of the evidence, not to its admissibility. *State v. Bullard*, 312 N.C. 129.



Thomas Knight calls Robbins 'a terrific person who's been terribly maligned.'

ABAJ/DAVID PADWIN

Under that standard, which remains in effect, Robbins could still testify in North Carolina if she were alive today, according to Carl Barrington Jr., Bullard's defense lawyer.

But not in Illinois. An appeals court there threw out the conviction of a man on murder, armed robbery, sexual assault and home invasion charges in 1988 on the grounds that Robbins' techniques didn't meet the "general acceptance" test set forth in *Frye*. *People v. Ferguson*, 172 Ill. App. 3d 1.

"While there is arguably a scientific basis in Robbins' theory (i.e., measurement techniques), her theory is not only not generally accepted in her scientific community, but is also not shared with any other member of her field," the court said.

Johnston's conviction also was overturned by an Ohio appeals court in 1986, but not on the basis of Robbins' testimony. The court held that Robbins met the test of admissibility under the state's rules of evidence, which require that expert testimony be "relevant and helpful to the finders of fact." *State v. Johnston*, 1986 WL 8799 (Ohio App.).

The judge at Johnston's second trial suppressed the boots, along with other evidence he found had been illegally obtained, in a ruling that was affirmed by an appeals court in 1990.

Now the U.S. Supreme Court has agreed to enter the debate by taking up the case of *Daubert v. Merrell Dow Pharmaceuticals*, the culmination of a 10-year battle in the federal courts over the admissibility of evidence alleging to show that the anti-nausea drug Bendectin causes birth defects.

The case stems from the dismissal of two federal suits against Merrell Dow, the maker of Bendectin, brought by the parents of two San Diego boys who were born with birth defects. Those suits were dismissed after two California courts refused to allow a jury to hear evidence purportedly linking the mothers' use of the drug during pregnancy with their sons' birth defects.

The narrow issue before the Court in *Daubert* is whether Congress' adoption of the new evidence rules in 1975 supersedes the judicially created Frye rule of 70 years ago. But the Court is widely expected to set a definitive standard for the admission of scientific evidence or, at the very least, clear up some of the confusion and inconsistency that exist now.

Although the decision will apply only to the federal courts, most state courts look to the High Court for guidance.

The Court heard oral arguments in the case on March 30. A ruling is expected by early summer. ■

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



SUPPLEMENT E



# Memorandum

TO: Chairmen and Reporters of the Advisory Committees

FROM: Daniel R. Coquillette, Reporter
Mary P. Squiers, Consultant

RE: Federal Rules Amendments Concerning Local Rules and Technical Amendments, Including Committee Notes

DATE: February 5, 1993

At our lunch meeting in Asheville, North Carolina, last month, the Chairmen and Reporters of the Advisory Committees agreed on precise language for rule amendments concerning local rules and technical amendments. The need for uniform committee notes on these rules was also discussed. We have set out the language for the proposed rules below. We have also set out committee notes that we believe accurately reflect the views of those present at the lunch meeting.

It is our understanding that each of the Advisory Committees will consider these rules and notes at their respective winter or spring 1993 meetings.

If you have any questions or comments about this material, please feel free to contact either one of us (Dan: (617) 552-4340; Mary: (617) 552-8851).

## Technical and Conforming Amendments

The Judicial Conference of the United States may amend these rules to correct errors in spelling, cross-references, or typography, or to make technical changes needed to conform these rules to statutory changes.

Committee Note

This rule is added to enable the Judicial Conference to make minor technical amendments to these rules without having to burden the Supreme Court and Congress with reviewing such changes. This delegation of authority will relate only to uncontroversial, nonsubstantive matters.

Uniform Numbering of Local Rules

Local rules must conform to any uniform numbering system prescribed by the Judicial Conference of the United States.

Committee Note

This rule requires that the numbering of local rules conform with any uniform numbering system that may be prescribed by the Judicial Conference. Lack of uniform numbering might create unnecessary traps for counsel and litigants. A uniform numbering system would make it easier for an increasingly national bar and for litigants to locate a local rule that applies to a particular procedural issue.

Procedure When There is No Controlling Law

A judge may regulate practice in any manner consistent with federal ~~statutes~~ laws, rules, [official forms],* and ~~with~~ local rules of the district. No sanction or other disadvantage may be imposed for noncompliance with any requirement not in federal ~~statutes~~ laws, rules, [official forms],* or the local district rules unless the alleged violator has actual notice of the requirement.

* Bankruptcy Rules only

Committee Note

This rule provides flexibility to the court in regulating practice when there is no controlling law. Specifically, it permits the court to regulate practice in any manner consistent with Acts of Congress, with rules adopted under [insert appropriate enabling legislation], [in bankruptcy cases: with Official Forms,] and with the district's local rules.

This rule recognizes that courts rely on multiple directives to control practice. Some courts regulate practice through the published Federal Rules and the local rules of the court. In the past, some courts have also used internal operating procedures, standing orders, and other internal directives. This can lead to problems. Counsel or litigants may be unaware of various directives. In addition, the sheer volume of directives may impose an unreasonable barrier. For example, it may be difficult to obtain copies of the directives. Finally, counsel or litigants may be unfairly sanctioned for failing to comply with a directive. For these reasons, this Rule disapproves imposing any sanction or other disadvantage on a person for noncompliance with such an internal directive, unless the alleged violation has actual notice of the requirement.

There should be no adverse consequence to a party or attorney for violating special requirements relating to practice before a particular judge unless the party or attorney has actual notice of those requirements. Furnishing litigants with a copy outlining the judge's practices--or attaching instructions to a notice setting a case for conference or trial--would suffice to give actual notice, as would an order in a case specifically adopting by reference a judge's standing order and indicating how copies can be obtained.

SECTION II EVID 9/10/93

TO: Members of the Advisory Committee on Federal Rules of Evidence

FROM: Margaret A. Berger, Reporter

RE: Rule 404

DATE: September 21, 1993

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I. Organization of discussion. After a brief overview of the scope of the rule, its rationale, and the central criticisms that it has provoked, this memorandum turns to possible amendments to Rule 404 that have been grouped into three categories:

A. Altering the Scope of Rule 404(a). Should the prohibited propensity inference incorporated in Rule 404(a) continue to apply in all criminal and civil cases subject to the three specific exceptions contained in subdivision (a)(1)-(3)? Three possible changes are considered: 1. modifying the propensity rule in cases in which defendant has been charged with a crime of a sexual nature; 2. modifying the rule or the exceptions to the rule in civil cases; 3. eliminating the bar on propensity evidence when defendant seeks to show another person's propensity to commit the crime with which defendant is charged.

B. Making Procedural Changes in Rule 404(b). Discussed are possible changes affecting the second sentence of subdivision (b): 1. altering the standard of proof that now applies to Rule 404(b) evidence as a result of the Supreme Court's decision in Huddleston v. United States, 485 U.S. 681 (1988); 2. clarifying that the issue to which the other crimes evidence is directed must be controverted; 3. miscellaneous changes.

C. Making Plainer the Current Meaning of Rule 404 and the Advisory Committee Note. Should an attempt be made to clarify the language of the rule even if the Committee chooses not to undertake any substantive changes? To what extent, if

any, may the Committee Note be revised if no changes are made in the text of the rule?

II. General Background: The Scope and Rationale of the Rule.

Rule 404(a) restates the traditional propensity rule: evidence of a person's character, whether manifested through convictions, uncharged misconduct, or specific characteristics, is not admissible when it is offered solely so that the fact finder may infer that the person acted in conformity with his or her character on the occasion in question. Character evidence does not fall within the prohibition of Rule 404 if it is offered pursuant to an evidential hypothesis that does not entail drawing a propensity inference. See Rule 404(b). Rule 404 is subject to three exceptions stated in subdivision (a): 1. an accused may, subject to limitations, introduce evidence of good character to show that he could not have committed the charged act, and the prosecution may respond to this evidence; 2. under some circumstances evidence of a victim's character may be introduced; 3. evidence of a witness' character for veracity is at times admissible subject to the rules in Article VI of the Federal Rules.

Rule 404, like the other quasi-privilege rules in Article IV, rests on relevancy and policy considerations: 1. doubt about the probative value of past acts in predicting the future;[1] and 2. concern that prejudice is inevitable once the jury becomes aware that a party has committed similar acts in the past. In criminal cases -- in which the danger of prejudice is most acute -- Rule 404 promotes constitutional objectives. The

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[1] Edward J. Imwinkelreid, The Evolution of the Use of the Doctrine of Chances as Theory of Admissibility for Similar Fact Evidence, Anglo-American Review 73, 76 (1993) ("The psychological literature indicates that character is a relatively poor predictor of conduct.").

evidentiary rule works in tandem with the privilege against self-incrimination to ensure that the accused must be proven guilty. Rule 404 assumes that once a defendant's criminal past becomes known, the jury will either punish him for prior transgressions, or will be distracted from properly assessing the evidence relating to the charged crime.[2]

The chief general criticisms voiced about the propensity rule are: 1. Rule 404(a) exacts too high a price by excluding highly probative evidence of the type on which we act in our every day lives. The strength of this argument varies somewhat depending on the particular act sought to be proved. See discussion infra. 2. Rule 404(a) is ineffectual because jurors undoubtedly draw a propensity inference even when evidence is admitted, as it often is, pursuant to a hypothesis that does not rest on a relationship between character and conduct.[3] Consequently, as the prohibited inference frequently creeps in anyway, the propensity rule is not worth keeping, particularly since it generates more reported cases than any other provision in the Federal Rules of Evidence. 3. Although the propensity rule exists in all Anglo-American jurisdictions, studies of reported opinions indicate a pronounced tendency to avoid the rule's prohibition in particular types of cases, such as those involving sexual misconduct or narcotics prosecutions. Inconsistencies of this sort breed contempt for the law.

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[2] See id. at 73 (empirical studies indicate that trier more likely to find adversely to the defendant once it learns about prior misconduct).

[3] Roger C. Park, "Other Crimes" Evidence in Sex Offense Cases 7 (manuscript dated 6/25/93) ("instructing a jury to follow only the permitted thought-path is like telling someone to ignore every taste in a Hershey bar except the nuts.").

## III. Possible Amendments

### A. Changing the Scope of Rule 404.

#### 1. Sex Crime Prosecutions.

a. Background. As reported out of committee in May 1993, S.11, the Violence Against Women Act contains a provision directing the Judicial Conference, within 180 days after enactment, to complete a study and make "recommendations for amending Federal Rule of Evidence 404 as it affects the admission of evidence of a defendant's prior sex crimes in cases . . . involving sexual misconduct." As of this writing, no further action has been taken with regard to S.11.

The commentary that follows is not the study mandated by the bill, (see Attachment A) since such a study would obviously be premature at this time. The discussion below does not survey the admissibility of prior similar sexual misconduct under state and federal evidentiary rules, and does not consider all of the specific issues commanded by S.11. Analyses of state practices and the desirability of changing the propensity rule in sex crimes cases are considered in two articles now awaiting publication which are included as Appendix A to provide additional background information. The authors have agreed to make them available to the Committee at this time.

The discussion below focuses on the central question of whether the propensity rule should be modified to permit evidence of a defendant's prior sexual misconduct in a sex crime prosecution. This inquiry, already a topic of considerable debate because of heightened attention to crimes of rape and child sexual abuse, has heated up even more

because of recent events involving celebrities, such as the highly publicized rape trials of William Kennedy Smith and Mike Tyson, and the charges against Woody Allen. Furthermore, legal commentators have long observed that in these kinds of cases some jurisdictions employ special rules to admit propensity evidence, and that courts tend to interpret overly expansively the categories pursuant to which prior acts evidence is admitted on a non-propensity inference.[4] See The Admission of Criminal Histories at Trial, 22 U. Mich. J.L.Ref. 713, 723-24 (1989) (reprint of paper prepared by the Office of Legal Policy, U.S. Dep't of Justice). Most of the relevant decisions have, of course, been rendered in state courts, as relatively few cases of sexual assault or child molestation are heard in federal courts.

S.6, which has been introduced in Congress and referred to the Judiciary Committee, would add Rules 413, 414, and 415 to the Federal Rules of Evidence. (see Attachment B) These proposed new rules provide that in sexual assault cases, child molestation cases, and civil cases concerning sexual assaults or child molestation, evidence that the party accused of these acts has previously committed a similar act is admissible whenever relevant. In a rape prosecution, for instance, Rule 413 would admit evidence that defendant had committed an uncharged sexual offense as making it more probable that he committed the charged crime.

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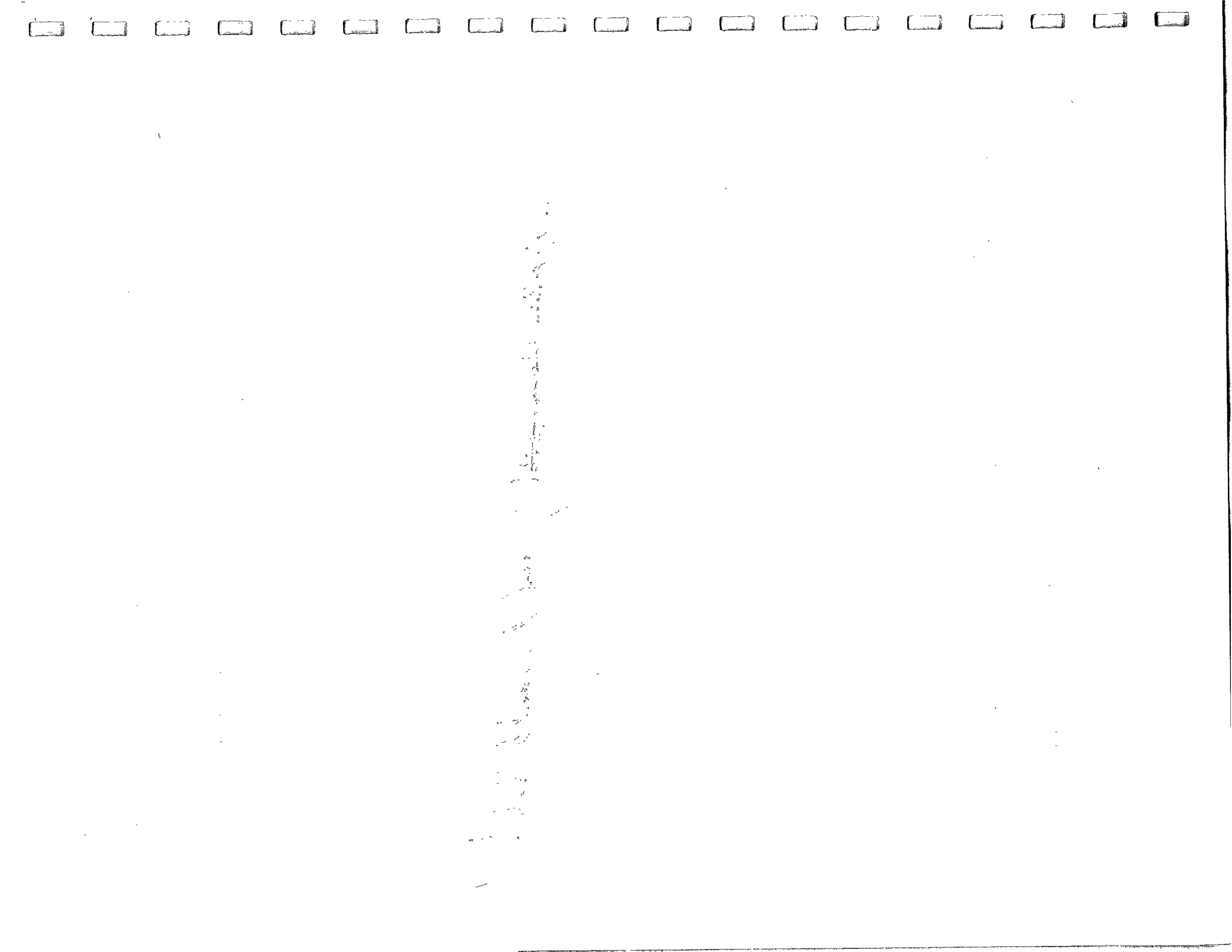
[4] The same argument -- that Rule 404(b) is cited to admit other crimes evidence mechanically, without analysis -- has been made with regard to conspiracy cases and narcotics prosecutions. See, e.g., J. Weinstein & M. Berger, Weinstein's Evidence par. 404[09] at pp. 404-58-59 and par. 404[12] at pp. 404-74-404-75. See also the discussion of narcotics prosecutions in United States v. Gordon, 987 F.2d 902 (2d Cir. 1993).



The proposed rules raise a number of serious issues which are discussed below. Some of these objections apply to any modification of the propensity rule in sexual assault cases, but others pertain more particularly to the pending version and could be mitigated.

b. The slippery slope. If the probative value of, and need for, propensity evidence in other criminal cases is of the same magnitude as it is in sexual offense cases, then carving out an exception for sexual offense cases will undermine the continued viability of the propensity rule in general. Although proponents of proposals to admit uncharged acts in sex offense cases argue that this evidence is particularly probative -- that the likelihood of a sexual offender committing another similar crime is remarkably high -- the empirical evidence supporting this conclusion is problematic.[5] Despite anecdotal evidence, the argument does not even seem particularly convincing in the case of certain kinds of sexual offenders such as pedophiles.[6] Furthermore, whether the rate of recidivism for sexual offenders is higher than for certain types of professional criminals is debatable.[7]

If the federal rules are amended to authorize the admission of uncharged sexual

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[5] Blackshaw, Furby & Weinrott, Sexual Offender Recidivism: A Review, 105 Psychological Bulletin, No.1 (1989) (concludes that despite large number of studies of sex offender recidivism we know little about it because of methodological flaws that enable one to "conclude anything one wants.").

[6] Romero & Williams, Recidivism Among Convicted Sex offenders: A Ten Year Follow Up Study, 49 Federal Probation 58, 62 (reported that rearrest rate for sexual assaulters is 10.4% and for pedophiles 6.2%).

[7] Id. (researchers found that non-sex offenders had a consistently higher rearrest rate than sex offenders).

offenses because of their allegedly high probative value, the door will be opened to overturning the propensity rule in other types of cases in which probative value is arguably high. Whether such a fundamental change in American jurisprudence is desirable needs to be considered. Whether the federal system should encourage such a shift by amending Rule 404 to deal with a kind of case rarely found in the federal courts is questionable. It should also be noted that some very recent state decisions have refused to admit uncharged misconduct evidence in sex offense prosecutions. See Getz v. State, 538 A.2d 726 (Del. 1988); State v. Zyback, 93 Ore.App. 218, 761 P.2d 1334 (1988), rev'd on other grounds, 308 Or. 96, 775 P.2d 318 (1989); Lannan v. State, 600 N.E.2d 1334 (1992).

c. The ease with which the uncharged act can be established. In Huddleston v. United States, 485 U.S. 681 (1988), the Supreme Court held that in order for evidence of uncharged offenses to be admissible under Rule 404(b), the trial judge must only find, pursuant to Rule 104(b), that a jury could reasonably conclude by a preponderance of the evidence that the defendant had committed the prior act. This standard may not adequately protect the defendant from evidence that jurors tend to overvalue, particularly if the definition of what constitutes a prior sexual assault is as broad as proposed in S.6. While it may be difficult to prove sexual offenses, it is also difficult to counter false accusations. When an alleged victim is willing to testify, or has made a statement that overcomes hearsay objections, the test of Huddleston is probably met. Of course, if Huddleston is abandoned in favor of a higher standard (see discussion infra), this objection will not apply.

Furthermore, Huddleston should perhaps not apply. The Supreme Court in Huddleston was concerned with non-propensity evidence admitted pursuant to subdivision (b). Evidence of prior sexual misconduct would be admitted as an exception to the propensity prohibition in subdivision (a). The existing exceptions to subdivision (a) offer no guidance about the appropriate burden because Rule 405 allows proof by reputation or opinion only. Presumably, given all the problems with evidence of prior sexual misconduct, one could require a preliminary determination by the court pursuant to Rule 104(a) as a condition to admitting such evidence. Whether a standard higher than the usual preponderance of the evidence should be required would also have to be decided.

Another possible solution would be to limit the use of prior misconduct to instances in which there has been a conviction. This modification would relieve jurors of having to cope with the collateral issue of whether defendant committed the uncharged act, and defendant of having to mount a defense with regard to uncharged crimes. Of course, such a limitation would cut down enormously on the cases in which evidence of prior sexual misconduct would be usable. It must also be remembered that some acts of sexual misconduct are so unique that they are properly admissible pursuant to Rule 404(b) even under the present rule.

d. The interaction with Rule 412. Although the propensity rule incorporated in Rule 404 is probably not constitutionally required, constitutional difficulties might arise were propensity evidence relating to the defendant's prior sexual conduct proffered in a case in which the prosecution invoked Rule 412 to bar the same

kind of evidence against the complainant. A judge might well find that under these circumstances, the evidence offered against the complainant "is constitutionally required to be admitted" pursuant to Rule 412(b)(1) of the Federal Rules of Evidence.[8] Allowing the prosecution to make use of an evidentiary principle while simultaneously restraining the defendant from introducing probative evidence is constitutionally suspect. Cf. Chambers v. Mississippi, 410 U.S. 284 (1973).

If, in order to avoid constitutional difficulties, judges permit defendants to introduce evidence of complainants' past sexual behavior, the result may well be that which Rule 412 seeks to avoid -- an unwillingness on the part of victims of sexual assaults to bring charges. Aside from undermining the rationale of Rule 412, this outcome would be directly contrary to the objective sought by those who advocate elimination of the propensity rule in sexual misconduct prosecutions in the hope of obtaining more convictions.

2. Civil Cases. By stating without any limitation that "evidence of a person's character or a trait of character is not admissible" to prove propensity, Rule 404(a) makes the prohibition applicable to all cases including civil cases. In contrast, the word "accused" in subdivisions (a)(1) and (a)(2) indicates that the exceptions apply only in criminal cases. This reading of Rule 404(a) is supported by the Advisory Committee Note which states quite clearly that evidence of conduct may not be used for a propensity inference in civil cases and that the exceptions stated in subdivisions (a)(1)

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[8] Our pending amendment to Rule 412 provides in subdivision (b)(1)(C) for the admission in criminal cases of "evidence the exclusion of which would violate the constitutional rights of the defendant."

and (a)(2) do not apply, The Advisory Committee defended its extension of the propensity rule to civil cases because of character evidence's low probative value and tendency to cause prejudice; it was unwilling to extend the defendant's option to introduce evidence of good character for fear of opening the door to psychological evaluations and testing.

Despite the clear mandate of Rule 404(a), an occasional federal court has indicated a willingness to extend the exceptions to a civil case if the conduct at issue is criminal. See, e.g., Bolton v. Tesoro Petroleum Corp., 871 F.2d 1267 (5th Cir.) (civil RICO; evidence admissible in a trial raising quasi-criminal allegations), cert. denied, 110 S.Ct. 83 (1989); Perrin v. Anderson, 784 F.2d 1040, 1044 (10th Cir. 1986) ("Although the literal language of the exception to Rule 404(a) applies only to criminal cases, . . .when the central issue involved in a civil case is in nature criminal the defendant may invoke the exceptions to Rule 404(a)."); Crumpton v. Confederation Life Ins. Co., 672 F.2d 1248, 1253-54 & n. 7 (5th Cir. 1982) (action on accidental death policy where insured had been shot by woman who claimed he raped her; beneficiary allowed to introduce evidence of insured's good character; court affirmed "when evidence would be admissible under Rule 404(a) in a criminal case, we think it should also be admissible in a civil suit where the focus is on essentially criminal aspects, and the evidence is relevant, probative, and not unduly prejudicial;" alternative holding).

The Committee might wish to reconsider the original Advisory Committee's conclusion, taking into account whether legal developments since 1975 justify a recasting of the propensity rule in civil cases. For instance, does the increased reliance on quasi-

criminal measures such as civil RICO and forfeiture proceedings make a difference, or an increase in intentional tort actions which furnish the closest analogy to criminal misconduct?

A number of the states have revised Rule 404(a) to deal specifically with problems posed by civil cases. See 1 Trial Evidence Committee, Section of Litigation, American Bar Association, Evidence in America: The Federal Rules in the States § 14.2 at pp. 4-5 (1992). The Texas rule broadens the (a)(1) exception to allow proof of good character in all instances involving accusations of moral turpitude whether in a civil or criminal case. and extends the (a)(2) exception to the character of victims of assaultive conduct in civil actions:

> (1) **Character of party accused of conduct involving moral turpitude.** Evidence of a pertinent trait of his character offered by a party accused of conduct involving moral turpitude, or by the accusing party to rebut the same;
> (2) **Character of alleged victim of assaultive conduct.** Evidence of character for violence of the alleged victim of assaultive conduct offered on the issue of self-defense by a party accused of the assaultive conduct or evidence of peaceable character to rebut the same.

3. A Third Party's Propensity. Read literally, Rule 404(a) excludes evidence relating to any person's character when offered for a propensity inference. See United States v. McCourt, 925 F.2d 1229, 1235 (9th Cir. 1991) (rule applies "to any person, and to any proponent"). In a criminal case, when the accused wishes to introduce character evidence to suggest that someone else was the perpetrator of the charged crime, concerns that propensity evidence will undermine defendant's presumption of innocence obviously are inapplicable. Rather, strict utilization of Rule 404 will deprive the accused of exculpatory evidence regardless of its probative value

even though it might engender a reasonable doubt. Few cases have dealt with this issue; sometimes the evidence proffered by defendant is found to satisfy Rule 404(b). See, e.g., United States v. Aboumoussallem, 726 F.2d 906 (2d Cir. 1984) (defendant who claimed that he had been duped into smuggling by his cousins wanted to show that his cousins had duped others; court found that evidence satisfied Rule 404(b) but not Rule 403). Should the propensity bar be removed when an accused seeks to introduce character evidence relating to a third person so that admissibility will be governed by Rules 401 and 403 rather than Rule 404?

B. Amendments to Rule 404(b).

1. Changing the burden of proof. Until the Supreme Court's decision in Huddleston v. United States, 485 U.S. 681 (1988), there was a conflict in the circuits as to the height of the prosecution's burden in proving the other crime, and as to whether Rule 104(a) or (b) applied. The Supreme Court resolved the issue by holding that the trial judge need not make a finding with regard to other crimes evidence; rather, pursuant to Rule 104(b), the court "simply examines all the evidence in the case and decides whether the jury could reasonably find the conditional fact . . .by a preponderance of the evidence."

There are critics who argue that the Huddleston standard does not afford the accused sufficient protection. The American Bar Association's Criminal Justice Section has urged abandonment of Huddleston in favor of a clear and convincing standard, and its position has been endorsed by the A.B.A.'s House of Delegates.[9] A number of states

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[9] See E.J. Imwinkelreid, Uncharged Misconduct Evidence § 2:08 (1993 Supplement).

have refused to adopt Huddleston in construing their own versions of Rule 404. See, e.g., State v. Faulker, 314 Md. 630 (1989). The Court of Appeals of Maryland, Standing Committee on Rules of Practice and Procedure has recently stated that it "intends to make no change in Maryland Law." Report at 37 (1993). Minnesota added a sentence to its Rule 404 after Huddleston:

> In a criminal prosecution, such evidence shall not be admitted unless the other crime, wrong, or act and the participation in it by a relevant person are proven by clear and convincing evidence.

Congress, however, may well wish to retain the status quo. Whether Huddleston should be extended to proof of prior sexual misconduct if such evidence is allowed as an exception to the propensity rule is discussed supra.

2. Clarifying whether the evidence must relate to a disputed issue. The courts are divided about the extent to which a consequential fact must be controverted in order for other crimes evidence to be admissible to prove that fact. A subsidiary issue on which courts disagree is whether the defendant has the right to preclude the prosecution from proffering other crimes evidence by offering to stipulate to the consequential fact to which the evidence is relevant. The Supreme Court by-passed the opportunity to clarify the stipulation issue when it dismissed its writ of certiorari in United States v. Hadley, 918 F.2d 848 (9th Cir. 1990) as improvidently granted. The stipulation issue is extensively discussed in E. Imwinkelreid, supra at §§ 8:10-8:15.

The words "if controverted" do not presently appear in Rule 404, although they do in Rule 407. Consequently, it is arguable that the plain-meaning of Rule 404(b) does not condition the admissibility of other crimes evidence on the defense having created an

actual dispute -- through evidence or other means such as an opening statement -- about the consequential fact to which the evidence is offered. The differences in the circuits is most apparent in connection with the issue of intent. Some courts allow other crimes evidence whenever specific, as compared to general intent, is a required element. See, e.g., United States v. Briscoe, 896 F.2d 1476 (7th Cir.), cert. denied, 111 S.Ct. 173 (1990); United States v. Engelman, 648 F.2d 473, 478 (8th Cir.1981). However, the nature of some crimes is such that no genuine issue of intent exists because of the inference that arises from the criminal act itself. Allowing other crimes evidence in such circumstances invites a propensity inference. See, United States v. Kramer, 955 F.2d 479, 492-93 (7th Cir. 1992) (Cudahy, J. concurring) (criticism of specific intent distinction). Other courts require the issue of intent to be seriously disputed and refuse to allow other crimes evidence when, for example, the defendant claims that he did not commit the charged act. See, e.g., United States v. Figueroa, 618 F.2d 934, 940 (2d Cir. 1980)..

The Supreme Court's opinion in Estelle v. McGuire, 112 S.Ct. 475 (1991), a habeas corpus challenge to a California conviction, contains dictum that provides some ammunition for concluding that the prosecutor is free to introduce other crimes evidence even when the defendant has failed to raise an issue concerning the fact which the evidence seeks to prove. In a prosecution charging defendant with the murder of his infant daughter, the prosecution offered evidence that she was a battered child. The Court of Appeals had ruled that this evidence should have been excluded because defendant did not raise a defense of accidental death. The Supreme Court disagreed:

> [T]he prosecution's burden to prove every element of the crime is not relieved by a defendant's tactical decision not to contest an essential element of the offense. In the federal courts "[a] simple plea of not guilty...puts the prosecution to its proof as to all elements of the crime charged." Matthews v. United States, 485 U.S. 58, 64-65 (1988).

Id. at 475.

Is this an issue we wish to address? For instance, the words "if controverted" could be added to Rule 404(b) after the words "mistake or accident."

Tennessee requires that upon request the judge must hold a hearing outside the jury's presence and at that hearing

> The court must determine that a material issue exists other than conduct conforming with a character trait and must upon request state on the record the material issue, the ruling, and the reasons for admitting the evidence;

Tenn R. Evid. 404(b)(2).

3. Other suggestions. Should one add a ten year limitation to Rule 404(b) analogous to that contained in Rule 609(b) regarding the use of convictions for impeachment? Should the rule add language aimed at distinguishing between "other" or "extrinsic" acts versus the "same" or "intrinsic" acts. Some recent codifications have attempted to deal with this issue. Louisiana has added the following language at the end of Rule 404(b):

> , or when it relates to conduct that constitutes an integral part of the act or transaction that is the subject of the present proceeding.

Kentucky has added a second subdivision to Rule 404(b) that deals with this issue somewhat differently:

> (2) If so inextricably intertwined with other evidence essential to the case that separation of the two (2) could not be accomplished without serious adverse effect on the offering party.

C. Amendments Aimed at Clarification of the Existing Rule. This section considers whether any changes should be made in the text of Rule 404 or the Committee Note to make them more comprehensible even if the Committee does not wish to affect the current meaning of the rule. Since the Committee has never had an opportunity to discuss the costs and benefits of revising rules in the interest of intelligibility, I have proceeded in the following manner. Rather than redrafting Rule 404 before knowing the Committee's views on when clarification is worth the risk of inadvertently creating unanticipated problems, I have instead categorized different kinds of possible changes so that we can consider general principles as well as specific changes. The sample amendments to Rule 404 which are set forth are intended more as illustrations of issues than as recommendations about specific language that should be adopted if the Committee determines to resolve the difficulty in question.

1. Enhancing plain-meaning. Into this category I have slotted possible changes that would make the intended plain-meaning of the rule plainer. Law professors would perhaps agree that the scope of Rule 404, and its interrelationship with Rule 405, often elude the casual reader.

a. Should the rule deal more comprehensively with character? Would lawyers better understand the scope of Rule 404 if the rule dealt with character evidence more comprehensively. Rule 404 prohibits the inferential or circumstantial use of evidence to prove conduct in conformity with character except in three specified circumstances. Subdivision (b) explicitly acknowledges that this general prohibition is inapplicable when evidence is offered to prove something other than character so that no

inference from character to conduct is entailed. The text of Rule 404 does not, however, explicitly state that the rule is equally inapplicable when a person's character is directly relevant without an inference about his or her conduct. Whether this is adequately clear is problematic despite being mentioned in the current Committee Note.

Oregon has changed the title of its Rule 404 to read: Character Evidence: Admissibility. It then adds a new first subdivision:

> (1) **Admissibility generally.** Evidence of a person'scharacter or trait of character is admissible when it is an essential element of a charge, claim or defense.[10]

A more ambitious undertaking would be to redraft Rule 404 to make clearer the difference between inferential and non-inferential use, and to tie the methods of proof more directly to the various ways in which evidence relating to a defendant's character may be used.[11]

b. Is the rule sufficiently clear as to when character evidence is admissible? Advisory Committee Note to Rule 404 (a) states:

> Character questions arise in two fundamentally different ways. (1) Character may itself be an element of a crime, claim, or defense. A situation of this kind is commonly referred to as "character in issue." Illustrations are: the chastity of the victim under a statute specifying her chastity as an element of the crime of seduction, or the competency of the driver in an action for negligently entrusting

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[10] Montana has adopted a similar provision as the last subdivision in Rule 404 but without a change in the caption of the rule to indicate that it is dealing with character evidence in general.

[11] See Glen Weissenberger, Character Evidence Under the Federal Rules: A Puzzle with Missing Pieces, 48 Cincinnati L. Rev. 1, 12 (1979). Professor Weissenberger's proposal which combines Rules 404 and 405 is attached. See Attachment C.

a motor vehicle to an incompetent driver.[12]

The Note further states that allowable methods of proof are dealt with in Rule 405. That rule refers to "cases in which character, or a trait of character of a person is an essential element of a charge, claim or defense." (emphasis added)

Is this language misleading? The formulation of "essential elements" in Rule 405 and the illustrations in the Rule 404 Note about formal "elements" of causes of action, suggest that something more is intended than character being a "fact that is of consequence." See Rule 401. Although reported opinions do not indicate that courts insist on anything other than a showing of relevancy, the departure from the language of Rule 401 may suggest that something more is required of a proponent. The Bar's discomfort with the meaning of an "essential elements" test was apparent when we discussed Rule 412.

If the Committee wishes to make Rule 404's treatment of character evidence more comprehensive by adding a provision that character evidence offered to prove something other than propensity is admissible (see a. supra), the formulation must be coordinated with Rule 405. Consequently, the "essential claims" phrase would have to be retained if Rule 405 is not amended.

c. Is Rule 404's treatment of civil cases adequate? This discussion is concerned with the clarity of the rule with regard to civil cases rather than with its wisdom which is discussed supra. Rule 404 makes two somewhat indirect statements

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[12] The terminology, "character in issue," is also used in connection with the very different situation codified in subdivision (a)(1) when the accused is allowed to introduce evidence of his good character.

about the inferential use of character evidence in civil cases. The Advisory Committee's intent is clearly expressed in the accompanying Note. By stating without any limitation that "evidence of a person's character or a trait of character is not admissible" to prove propensity, the Rule makes the general prohibition applicable to civil cases. By using the word "accused" in subdivisions (a)(1) and (a)(2), it limits the two exceptional circumstances in which the propensity inference is usable to criminal cases. One could make both of these points explicitly. Adding "in a criminal case" to the exceptions (if that is the desired rule) would eliminate arguments that "accused" means the defendant in a civil case.

d. Is the relationship between subdivision (a) and subdivision (b) sufficiently clear? Is it helpful that the first sentence of subdivision (b) restates the general rule of subdivision (a)? One consequence is that courts at times quote this sentence and cite subdivision (b) when they are they are solely concerned with analyzing the scope of the propensity rule. The case is then classified in annotations, etc. as a Rule 404(b) case. Furthermore, the repetition in (b) perhaps obscures the difference between a propensity and non-propensity inference, and promotes the erroneous impression that subdivision (b) is an exception to subdivision (a).

2. Codifying Supreme Court holdings. There is precedent for amending the Evidence Rules to incorporate Supreme Court holdings; both the Civil and Criminal Rules of Procedure have at times been amended to codify a Supreme Court holding.[13]

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[13] For instance, the work product rule in Fed.R.Civ.P. 26 has its genesis in Hickman v. Taylor, 329 U.S. 495 (1947) and Criminal Rule 26.2 was in part a response to United States v. Nobles, 422 U.S. 225 (1975).

Most evidence courses now teach evidence as a code subject, and the multi-state bar exam is based on the Federal Rules of Evidence. Failing to incorporate a significant decision of the Supreme Court that is essential to understanding and using a particular rule may therefore mislead the advocate who expects to find everything in the Rules. On the other hand, additional codification will make the rules more prolix.

Possible candidates for codification are Huddleston v. United States, 485 U.S. 681 (1988), see supra and Dowling v. United States, 493 U.S. 342 (1990) (evidence of crimes of which defendant has been acquitted may be admitted pursuant to Rule 404(b). Huddleston is the far more significant opinion since its holding applies in every case in which Rule 404(b) evidence is proffered, and a number of states interpret identical versions of Rule 404 differently. See discussion supra and see 1 Trial Evidence Committee, Section of Litigation, American Bar Association, Evidence in America: The Federal Rules in the States § 14.2 (1992). A sentence with a cross-reference to Rule 104(b) could be added to the end of subdivision (b), or a comment could be added to the Note. The need to codify Dowling is considerably less.

3. Adding cross-references. Rule 404 currently contains cross-references to Rules 607, 608 and 609 in subdivision (a)(3). Subdivision (a)(2) should perhaps state that it is subject to Rule 412 since it clearly is. See Iowa and Texas Rule 412. A cross-reference to Rule 405 might also be desirable to clarify the relationship between Rules 404 and 405. See discussion of Rule 405.

4. Revising the notes. In a previous memorandum I questioned whether we are free to issue new notes if we make no changes in a rule. Assuming that we may make

changes (either in conjunction with amendments to the text of the Rule or otherwise), we need to consider the type of changes we would wish to undertake.

a. Correcting errors. The third paragraph of the Note is clearly wrong in light of Rule 412 in the example it gives of evidence of the character of the victim being admissible on the issue of consent in a rape case.

b. Updating case law developments. The extent to which one should update references in the Committee Note is particularly troublesome with a rule like 404 which has engendered so much commentary both in the courts and legal literature. For instance, an entire treatise is devoted solely to Rule 404(b). Do we want to include references to helpful secondary materials? even if their authors are members of the Evidence Committee?

S. 11 — Violence Against Women Act

611

**SEC. 611 REPORT ON FEDERAL RULE OF EVIDENCE 404**

(request of full Judiciary Committee)

**(a) STUDY. – Not later than 180 days after the date of enactment of this Act, the Judicial Conference shall complete a study of, and shall submit to Congress, recommendations for amending Federal Rule of Evidence 404 as it affects the admission of evidence of a defendant's prior sex crimes in cases brought pursuant to chapter 109A or other cases involving sexual misconduct.**

**(b) SPECIFIC ISSUES. – This study shall include, but is not limited to, consideration of the following issues: (1) a survey of existing law on the introduction of prior similar sex crimes under state and federal evidentiary rules; (2) a recommendation about whether Rule 404 should be amended to introduce evidence of prior sex crimes and, if so, (a) whether such acts could be used to prove the defendant's "propensity" to act therewith and (b) whether prior similar sex crimes should be admitted for purposes other than to show character; (3) a recommendation about whether similar acts, if admitted, should meet a threshold of similarity to the crime charged; (4) a recommendation about whether similar acts, if admitted, should be confined within a certain time period, (e.g. 10 years); and (5) the effect, if any, of the adoption of any proposed changes on the admissibility of evidence under Rule 412, the rape shield law.**



ATTACHMENT A

new baby, or an aging parent with a serious medical problem. That worker's presence in the home for the time it takes to get the family through the situation will make a difference not only in the worker's peace of mind during the crisis, but in her or his ability to do their job well for months and years after they return to work.

Mr. President, as much as I have been proud and pleased to support family and medical leave legislation for the past several years, I will be even more happy to see this bill with a public law number assigned to it. Those Members or Congress and organizations who have put in yeomans' service in this effort can then move on to other pressing issues facing American families. Thank you, Mr. President.●

Mrs. BOXER. Mr. President, it has been a long difficult fight, but today we stand a few short steps from victory. We now have a Congress that will pass the Family and Medical Leave Act and a President who has agreed to sign it into law. I am proud to be an original cosponsor of this legislation.

The Family and Medical Leave Act, which provides families with job security at a time when they most need it, is long overdue. No worker should be subject to termination for taking time off to care for a sick child. I believe that not only will this bill institute more humane workplace policies, it will make workers more productive by eliminating the prospect that they would leave to choose between their families and their jobs.

I urge my colleagues to join me in working for fast action on the Family and Medical Leave Act.

## By Mr. DOLE (for himself, Mr. THURMOND, Mr. SIMPSON, Mr. MCCAIN, Mr. SPECTER, and Mr. COVERDELL):

S. 6. A bill to prevent and punish sexual violence and domestic violence, to assist ad protect the victims of such crimes, to assist State and local effects, and for other purposes; to the Committee on the Judiciary.

### SEXUAL ASSAULT PREVENTION ACT OF 1993

Mr. DOLE. Mr. President, as I stated earlier, I am joined today by several of my Republican colleagues in introducing the Sexual Assault Prevention Act of 1993.

As is my right as Republican leader, I have asked that this bill be designated as "S. 6," symbolizing the fact that this bill is a top priority of Senate Republicans. This legislation is also being introduced in the House by Congresswoman SUSAN MOLINARI of New York.

I first introduced legislation similar to S. 6 in February of 1991—nearly 2 years ago. I reintroduced the legislation last fall. I know that Senator BIDEN is also very interested in this issue, and hope we can work together to write legislation that will protect women from crime in the streets and crime in their own home.

The bill contains three titles. Title I is concerned with violent sex crimes. Subtitle A of title I increases penalties for sexual violence and strengthens the rights and remedies available to victims of sexual violence.

Subtitle B contains changes in rules of evidence, practice, and procedure to facilitate effective prosecution of violent sex offenders, and to prevent abuse of victims and increase the rights of victims.

Subtitle C addresses the problem of sexual assaults at colleges and universities.

Subtitle D contains new justice assistance measures to enhance State and Local efforts against sexual violence.

Title II of the bill concerns domestic violence, stalking, and offenses against the family. It strengthens the Federal response to domestic violence, stalking, and noncompliance with child support obligations in cases with interstate elements, requires reports on a number of issues of importance to protecting the victims of domestic violence, and establishes a new justice assistance program to enhance State and local efforts to combat domestic violence and stalking, and to enforce child support obligations.

Title III of the bill establishes a national task force on violence against women. The task force would carry out a comprehensive examination of violent crime against women and recommend additional reforms and improvements.

I look forward to working with the distinguished chairman of the Judiciary Committee in finding common ground in our legislative proposals, and seeing them adopted into law.

I ask unanimous consent that the text of the bill and any additional statements be printed in the CONGRESSIONAL RECORD.

There being no objection, the material was ordered to be printed in the RECORD, as follows:

S. 6

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,*

**SECTION 1. SHORT TITLE.**

This Act may be cited as the "Sexual Assault Prevention Act of 1993".

**SEC. 2. TABLE OF CONTENTS.**



TITLE I—SEXUAL VIOLENCE

SUBTITLE A—PENALTIES AND REMEDIES

**SEC. 101. PRE-TRIAL DETENTION IN SEX OFFENSE CASES.**

Section 3156(a)(4) of title 18, United States Code, is amended by striking ", or" at the end of subparagraph (A) and inserting a semicolon, by striking the period at the end of subparagraph (B) and inserting "; or", and by adding after subparagraph (B) the following new subparagraph:

"(C) any felony under chapter 109A or chapter 110 of this title."

**SEC. 102. DEATH PENALTY FOR MURDERS COMMITTED BY SEX OFFENDERS.**

Title 18 of the United States Code is amended—

(a) by adding the following new section at the end of chapter 51:

**"§ 1118. Capital Punishment for Murders Committed by Sex Offenders**

"(a) OFFENSE.—Whoever—

ATTACHMENT B

"(1) causes the death of a person intentionally, knowingly, or through recklessness manifesting extreme indifference to human life; or

"(2) causes the death of a person through the intentional infliction of serious bodily injury;

shall be punished as provided in subsection (c) of this section.

"(b) FEDERAL JURISDICTION.—There is Federal jurisdiction over an offense described in this section if the conduct resulting in death occurs in the course of another offense against the United States.

"(c) PENALTY.—An offense described in this section is a Class A felony. A sentence of death may be imposed for an offense described in this section as provided in subsections (d)–(l), except that a sentence of death may not be imposed on a defendant who was below the age of eighteen at the time of the commission of the crime.

"(d) MITIGATING FACTORS.—In determining whether to recommend a sentence of death, the jury shall consider whether any aspect of the defendant's character, background, or record or any circumstance of the offense that the defendant may proffer as a mitigating factor exists, including the following factors:

"(1) MENTAL CAPACITY.—The defendant's mental capacity to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law was significantly impaired.

"(2) DURESS.—The defendant was under unusual and substantial duress.

"(3) PARTICIPATION IN OFFENSE MINOR.—The defendant is punishable as a principal (pursuant to section 2 of this title) in the offense, which was committed by another, but the defendant's participation was relatively minor.

"(e) AGGRAVATING FACTORS.—In determining whether to recommend a sentence of death, the jury shall consider any aggravating factor for which notice has been provided under subsection (f), including the following factors—

"(1) KILLING IN COURSE OF DESIGNATED SEX CRIMES.—The conduct resulting in death occurred in the course of an offense defined in chapter 109A, 110, or 117 of this title.

"(2) KILLING IN CONNECTION WITH SEXUAL ASSAULT OR CHILD MOLESTATION.—The defendant committed a crime of sexual assault or crime of child molestation, as defined in subsection (x), in the course of an offense on which federal jurisdiction is based under subsection (b).

"(3) PRIOR CONVICTION OF SEXUAL ASSAULT OR CHILD MOLESTATION.—The defendant has previously been convicted of a crime of sexual assault or crime of child molestation as defined in subsection (x).

"(f) NOTICE OF INTENT TO SEEK DEATH PENALTY.—If the government intends to seek the death penalty for an offense under this section, the attorney for the government shall file with the court and serve on the defendant a notice of such intent. The notice shall be provided a reasonable time before the trial or acceptance of a guilty plea, or at such later time before trial as the court may permit for good cause. If the court permits a late filing of the notice upon a showing of good cause, the court shall ensure that the defendant has adequate time to prepare for trial. The notice shall set forth the aggravating factor or factors set forth in subsection (e) and any other aggravating factor or factors that the government will seek to prove as the basis for the death penalty. The factors for which notice is provided under this subsection may include factors concerning the effect of the offense on the victim and the victim's family. The court may permit the attorney for the government to amend the notice upon a showing of good cause.

"(g) JUDGE AND JURY AT CAPITAL SENTENCING HEARING.—A hearing to determine whether the death penalty will be imposed for an offense under this section shall be conducted by the judge who presided at trial or accepted a guilty plea, or by another judge if that judge is not available. The hearing shall be conducted before the jury that determined the defendant's guilt if that jury is available. A new jury shall be impaneled for the purpose of the hearing if the defendant pleaded guilty, the trial of guilt was conducted without a jury, the jury that determined the defendant's guilt was discharged for good cause, or reconsideration of the sentence is necessary after the initial imposition of a sentence of death. A jury impaneled under this subsection shall have twelve members unless the parties stipulate to a lesser number at any time before the conclusion of the hearing with the approval of the judge. Upon motion of the defendant, with the approval of the attorney for the government, the hearing shall be carried out before the judge without a jury. If there is no jury, references to "the jury" in this section, where applicable, shall be understood as referring to the judge.

"(h) PROOF OF MITIGATING AND AGGRAVATING FACTORS.—No presentence report shall be prepared if a capital sentencing hearing is held under this section. Any information relevant to the existence of mitigating factors, or to the existence of aggravating factors for which notice has been provided under subsection (f), may be presented by either the government or the defendant. The information presented may include trial transcripts and exhibits. Information presented by the government in support of factors concerning the effect of the offense on the victim and the victim's family may include oral testimony, a victim impact statement that identifies the victim of the offense and the nature and extent of harm and loss suffered by the victim and the victim's family, and other relevant information. Information is admissible regardless of its admissibility under the rules governing the admission of evidence at criminal trials except that information may be excluded if its probative value is outweighed by the danger of creating unfair prejudice, confusing the issues, or misleading the jury. The attorney for the government and for the defendant shall be permitted to rebut any information received at the hearing, and shall be given fair opportunity to present argument as to the adequacy of the information to establish the existence of any aggravating or mitigating factor, and as to the appropriateness in that case of imposing a sentence of death. The attorney for the government shall open the argument, the defendant shall be permitted to reply, and the government shall then be permitted to reply in rebuttal.

"(i) FINDINGS OF AGGRAVATING AND MITIGATING FACTORS.—The jury shall return special findings identifying any aggravating factor or factors for which notice has been provided under subsection (f) and which the jury unanimously determines have been established by the government beyond a reasonable doubt. A mitigating factor is established if the defendant has proven its existence by a preponderance of the evidence, and any member of the jury who finds the existence of such a factor may regard it as established for purposes of this section regardless of the number of jurors who concur that the factor has been established.

"(j) FINDING CONCERNING A SENTENCE OF DEATH.—If the jury specially finds under subsection (i) that one or more aggravating factors set forth in subsection (e) exist, and the jury further finds unanimously that there are no mitigating factors or that the aggravating factor or factors specially found under subsection (i) outweigh any mitigating factors, then the jury shall recommend a sentence of death. In any other case, the jury shall not recommend a sentence of death. In any other case, the jury shall not recommend a sentence of death. The jury shall be instructed that it must avoid any influence of sympathy, sentiment, passion, prejudice, or other arbitrary factors in its decision, and should make such a recommendation as the information warrants.

"(k) SPECIAL PRECAUTION TO ASSURE AGAINST DISCRIMINATION.—In a hearing held before a jury, the court, before the return of a finding under subsection (j), shall instruct the jury that, in considering whether to recommend a sentence of death, it shall not be influenced by prejudice or bias relating to the race, color, religion, national origin, or sex of the defendant or any victim, and that the jury is not to recommend a sentence of death unless it has concluded that it would recommend a sentence of death for such a crime regardless of the race, color, religion, national origin, or sex of the defendant or any victim. The jury, upon the return of a finding under subsection (j), shall also return to the court a certificate, signed by each juror, that the race, color, religion, national origin, or sex of the defendant or any victim did not affect the juror's individual decision and that the individual juror would have recommended the same sentence for such a crime regardless of the race, color, religion, national origin, or sex of the defendant or any victim.

"(l) IMPOSITION OF A SENTENCE OF DEATH.—Upon a recommendation under subsection (j) that a sentence of death be imposed, the court shall sentence the defendant to death. Otherwise the court shall impose a sentence, other than death, that is authorized by law.

"(m) REVIEW OF A SENTENCE OF DEATH.—The defendant may appeal a sentence of death under this section by filing a notice of appeal of the sentence within the time provided for filing a notice of appeal of the judgment of conviction. An appeal of a sentence under this subsection may be consolidated with an appeal of the judgment of conviction and shall have priority over all non-capital matters in the court of appeals. The court of appeals shall review the entire record in the case including the evidence submitted at trial and information submitted during the sentencing hearing, the procedures employed in the sentencing hearing, and the special findings returned under subsection (i). The court of appeals shall uphold the sentence if it determines that the sentence of death was not imposed under the influence of passion, prejudice, or any other arbitrary factor, that the evidence and information support the special findings under subsection (i), and that the proceedings were otherwise free of prejudicial error that was properly preserved for and raised on appeal. In any other case, the court of appeals shall remand the case for reconsideration of the sentence or imposition of another authorized sentence as appropriate, except that the court shall not reverse a sentence of death on the ground that an aggravating factor was not supported by the evidence and information if at least one aggravating factor set forth in subsection (e) which was found to exist remains and the court, on the basis of the evidence submitted at trial and the information submitted at the sentencing hearing, finds no mitigating factor or finds that the remaining aggravating factor or factors which were found to exist outweigh any mitigating factors. The court of appeals shall state in writing the reasons for its disposition of an appeal of a sentence of death under this section.

"(n) IMPLEMENTATION OF SENTENCE OF DEATH.—A person sentenced to death under this section shall be committed to the custody of the Attorney General until exhaus-

tion of the procedures for appeal of the judgment of conviction and review of the sentence. When the sentence is to be implemented, the Attorney General shall release the person sentenced to death to the custody of a United States Marshal. The Marshal shall supervise implementation of the sentence in the manner prescribed by the law of the State in which the sentence is imposed, or in the manner prescribed by the law of another State designated by the court if the law of the State in which the sentence was imposed does not provide for implementation of a sentence of death. The Marshal may use State or local facilities, may use the services of an appropriate State or local official or of a person such an official employs, and shall pay the costs thereof in an amount approved by the Attorney General.

"(o) SPECIAL BAR TO EXECUTION.—A sentence of death shall not be carried out upon a woman while she is pregnant.

"(p) CONSCIENTIOUS OBJECTION TO PARTICIPATION IN EXECUTION.—No employee of any State department of corrections, the Federal Bureau of Prisons, or the United States Marshals Service, and no person providing services to that department, bureau, or service under contract shall be required, as a condition of that employment or contractual obligation, to be in attendance at or to participate in any execution carried out under this section if such participation is contrary to the moral or religious convictions of the employee. For purposes of this subjection, the term 'participate in any execution' includes personal preparation of the condemned individual and the apparatus used for the execution, and supervision of the activities of other personnel in carrying out such activities.

"(q) APPOINTMENT OF COUNSEL FOR INDIGENT CAPITAL DEFENDANTS.—A defendant against whom a sentence of death is sought, or on whom a sentence of death has been imposed, under this section, shall be entitled to appointment of counsel from the commencement of trial proceedings until one of the conditions specified in subsection (v) has occurred. If the defendant is or becomes financially unable to obtain adequate representation, counsel shall be appointed for trial representation as provided in section 3005 of this title, and at least one counsel so appointed shall continue to represent the defendant until the conclusion of direct review of the judgment, unless replaced by the court with other qualified counsel. Except as otherwise provided in this section, the provisions of section 3006A of this title shall apply to appointments under this section.

"(r) REPRESENTATION AFTER FINALITY OF JUDGMENT.—When a judgment imposing a sentence of death under this section has become final through affirmance by the Supreme Court on direct review, denial of certiorari by the Supreme Court on direct review, or expiration of the time for seeking direct review in the court of appeals or the Supreme Court, the government shall promptly notify the court that imposed the sentence. The court, within 10 days of receipt of such notice, shall proceed to make a determination whether the defendant is eligible for appointment of counsel for subsequent proceedings. The court shall issue an order appointing one or more counsel to represent the defendant upon a finding that the defendant is financially unable to obtain adequate representation and wishes to have counsel appointed or is unable competently to decide whether to accept or reject appointment of counsel. The court shall issue an order denying appointment of counsel upon a finding that the defendant is financially able to obtain adequate representation or that the defendant rejected appointment of counsel with an understanding of the consequences of that decision. Counsel appointed pursuant to this subsection shall be different from the counsel who represented the defendant at trial and on direct review unless the defendant and counsel request a continuation or renewal of the earlier representation.

"(s) STANDARDS FOR COMPETENCE OF COUNSEL.—In relation to a defendant who is entitled to appointment of counsel under subsections (q)–(r), at least one counsel appointed for trial representation must have been admitted to the bar for at least 5 years and have at least three years of experience in the trial of felony cases in the Federal district courts. If new counsel is appointed after judgment, at least one counsel so appointed must have been admitted to the bar for at least 5 years and have at least 3 years of experience in the litigation of felony cases in the Federal courts of appeals or the Supreme Court. The court, for good cause, may appoint counsel who does not meet these standards, but whose background, knowledge, or experience would otherwise enable him or her to properly represent the defendant, with due consideration of the seriousness of the penalty and the nature of the litigation.

"(t) CLAIMS OF INEFFECTIVENESS OF COUNSEL IN COLLATERAL PROCEEDINGS.—The ineffectiveness of incompetence of counsel during proceedings on a motion under section 2255 of title 28, United States Code, shall not be a ground for relief from the judgment or sentence in any proceeding. This limitation shall not preclude the appointment of different counsel at any stage of the proceedings.

"(u) TIME FOR COLLATERAL ATTACK ON DEATH SENTENCE.—A motion under section 2255 of title 28, United States Code, attacking a sentence of death under this section, or the conviction on which it is predicated, must be filed within 90 days of the issuance of the order under subsection (r) appointing or denying the appointment of counsel for such proceedings. The court in which the motion is filed, for good cause shown, may extend the time for filing for a period over all non-capital matters in the district court, and in the court of appeals on review of the district court's decision.

"(v) STAY OF EXECUTION.—The execution of a sentence of death under this section shall be stayed in the course of direct review of the judgment and during the litigation of an initial motion in the case under section 2255 of title 28, United States Code. The stay shall run continuously following imposition of the sentence and shall expire if—

"(1) the defendant fails to file a motion under section 2255 of title 28, United States Code, within the time specified in subsection (u), fails to make a timely application for court of appeals review following the denial of such a motion by a district court;

"(2) upon completion of district court and court of appeals review under section 2255 of title 28, United States Code, the Supreme Court disposes of a petition for certiorari in a manner that leaves the capital sentence undisturbed, or the defendant fails to file a timely petition for certiorari; or

"(3) before a district court, in the presence of counsel and after having been advised of the consequences of such a decision, the defendant waives the right to file a motion under section 2255 of title 28, United States Code.

"(w) FINALITY OF THE DECISION ON REVIEW.—If one of the conditions specified in subsection (v) has occurred, no court thereafter shall have the authority to enter a stay of execution or grant relief in the case unless—

"(1) the basis for the stay and request for relief is a claim not presented in earlier proceedings;

"(2) the failure to raise the claim is the result of governmental action in violation of the Constitution or laws of the United States, the result of the Supreme Court's recognition of a new Federal right that is retroactively applicable, or the result of the fact that the factual predicate of the claim could not have been discovered through the exercise of reasonable diligence in time to present the claim in earlier proceedings; and

"(3) the facts underlying the claim would be sufficient, if proven, to undermine the court's confidence in the determination of guilt on the offense or offenses for which the death penalty was imposed.

"(x) DEFINITIONS.—For purposes of this section—

"(1) 'crime of sexual assault' means a crime under Federal or State law that involved—

"(A) contact, without consent, between any part of the defendant's body or an object and the genitals or anus of another person;

"(B) contact, without consent, between the genitals or anus of the defendant and any part of the body of another person;

"(C) deriving sexual pleasure or gratification from the infliction of death, bodily injury, or physical pain on another person; or

"(D) an attempt or conspiracy to engage in any conduct described in paragraphs (A)–(C);

"(2) 'crime of child molestation' means a crime under Federal or State law that involved—

"(A) contact between any part of the defendant's body or an object and the genitals or anus of a child;

"(B) contact between the genitals or anus of the defendant and any part of the body of a child;

"(C) deriving sexual pleasure or gratification from the infliction of death, bodily injury, or physical pain on a child; or

"(D) an attempt or conspiracy to engage in any conduct described in paragraphs (A)–(C); and

"(3) 'child' means a person below the age of 16."; and

(b) by adding the following at the end of the table of sections for chapter 51:

"1118. Capital Punishment for Murders Committed by Sex Offenders.".

SEC. 103. INCREASED PENALTIES FOR RECIDIVIST SEX OFFENDERS.—

(a) Section 2245 of title 18, United States Code, is redesignated section 2246.

(b) Chapter 109A of title 18, United States Code, is amended by inserting the following new section after section 2244:

"2245. Penalties for subsequent offenses.

"Any person who violates a provision of this chapter after a prior conviction under a provision of this chapter or the law of a State (as defined in section 513 of this title) for conduct proscribed by this chapter has become final is punishable by a term of imprisonment up to twice that otherwise authorized.".

(c) The table of sections for chapter 109A of title 18, United States Code, is amended by—

(1) striking "2245" and inserting in lieu thereof "2246"; and

(2) inserting the following after the item relating to section 2244:

"2245. Penalties for subsequent offenses.".

SEC. 104. INCREASED PENALTIES FOR SEX OFFENSES AGAINST VICTIMS BELOW THE AGE OF 16.—

Paragraph (2) of section 2245 of title 18, United States Code, is amended—

(1) in subparagraph (B) by striking "or" after the semicolon;

(2) in subparagraph (C) by striking "; and" and inserting in lieu thereof "; or"; and

(3) by inserting a new subparagraph (D) as follows:

"(D) the intentional touching, not through the clothing, of the genitalia of another person who has not attained the age of 16 years with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person;".

SEC. 105. SENTENCING GUIDELINES INCREASE FOR SEX OFFENSES.

The United States Sentencing Commission shall amend the sentencing guidelines to increase by at least 4 levels the base offense level for an offense under section 2241 (aggravated sexual abuse) or section 2242 (sexual abuse) of title 18, United States Code, and shall consider whether any other changes are warranted in the guidelines provisions applicable to such offenses to ensure realization of the objectives of sentencing. In amending the guidelines in conformity with this section, the Sentencing Commission shall review the appropriateness and adequacy of existing offense characteristics and adjustments applicable to such offenses, taking into account the heinousness of sexual abuse offenses, the severity and duration of the harm caused to victims, and any other relevant factors. In any subsequent amendment to the sentencing guidelines, the Sentencing Commission shall maintain minimum guidelines sentences for the offenses referenced in this section which are at least equal to those required by this section.

SEC. 106. HIV TESTING AND PENALTY ENHANCEMENT IN SEXUAL OFFENSE CASES.

(a) Chapter 109A of title 18, United States Code, is amended by inserting at the end the following new section:

**"§ 2247. Testing for Human Immunodeficiency Virus; Disclosure of Test Results to Victim; Effect on Penalty**

"(a) TESTING AT TIME OF PRE-TRIAL RELEASE DETERMINATION.—In a case in which a person is charged with an offense under this chapter, a judicial officer issuing an order pursuant to section 3142(a) of this title shall include in the order a requirement that a test for the human immunodeficiency virus be performed upon the person, and that follow-up tests for the virus be performed six months and twelve months following the date of the initial test, unless the judicial officer determines that the conduct of the person created no risk of transmission of the virus to the victim, and so states in the order. The order shall direct that the initial test be performed within 24 hours, or as soon thereafter as feasible. The person shall not be released from custody until the test is performed.

"(b) TESTING AT LATER TIME.—If a person charged with an offense under this chapter was not tested for the human immunodeficiency virus pursuant to subsection (a), the court may at a later time direct that such a test be performed upon the person, and that follow-up tests be performed six months and twelve months following the date of the initial test, if it appears to the court that the conduct of the person may have risked transmission of the virus to the victim. A testing requirement under this subsection may be imposed at any time while the charge is pending, or following conviction at any time prior to the person's completion of service of the sentence.

"(c) TERMINATION OF TESTING REQUIREMENT.—A requirement of follow-up testing imposed under this section shall be canceled if any test is positive for the virus or the person obtains an acquittal on, or dismissal of, all charges under this chapter.

"(d) DISCLOSURE OF TEST RESULTS.—The results of any test for the human immunodeficiency virus performed pursuant to an order under this section shall be provided to the judicial officer or court. The judicial officer or court shall ensure that the results are disclosed to the victim (or to the victim's parent or legal guardian, as appropriate), the attorney for the Government, and the person tested.

"(e) EFFECT ON PENALTY.—The United States Sentencing Commission shall amend existing guidelines for sentences for offenses under this chapter to enhance the sentence if the offender knew or had reason to know that he was infected with the human immunodeficiency virus, except where the offender did not engage or attempt to engage in conduct creating a risk of transmission of the virus to the victim.".

"(b) CLERICAL AMENDMENT.—The table of sections for chapter 109A of title 18, United States Code, is amended by inserting at the end thereof the following new item:

"2247. Testing for Human Immunodeficiency Virus; Disclosure of Test Results to Victim; Effect on Penalty".

SEC. 107. PAYMENT OF COST OF HIV TESTING FOR VICTIMS IN SEX OFFENSE CASES.

Section 503(c)(7) of the Victims' Rights and Restitution Act of 1990 is amended by inserting before the period at the end thereof the following: ", the cost of up to two tests of the victim for the human immunodeficiency virus during the twelve months following the assault, and the cost of a counseling session by a medically trained professional on the accuracy of such tests and the risk of transmission of the human immunodeficiency virus to the victim as the result of the assault".

SEC. 108. INCREASED PENALTIES FOR DRUG DISTRIBUTION TO PREGNANT WOMEN.

Section 405 of the Controlled Substances Act (21 U.S.C. 859) is amended by inserting ", or to a woman while she is pregnant," after "to a person under twenty-one years of age" in subsection (a) and subsection (b).

SEC. 109. EXTENSION AND STRENGTHENING OF RESTITUTION.

Secton 3663 of title 18, United States Code, is amended—

(1) in subsection (b), by inserting "or an offense under chapter 109A or chapter 110" after "an offense resulting in bodily injury to a victim" in paragraph (2);

(2) in subsection (b), by striking "and" at the end of paragraph (3), by redesignating paragraph (4) as paragraph (5), and by inserting after paragraph (4) the following new paragraph:

"(4) in any case, reimburse the victim for lost income and necessary child care, transportation, and other expenses related to participation in the investigation or prosecution of the offense or attendance at proceedings related to the offense; and"; and

(3) in subsection (d), by inserting at the end the following: "However, the court shall issue an order requiring restitution of the full amount of the victim's losses and expenses for which restitution is authorized under this section in imposing sentence for an offense under chapter 109A or chapter 110 unless the government and the victim do not request such restitution.".

SEC. 110. ENFORCEMENT OF RESTITUTION ORDERS THROUGH SUSPENSION OF FEDERAL BENEFITS.

Section 3663 of title 18, United States Code, is amended—

(1) by redesignating subsections (g) and (h) as subsections (h) and (i), respectively; and

(2) by inserting after subsection (f) the following new subsection:

"(g)(1) If the defendant is delinquent in making restitution in accordance with any schedule of payments or any requirement of immediate payment imposed under this section, the court may, after a hearing, suspend the defendant's eligibility for all Federal benefits until such time as the defendant demonstrates to the court good-faith efforts to return to such schedule.

"(2) For purposes of this subsection—

"(A) the term 'Federal benefits'—

"(i) means any grant, contract, loan, professional license, or commercial license provided by an agency of the United States or appropriated funds of the United States; and

"(ii) does not include any retirement, welfare, Social Security, health, disability, veterans benefit, public housing, or other similar benefit, or any other benefit for which payments or services are required for eligibility; and

"(B) the term 'veterans benefit' means all benefits provided to veterans, their families, or survivors by virtue of the service of a veteran in the Armed Forces of the United States.".

SEC. 111. CIVIL REMEDY FOR VICTIMS OF SEXUAL VIOLENCE.

(a) CAUSE OF ACTION.—Whoever, in violation of the Constitution or laws of the United States, engages in sexual violence against another, shall be liable to the injured party in an action under this section. The relief available in such an action shall include compensatory and punitive damages and any appropriate equitable or declaratory relief.

(b) DEFINITION.—For purposes of this section, "sexual violence" means any conduct proscribed by chapter 109A of title 18, United States Code, whether or not the conduct occurs in the special maritime and territorial jurisdiction of the United States or in a Federal prison.

(c) ATTORNEY'S FEES.—The Civil Rights Attorney's Fees Award Act of 1976 (42 U.S.C. 1988) is amended by striking "or" after "Public Law 92-318" and by inserting after "1964" the following: ", or section 111 of the Sexual Assault Prevention Act of 1993,".

SUBTITLE B—RULES OF EVIDENCE, PRACTICE, AND PROCEDURE

SEC. 121. ADMISSIBILITY OF EVIDENCE OF SIMILAR CRIMES IN SEX OFFENSE CASES.

The Federal Rules of Evidence are amended by adding after Rule 412 the following new rules:

"Rule 413. Evidence of Similar Crimes in Sexual Assault Cases

"(a) In a criminal case in which the defendant is accused of an offense of sexual assault, evidence of the defendant's commission of another offense or offense or offenses of sexual assault is admissible, and may be considered for its bearing on any matter to which it is relevant.

"(b) In a case in which the government intends to offer evidence under this Rule, the attorney for the government shall disclose the evidence to the defendant, including statements of witnesses or a summary of the substance of any testimony that is expected to be offered, at least fifteen days before the scheduled date of trial or at such later time as the court may allow for good cause.

"(c) This Rule shall not be construed to limit the admission or consideration of evidence under any other Rule.

"(d) For purposes of this Rule and Rule 415, "offense of sexual assault" means a crime under Federal law or the law of a State (as defined in section 513 of title 18, United States Code) that involved—

"(1) any conduct proscribed by chapter 109A of title 18, United States Code;

"(2) contact, without consent, between any part of the defendant's body or an object and the genitals or anus of another person;

"(3) contact, without consent, between the genitals or anus of the defendant and any part of another person's body;

"(4) deriving sexual pleasure or gratification from the infliction of death, bodily injury, or physical pain on another person; or

"(5) an attempt or conspiracy to engage in conduct described in paragraphs (1)–(4).

"Rule 414. Evidence of Similar Crimes in Child Molestation Cases

"(a) In a criminal case in which the defendant is accused of an offense of child molestation, evidence of the defendant's commission of another offense or offenses of child molestation is admissible, and may be considered for its bearing on any matter to which it is relevant.

"(b) In a case in which the government intends to offer evidence under this Rule, the attorney for the government shall disclose the evidence to the defendant, including statements of witnesses or a summary of the substance of any testimony that is expected to be offered, at least fifteen days before the scheduled date of trial or at such later time as the court may allow for good cause.

"(c) This Rule shall not be construed to limit the admission or consideration of evidence under any other Rule.

"(d) For purposes of this Rule and Rule 415, "child" means a person below the age of fourteen, and "offense of child molestation" means a crime under Federal law or the law of a State (as defined in section 513 of title 18, United States Code) that involved—

"(1) any conduct proscribed by chapter 109A of title 18, United States Code, that was committed in relation to a child;

"(2) any conduct proscribed by chapter 110 of title 18, United States Code;

"(3) contact between any part of the defendant's body or an object and the genitals or anus of a child;

"(4) contact between the genitals or anus of the defendant and any part of the body of a child;

"(5) deriving sexual pleasure or gratification from the infliction of death, bodily injury, or physical pain on a child; or

"(6) an attempt or conspiracy to engage in conduct described in paragraphs (1)–(5).

"Rule 415. Evidence of Similar Acts in Civil Cases Concerning Sexual Assault or Child Molestation

"(a) In a civil case in which a claim for damages or other relief is predicated on a party's alleged commission of conduct constituting an offense of sexual assault or child molestation, evidence of that party's commission of another offense or offenses of sexual assault or child molestation is admissible and may be considered as provided in Rule 413 and Rule 414 of these Rules.

"(b) A party who intends to offer evidence under this Rule shall disclose the evidence to the party against whom it will be offered, including statements of witnesses or a summary of the substance of any testimony that is expected to be offered, at least fifteen days before the scheduled date of trial or at such later time as the court may allow for good cause.

"(c) This Rule shall not be construed to limit the admission or consideration of evidence under any other Rule."

SEC. 122. EXTENSION AND STRENGTHENING OF RAPE VICTIM SHIELD LAW.

(a) AMENDMENTS TO RAPE VICTIM SHIELD LAW.—Rule 412 of the Federal Rules of Evidence is amended—

(1) in subdivisions (a) and (b), by striking "criminal case" and inserting "criminal or civil case";

(2) in subdivisions (a) and (b), by striking "an offense under chapter 109A of title 18, United States Code," and inserting "an offense or civil wrong involving conduct proscribed by chapter 109A of title 18, United States Code, whether or not the conduct occurred in the special maritime and territorial jurisdiction of the United States or in a Federal prison.";

(3) in subdivision (a), by striking "victim of such offense" and inserting "victim of such conduct";

(4) in subdivision (c)—

(A) by striking in paragraph (1) "the person accused of committing an offense under chapter 109A of title 18, United States Code" and inserting "the accused"; and

(B) by inserting at the end of paragraph (3) the following: "An order admitting evidence under this paragraph shall explain the reasoning leading to the finding of relevance, and the basis of the finding that the probative value of the evidence outweighs the danger of unfair prejudice notwithstanding the potential of the evidence to humiliate and embarrass the alleged victim and to result in unfair or biased inferences."; and

(5) in subdivision (d), by striking "an offense under chapter 109A of title 18, United States Code" and inserting "the conduct proscribed by chapter 109A of title 18, United States Code,".

(b) INTERLOCUTORY APPEAL.—Section 3731 of title 18, United States Code, is amended by inserting after the second paragraph the following:

"An appeal by the United States before trial shall lie to a court of appeals from an order of a district court admitting evidence of an alleged victim's past sexual behavior in a criminal case in which the defendant is charged with an offense involving conduct proscribed by chapter 109A of title 18, United States Code, whether or not the conduct occurred in the special maritime and territorial jurisdiction of the United States or in a Federal prison."

SEC. 123. INADMISSIBILITY OF EVIDENCE TO SHOW PROVOCATION OR INVITATION BY VICTIM IN SEX OFFENSE CASES.

The Federal Rules of Evidence are amended by adding after Rule 415 (as added by section 121 of this Act) the following:

"Rule 416. Inadmissibility of evidence to show invitation or provocation by victim in sexual abuse cases.

"In a criminal case in which a person is accused of an offense involving conduct proscribed by chapter 109A of title 18, United States Code, whether or not the conduct occurred in the special maritime and territorial jurisdiction of the United States or in a Federal prison, evidence is not admissible to show that the alleged victim invited or provoked the commission of the offense. This Rule does not limit the admission of evidence of consent by the alleged victim if the issue of consent is relevant to liability and the evidence is otherwise admissible under these Rules."

SEC. 124. RIGHT OF THE VICTIM TO FAIR TREATMENT IN LEGAL PROCEEDINGS.

The following rules, to be known as the Rules of Professional Conduct for Lawyers in Federal Practice, are enacted as an appendix to title 28, United States Code:

"RULES OF PROFESSIONAL CONDUCT FOR LAWYERS IN FEDERAL PRACTICE



"Rules 1. Scope

"(a) These rules apply to the conduct of lawyers in their representation of clients in relation to proceedings and potential proceedings before federal tribunals.

"(b) For purposes of these rules, 'federal tribunal' and 'tribunal' mean a court of the United States or an agency of the federal government that carries out adjudicatory or quasiadjudicatory functions.

"Rule 2. Abuse of Victims and Others Prohibited

"(a) A lawyer shall not engage in any action or course of conduct for the purpose of increasing the expense of litigation for any person, other than a liability under an order or judgment of a tribunal.

"(b) A lawyer shall not engage in any action or course of conduct that has no substantial purpose other than to distress, harass, embarrass, burden, or inconvenience another person.

"(c) A lawyer shall not offer evidence that the lawyer knows to be false or attempt to discredit evidence that the lawyer knows to be true.

"Rule 3. Duty of Enquiry in Relation to Client

"A lawyer shall attempt to elicit from the client a truthful account of the material facts concerning the matters in issue. In representing a client charged with a crime or civil wrong, the duty of enquiry under this rule includes—

(1) "attempting to elicit from the client a materially complete account of the alleged criminal activity or civil wrong if the client acknowledges involvement in the alleged activity or wrong; and

"(2) attempting to elicit from the client the material facts relevant to a defense of alibi if the client denies such involvement.

"Rule 4. Duty to Expedite Litigation

"(a) A lawyer shall seek to bring about the expeditious conduct and conclusion of litigation.

"(b) A lawyer shall not seek a continuance or otherwise attempt to delay or prolong proceedings in the hope or expectation that—

"(1) evidence will become unavailable;

"(2) evidence will become more subject to impeachment or otherwise less useful to another party because of the passage of time; or

"(3) an advantage will be obtained in relation to another party because of the expense, frustration, distress, or other hardship resulting from prolonged or delayed proceedings.

"Rule 5. Duty to Prevent Commission of Crime

"(a) A lawyer may disclose information relating to the representation of a client to the extent necessary to prevent the commission of a crime or other unlawful act.

"(b) A lawyer shall disclose information relating to the representation of a client where disclosure is required by law. A lawyer shall also disclose such information to the extent necessary to prevent—

"(1) the commission of a crime involving the use or threatened use of force against another, or a substantial risk of death or serious bodily injury to another; or

"(2) the commission of a crime of sexual assault or child molestation.

"(c) For purposes of this rule, 'crime' means a crime under the law of the United States or the law of a State, and 'unlawful act' means an act in violation of the law of the United States or the law of a State.".

SEC. 125. RIGHT OF THE VICTIM TO AN IMPARTIAL JURY.

Rule 24(b) of the Federal Rules of Criminal Procedure is amended by striking "the Government is entitled to 6 peremptory challenges and the defendant or defendants jointly to 10 peremptory challenges" and inserting "each side is entitled to 6 peremptory challenges."

SEC. 126 VICTIM'S RIGHT OF ALLOCUTION IN SENTENCING.

Rule 32 of the Federal Rules of Criminal Procedure is amended—

(1) by striking "and" at the end of subdivision (a)(1)(B);

(2) by striking the period at the end of subdivision (a)(1)(C) and inserting "; and";

(3) by inserting after subdivision (a)(1)(C) the following:

"(D) if sentence is to be imposed for a crime of violence or sexual abuse, address the victim personally if the victim is present at the sentencing hearing and determine if the victim wishes to make a statement and to present any information in relation to the sentence.";

(4) in the penultimate sentence of subdivision (a)(1) by striking "equivalent opportunity" and inserting "opportunity equivalent to that of the defendant's counsel";

(5) in the last sentence of subdivision (a)(1) by inserting "the victim," before ", or the attorney for the Government."; and

(6) by adding at the end the following new subdivision:

"(f) DEFINITIONS.—For purposes of this rule—

"(1) 'crime of violence or sexual abuse' means a crime that involved the use or attempted or threatened use of physical force against the person or property of another, or a crime under chapter 109A of title 18, United States Code; and

"(2) 'victim' means an individual against whom an offense for which a sentence is to be imposed has been committed, but the right of allocution under subdivision (a)(1)(D) may be exercised instead by—

"(A) a parent or legal guardian if the victim is below the age of 18 years or incompetent; or

"(B) one or more family members or relatives designated by the court if the victim is deceased or incapacitated,

if such person or persons are present at the sentencing hearing, regardless of whether the victim is present.

SEC. 127. VICTIM'S RIGHT OF PRIVACY.

(a) FINDINGS.—The Congress finds that—

(1) the crime of rape is underreported to law enforcement authorities because of its traumatic effect on victims and the stigmatizing nature of the crime;

(2) rape victims may be further victimized by involuntary public disclosure of their identities;

(3) rape victims should be encouraged to come forward and report the crime without fear of being revictimized through involuntary public disclosure of their identities; and

(4) any interest of the public in knowing the identity of a rape victim notwithstanding the victim's wishes to the contrary is outweighed by the interest of protecting the privacy of rape victims and encouraging rape victims to report the crime and assist in prosecution.

(b) SENSE OF CONGRESS.—It is the sense of Congress that news media, law enforcement personnel, and other persons should exercise restraint and respect a rape victim's privacy by not disclosing the victim's identity to the general public or facilitating such disclosure without the consent of the victim.

SUBTITLE C—SAFE CAMPUSES

SEC. 131. NATIONAL BASELINE STUDY ON CAMPUS SEXUAL ASSAULT.

(a) STUDY.—The Attorney General shall provide for a national baseline study to examine the scope of the problem of campus sexual assaults and the effectiveness of institutional and legal policies in addressing such crimes and protecting victims. The Attorney General may utilize the Bureau of Justice Statistics, the National Institute of Justice, and the Office for Victims of Crime in carrying out this section.

(b) REPORT.—Based on the study required by subsection (a), the Attorney General shall prepare a report including an analysis of—

(1) the number of reported allegations and estimated number of unreported allegations of campus sexual assaults, and to whom the allegations are reported (including authorities of the educational institution, sexual assault victim service entities, and local criminal authorities);

(2) the number of campus sexual assault allegations reported to authorities of educational institutions which are reported to criminal authorities;

(3) the number of campus sexual assault allegations that result in criminal prosecution in comparison with the number of non-campus sexual assault allegations that result in criminal prosecution;

(4) Federal and State laws or regulations pertaining specifically to campus sexual assaults;

(5) the adequacy of policies and practices of educational institutions in addressing campus sexual assaults and protecting victims, including consideration of—

(A) the security measures in effect at educational institutions, such as utilization of campus police and security guards, control over access to grounds and buildings, supervision of student activities and student living arrangements, control over the consumption of alcohol by students, lighting, and the availability of escort services;

(B) the articulation and communication to students of the institution's policies concerning sexual assaults;

(C) policies and practices that may prevent or discourage the reporting of campus sexual assaults to local criminal authorities, or that may otherwise obstruct justice or interfere with the prosecution of perpetrators of campus sexual assaults;

(D) the nature and availability of victim services for victims of campus sexual assaults;

(E) the ability of educational institutions' disciplinary processes to address allegations of sexual assault adequately and fairly;

(F) measures that are taken to ensure that victims are free of unwanted contact with alleged assailants, and disciplinary sanctions that are imposed when a sexual assault is determined to have occurred; and

(G) the grounds on which educational institutions are subject to lawsuits based on campus sexual assaults, the resolution of these cases, and measures that can be taken to avoid the likelihood of lawsuits and civil liability;

(6) an assessment of the policies and practices of educational institutions that are of greatest effectiveness in addressing campus sexual assaults and protecting victims, including policies and practices relating to the particular issues described in paragraph (5); and

(7) any recommendations the Attorney General may have for reforms to address campus sexual assaults and protect victims more effectively, and any other matters that the Attorney General deems relevant to the subject of the study and report required by this section.

(c) SUBMISSION OF REPORT.—The report required by subsection (b) shall be submitted to the Congress no later than September 1, 1995.

(d) DEFINITION.—For purposes of this section, "campus sexual assaults" includes sexual assaults occurring at institutions of postsecondary education and sexual assaults committed against or by students or employees of such institutions.

(e) AUTHORIZATION OF APPROPRIATION.—There is authorized to be appropriated $200,000 to carry out the study required by this section.

SUBTITLE D—ASSISTANCE TO STATES AND LOCALITIES

SEC. 141. SEXUAL VIOLENCE GRANT PROGRAM.

(a) PURPOSE.—The purpose of this section is to strengthen and improve State and local efforts to prevent and punish sexual violence, and to assist and protect the victims of sexual violence.

(b) AUTHORIZATION OF GRANTS.—The Attorney General, through the Bureau of Justice Assistance, the Office for Victims of Crime, and the Bureau of Justice Statistics, may make grants to support projects and programs relating to sexual violence, including support of—

(1) training and policy development programs for law enforcement officers and prosecutors concerning the investigation and prosecution of sexual violence;

(2) law enforcement and prosecutorial units and teams that target sexual violence;

(3) victim services programs for victims of sexual violence;

(4) educational and informational programs relating to sexual violence;

(5) improved systems for collecting, keeping, and disseminating records and data concerning sexual violence and offenders who engage in sexual violence;

(6) background check systems that enable employers to determine whether employees and applicants for employment have criminal histories involving sexual violence, in relation to employment positions for which a person may be unsuitable on the basis of such a history, such as child care positions and positions involving access to people's homes;

(7) registration systems which require persons convicted of sexual violence to keep law enforcement authorities informed of their addresses or locations;

(8) security measures in parks, public transportation systems, public buildings and facilities, and other public places which reduce the risk that acts of sexual violence will occur in such places;

(9) programs addressing campus sexual assaults, as defined in section 131 of this Act;

(10) programs assisting runaway and homeless children or other persons who have been subjected to or are at risk of sexual violence or sexual exploitation, including sexual exploitation through prostitution or in the production of pornography;

(11) training programs for judges in relation to cases involving sexual violence; and

(12) treatment programs in a correctional setting for offenders who engage in sexual violence, which may include aftercare components, and which shall include an evaluation component to determine the effectiveness of the treatment in reducing recidivism.

(c) FORMULA GRANTS.—Of the amount appropriated in each fiscal year for grants under this section, other than the amount set aside to carry out subsection (d)—

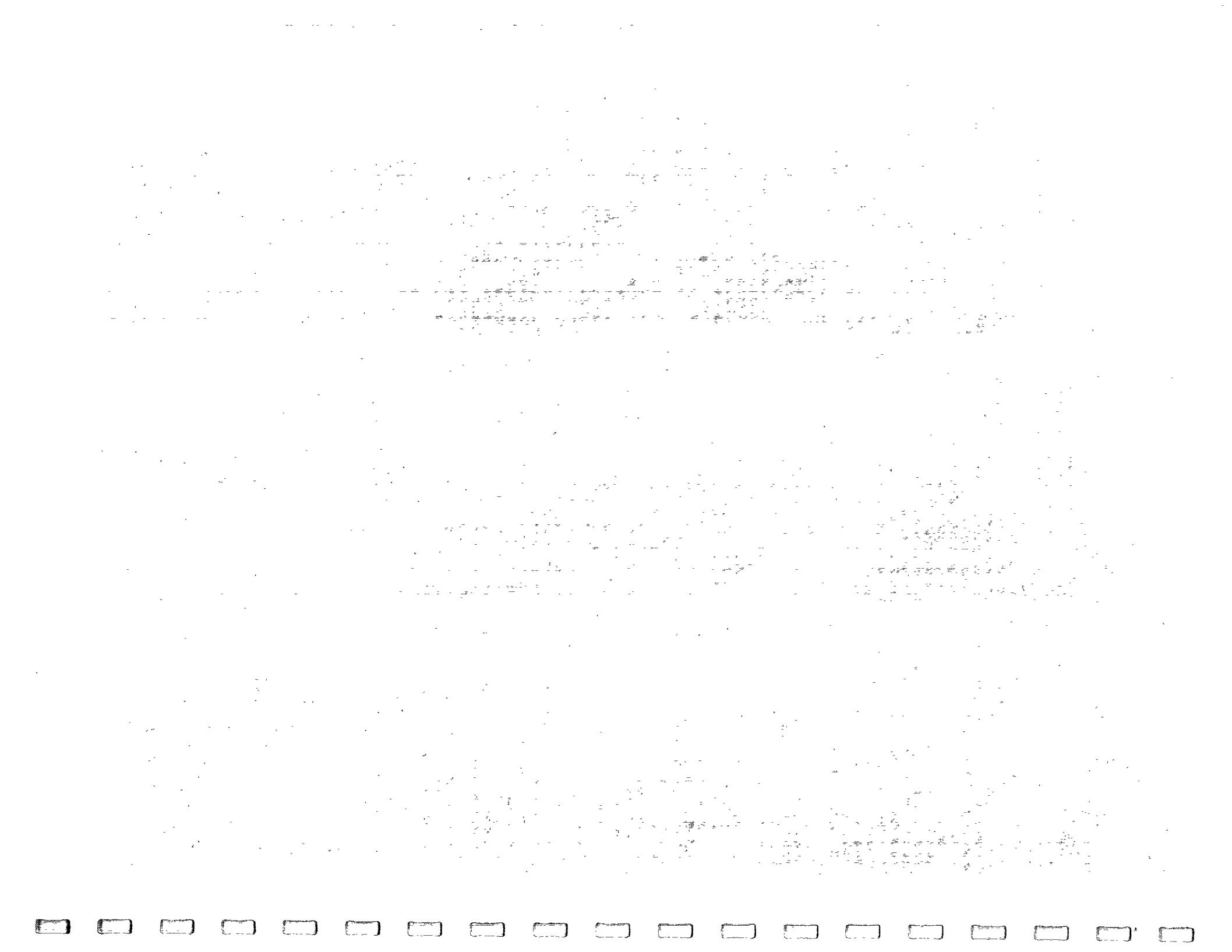
(1) 0.25 percent shall be set aside for each participating State; and

(2) the remainder shall be allocated to the participating States in proportion to their populations;

for the use of State and local governments in the States.

(d) DISCRETIONARY GRANTS.—Of the amount appropriated in each fiscal year, 20 percent shall be set aside in a discretionary fund to provide grants to public and private agencies to further the purposes and objectives set forth in subsections (a) and (b).

(e) APPLICATION FOR FORMULA GRANTS.—To request a grant under subsection (c), the chief executive officer of a State must, in each fiscal year, submit to the Attorney General a plan for addressing sexual violence



in the State, including a specification of the uses to which funds provided under subsection (c) will be put in carrying out the plan. The application must include—

(1) certification that the Federal funding provided will be used to supplement and not supplant State and local funds;

(2) certification that any requirement of State law for review by the State legislature or a designated body, and any requirement of State law for public notice and comment concerning the proposed plan, has been satisfied; and

(3) provisions for fiscal control, management, recordkeeping, and submission of reports in relation to funds provided under this section that are consistent with requirements prescribed for the program.

(f) CONDITIONS ON GRANTS.—

(1) MATCHING FUNDS.—Grants under subsection (c) may be for up to 50 percent of the overall cost of a project or program funded. Discretionary grants under subsection (d) may be for up to 100 percent of the overall cost of a project of program funded.

(2) DURATION OF GRANTS.—Grants under subsection (c) may be provided in relation to a particular project or program for up to an aggregate maximum period of four years.

(3) LIMIT ON ADMINISTRATIVE COSTS.—Not more than 5 percent of a grant under subsection (c) may be used for costs incurred to administer the grant.

(4) PAYMENT OF COST OF FORENSIC MEDICAL EXAMINATIONS.—It is a condition of eligibility for grants under subsection (c) that a State pay the cost of forensic medical examinations for victims of sexual violence.

(5) POLICIES AGAINST CAMPUS SEXUAL ASSAULTS.—For an institution of postsecondary education seeking a grant under subsection (d), it is a condition of eligibility that the institution articulate and communicate to its students a clear policy that sexual violence will not be tolerated by the institution.

(g) EVALUATION.—The National Institute of Justice shall have the authority to carry out evaluations of programs funded under this section. The recipient of any grant under this section may be required to include an evaluation component to determine the effectiveness of the project or program funded that is consistent with guidelines issued by the National Institute of Justice.

(h) COORDINATION.—The Attorney General may utilize the Office of Justice Programs to coordinate the administration of grants under this section. The coordination of grants under this section shall include prescribing consistent program requirements for grantees, allocating functions and the administration of particular grants among the components that participate in the administration of the program under this section, coordinating the program under this section with the Domestic Violence and Family Support Grant Program established by section 208 of this Act, and coordinating the program under this section with other grant programs administered by components of the Department of Justice.

(i) DEFINITION.—For purposes of this section, "sexual violence" includes non-consensual sex offenses and sex offenses involving victims who are not able to give legally effective consent because of age or incompetency.

(j) REPORT.—The Attorney General shall submit an annual report to Congress concerning the operation and effectiveness of the program under this section.

(k) AUTHORIZATION OF APPROPRIATIONS.—There are authorized to be appropriated, in each of fiscal years 1994, 1995, and 1996, $250,000,000 to carry out this section, and such sums as may be necessary in each fiscal year thereafter.

SEC. 142. SUPPLEMENTARY GRANTS FOR STATES ADOPTING EFFECTIVE LAWS RELATING TO SEXUAL VIOLENCE.

(a) SUPPLEMENTARY GRANTS.—The Attorney General may, in each fiscal year, authorize the award to a State of an aggregate amount of up to $1 million under the Sexual Violence Grant Program established by section 141 of this Act, in addition to any funds that are otherwise authorized under that program. The authority to award additional funding under this section is conditional on certification by the Attorney General that the State has laws relating to sexual violence that exceed or are reasonably comparable to the provisions of federal law (including changes in federal law adopted by this Act) in the following areas:

(1) Authorization of pre-trial detention of defendants in sexual assault cases where prevention of flight or the safety of others cannot be reasonably assured by other means, and denial of release pending appeal for persons convicted of sexual assault offenses who have been sentenced to imprisonment.

(2) Authorization of severe penalties for sexual assault offenses.

(3) Pre-trial testing for the human immunodeficiency virus of persons charged with sexual assault offenses, with disclosure of test results to the victim.

(4) Payment of the cost of medical examinations and the cost of testing for the human immunodeficiency virus for victims of sexual assaults.

(5) According the victim of a sexual assault the right to be present at judicial proceedings in the case.

(6) Protection of victims from inquiry into unrelated sexual behavior in sexual assault cases.

(7) Rules of professional conduct for lawyers that protect victims from unwarranted cross-examination and impeachment, dilatory tactics, and other abuses in sexual assault cases.

(8) Authorization of admission and consideration in sexual assault cases of evidence that the defendant has committed sexual assaults on other occasions.

(9) Authorization of the victim in sexual assault cases to address the court concerning the sentence to be imposed.

(10) Authorization of the award of restitution to victims of sexual assaults as part of a criminal sentence.

(b) AUTHORIZATION OF APPROPRIATIONS.—There are authorized to be appropriated in each fiscal year such sums as may be necessary to carry out this section.

TITLE II—DOMESTIC VIOLENCE, STALKING, AND OFFENSES AGAINST THE FAMILY

SEC. 201. INTERSTATE TRAVEL TO COMMIT SPOUSE ABUSE OR TO VIOLATE PROTECTIVE ORDER; INTERSTATE STALKING.

(a) OFFENSE.—Part 1 of title 18, United States Code, is amended by inserting after chapter 110 the following:

"CHAPTER 110A—DOMESTIC VIOLENCE AND STALKING

"Sec.
"2261. Domestic violence and stalking.

"2261. Domestic violence and stalking

(a) OFFENSE.—Whoever causes or attempts to cause bodily injury to, engages in sexual abuse against, or violates a protective order in relation to, another shall be punished—

"(1) if death results, by death or by imprisonment for any term of years or for life;

"(2) if permanent disfigurement or life-threatening bodily injury results, by imprisonment for not more than 20 years;

"(3) if serious bodily injury results, or if a firearm, knife, or other dangerous weapon is possessed, carried, or used during the commission of the offense, by imprisonment for not more than 10 years; and

"(4) in any other case, by imprisonment for not more than five years.

If, however, the defendant engages in sexual abuse and the penalty authorized for such conduct under chapter 109A exceeds the penalty which would otherwise be authorized under this subsection, then the penalty authorized for such conduct under chapter 109A shall apply.

"(b) MANDATORY PENALTIES.—A sentence under this section shall include at least three months of imprisonment if the offense involves the infliction of bodily injury on or the commission of sexual abuse against the victim. A sentence under this section shall include at least six months of imprisonment if the offense involves the violation of a protective order and the defendant has previously violated a protective order in relation to the same victim.

"(c) JURISDICTION.—There is Federal jurisdiction to prosecute an offense under this section if the defendant traveled in interstate or foreign commerce, or transported or caused another to move in interstate or foreign commerce, with the intention of committing or in furtherance of committing the offense, and—

"(1) the victim was a spouse or former spouse of the defendant, was cohabiting with or had cohabited with the defendant, or had a child in common with the defendant; or

"(2) the defendant on two or more occasions—

"(A) has caused or attempted or threatened to cause death or serious bodily injury to or engaged in sexual abuse in relation to the victim; or

"(B) has engaged in any conduct that caused or was intended to cause apprehension by the victim that the victim would be subjected to death, serious bodily injury, or sexual abuse.

"(d) DEFINITIONS.—For purposes of this section—

"(1) 'protective order' means an order issued by a court of a State prohibiting or limiting violence against, harassment of, contact or communication with, or physical proximity to another person;

"(2) 'sexual abuse' means any conduct proscribed by chapter 109A of this title, whether or not the conduct occurs in the special maritime and territorial jurisdiction of the United States or in a Federal prison;

"(3) 'serious bodily injury' and 'bodily injury' have the meanings given in section 1365(g); and

"(4) 'State' has the meaning given in section 513(c)(5).".

"(b) CLERICAL AMENDMENT.—The analysis for Part 1 of title 18, United States Code, is amended by inserting after the item for chapter 110 the following:

"110A. Domestic violence and offenses against the family ..... 2261",

"(c) MANDATORY RESTITUTION.—Section 3663 of title 18, United States Code, as amended by section 109 of this Act, is further amended by striking "or chapter 110" and inserting ", chapter 110, or section 2261" in each of subsection (b)(2) and subsection (d).

"(d) INTERIM PROTECTION.—Section 3156(a)(4)(C) of title 18, United States Code, as added by section 101 of this Act, is amended by striking "or chapter 110" and inserting ", chapter 110, or section 2261".

"(e) DEATH PENALTY PROCEDURES.—Section 1118 of title 18, United States Code, as enacted by section 102 of this Act, is amended in paragraph (1) of subsection (e) by inserting "or section 2261" after "117".

SEC. 202. FULL FAITH AND CREDIT FOR PROTECTIVE ORDERS.

"(a) REQUIREMENT OF FULL FAITH AND CREDIT.—Chapter 110A of title 18, United States Code, as enacted by section 201, is amended by adding at the end the following:

"§ 2262. Full Faith and Credit for Protective Orders

"(a) A protective order issued by a court of a State shall have the same full faith and credit in a court in another State that it would have in a court of the State in which issued, and shall be enforced by the courts of any State if it were issued in that State.

"(b) For purposes of this section—

"(1) 'protective order' means an order prohibiting or limiting violence against, harassment of, contact or communication with, or physical proximity to another person; and

"(2) 'State' has the meaning given in section 513(c)(5).".

(b) CLERICAL AMENDMENT.—The analysis for chapter 110A of title 18, United States Code, as enacted by section 201, is amended by inserting at the end of the following:

"§ 2262. Full Faith and Credit for Protective Orders.".

SEC. 203. NON-COMPLIANCE WITH CHILD SUPPORT OBLIGATIONS IN INTERSTATE CASES.

Chapter 11A of title 18, United States Code, is amended to read as follows:

"CHAPTER 11A—CHILD SUPPORT

"Sec.
"228. Non-compliance with child support obligations.

"§ 228. Non-compliance with child support obligations.

"(a) OFFENSE.—Whoever—

"(1) leaves or remains outside a State with intent to avoid payment of a child support obligation; or

"(2) fails to pay a major child support obligation, as defined in subsection (e), with respect to a child who resides in another State, despite having the financial resources to pay the obligation or the ability to acquire such resources through reasonable diligence;

shall be punished as provided in subsection (c).

"(b) PRESUMPTION.—In relation to an offense charged under paragraph (1) of subsection (a), the absence of the defendant from the State for an aggregate period of six months without payment of the child support obligation shall create a rebuttable presumption that the intent existed to avoid payment of the obligation.

"(c) PENALTY.—A person convicted of an offense under this section shall be punished by imprisonment for up to six months, and on a second or subsequent conviction, by imprisonment for up to two years.

"(d) RESTITUTION.—In addition to any restitution that may be ordered pursuant to section 3663, a sentence for an offense under this section shall include an order of restitution in an amount equal to the past due support obligation as it exists at the time of sentencing. Subsections (e)–(i) of section 3663 shall apply to an order of restitution pursuant to this subsection.

"(e) DEFINITIONS.—For purposes of this section—

"(1) 'child support obligation' means an amount determined under a court order or an order of an administrative process pursuant to the law of a State to be due from a person for the support of a child or of a child and the parent with whom the child is living;

"(2) 'major child support obligation' means a child support obligation that has remained unpaid for a period exceeding one year, or that is greater than $5,000;

"(3) 'past due support obligation' means a child support obligation that is unpaid at the time of sentencing for an offense under this section; and

"(4) 'State' has the meaning given in section 513(c)(5).".

SEC. 204. PRESUMPTION AGAINST CHILD CUSTODY FOR SPOUSE ABUSERS.

(a) The Congress finds that—

(1) courts fail to recognize the detrimental effects of having as a custodial parent an individual who physically abuses his or her spouse, insofar as they do not hear or weigh evidence of domestic violence in child custody litigation;

(2) joint custody forced upon hostile parents can create a damaging psychological environment for a child;

(3) physical abuse of a spouse is relevant to the likelihood of child abuse in child custody disputes;

(4) the effects on children of physical abuse of a spouse include—

(A) traumatization and psychological damage to children resulting from observation of the abuse and the climate of violence and fear existing in a home where abuse takes place;

(B) the risk that children may become targets of physical abuse when they attempt to intervene on behalf of an abused parent; and

(C) the negative effects on children of exposure to an inappropriate role model, in that witnessing an aggressive parent may communicate to children that violence is an acceptable means of dealing with others; and

(5) the harm to children from spouse abuse may be compounded by award of exclusive or joint custody to an abuser because further abuse may occur when the abused spouse is forced to have contact with the abuser as a result of the custody arrangement, and because the child or children may be exposed to abuse committed by the abuser against a subsequent spouse or partner.

(b) SENSE OF CONGRESS.—It is the sense of the Congress that, for purposes of determining child custody, evidence establishing that a parent engages in physical abuse of a spouse should create a statutory presumption that is detrimental to the child to be placed in the custody of the abusive spouse.

SEC. 205. REPORT ON BATTERED WOMEN'S SYNDROME.

(a) REPORT.—The Attorney General shall prepare and transmit to the Congress a report on the status of battered women's syndrome as a medical and psychological condition and on its effect in criminal trials. The Attorney General may utilize the National Institute of Justice to obtain information required for the preparation of the report.

(b) COMPONENTS OF REPORT.—The report described in subsection (a) shall include—

(1) a review of medical and psychological views concerning the existence, nature, and effects of battered women's syndrome as a psychological condition;

(2) a compilation of judicial decisions that have admitted or excluded evidence of battered women's syndrome as evidence of guilt or as a defense in criminal trials; and

(3) information on the views of judges, prosecutors, and defense attorneys concerning the effects that evidence of battered women's syndrome may have in criminal trials.

SEC. 206. REPORT ON CONFIDENTIALITY OF ADDRESSES FOR VICTIMS OF DOMESTIC VIOLENCE.

(a) The Attorney General shall conduct a study of the means by which abusive spouses may obtain information concerning the addresses or locations of estranged or former spouses, notwithstanding the desire of the victims to have such information withheld to avoid further exposure to abuse. Based on the study, the Attorney General shall transmit a report to Congress including—

(1) the findings of the study concerning the means by which information concerning the addresses or locations of abused spouses may be obtained by abusers; and

(2) analysis of the feasibility of creating effective means of protecting the confidentiality of information concerning the addresses and locations of abused spouses to protect such persons from exposure to further abuse while preserving access to such information for legitimate purposes.

(b) The Attorney General may utilize the National Institute of Justice and the Office for Victims of Crime in carrying out this section.

SEC. 207. REPORT ON RECORDKEEPING RELATING TO DOMESTIC VIOLENCE.

Not later than 1 year after the date of enactment of this Act, the Attorney General shall complete a study of, and shall submit to Congress a report and recommendations on, problems of recordkeeping of criminal complaints involving domestic violence. The study and report shall examine—

(1) the efforts that have been made by the Department of Justice, including the Federal Bureau of Investigation, to collect statistics on domestic violence; and

(2) the feasibility of requiring that the relationship between an offender and victim be reported in Federal records of crimes of aggravated assault, rape, and other violent crimes.

SEC. 208. DOMESTIC VIOLENCE AND FAMILY SUPPORT GRANT PROGRAM.

(a) PURPOSE.—The purpose of this section is to strengthen and improve State and local efforts to prevent and punish domestic violence and other criminal and unlawful acts that particularly affect women, and to assist and protect the victims of such crimes and acts.

(b) AUTHORIZATION OF GRANTS.—The Attorney General, through the Bureau of Justice Assistance, the Office for Victims of Crime, and the Bureau of Justice Statistics, may make grants to support projects and programs relating to domestic violence and other criminal and unlawful acts that particularly affect women, including support of—

(1) training and policy development programs for law enforcement officers and prosecutors concerning the investigation and prosecution of domestic violence;

(2) law enforcement and prosecutorial units and teams that target domestic violence;

(3) model, innovative, and demonstration law enforcement programs relating to domestic violence that involve pro-arrest and aggressive prosecution policies;

(4) model, innovative, and demonstration programs for the effective utilization and enforcement of protective orders;

(5) programs addressing stalking and persistent menacing;

(6) victim services programs for victims of domestic violence;

(7) shelters that provide services for victims of domestic violence and related programs;

(8) educational and informational programs relating to domestic violence;

(9) resource centers providing information, technical assistance, and training to domestic violence service providers, agencies, and programs;

(10) coalitions of domestic violence service providers, agencies, and programs;

(11) training programs for judges and court personnel in relation to cases involving domestic violence; and

(12) enforcement of child support obligations, including cooperative efforts and arrangements of States to improve enforcement in cases involving interstate elements.

(c) FORMULA GRANTS.—Of the amount appropriated in each fiscal year for grants under this section, other than the amount set aside to carry out subsection (d)—

(1) 0.25 percent shall be set aside for each participating State; and

(2) the remainder shall be allocated to the participating States in proportion to their populations, for the use of State and local governments in the States.

(d) DISCRETIONARY GRANTS.—Of the amount appropriated in each fiscal year, 20 percent shall be set aside in a discretionary fund to provide grants to public and private agencies to further the purposes and objectives set forth in subsections (a) and (b).

(e) APPLICATION FOR FORMULA GRANTS.—To request a grant under subsection (c), the chief executive officer of a State must, in each fiscal year, submit to the Attorney General a plan for addressing domestic violence and other criminal and unlawful acts that particularly affect women in the State, including a specification of the uses to which funds provided under subsection (c) will be put in carrying out the plan. The application must include—

(1) certification that the Federal funding provided will be use to supplement and not supplant State and local funds;

(2) certification that any requirement of State law for review by the State legislature of a designated body, and any requirement of State law for public notice and comment concerning the proposed plan, has been satisfied; and

(3) provisions for fiscal control, management, recordkeeping, and submission of reports in relation to funds provided under this section that are consistent with requirements prescribed for the program.

(f) CONDITIONS ON GRANTS.—

(1) MATCHING FUNDS.—Grants under subsection (c) may be for up to 50 percent of the overall cost of a project or program funded. Discretionary grants under subsection (d) may be for up to 100 percent of the overall cost of a project or program funded.

(2) DURATION OF GRANTS.—Grants under subsection (c) may be provided in relation to a particular project or program for up to an aggregate maximum period of four years.

(3) LIMIT ON ADMINISTRATIVE COSTS.—Not more than 5 percent of a grant under subsection (C) may be used for costs incurred to administer the grant.

(g) EVALUATION.—The National Institute of Justice shall have the authority to carry out evaluations of programs funded under this section. The recipient of any grant under this section may be required to include an evaluation component to determine the effectiveness of the project or program funded that is consistent with guidelines issued by the National Institute of Justice.

(h) COORDINATION.—The Attorney General may utilize the Office of Justice Programs to coordinate the administration of grants under this section. The coordination of grants under this section shall include prescribing consistent program requirements for grantees, allocating functions and the administration of particular grants among the components that participate in the administration of the program under this section, coordinating the program under this section with the Sexual Violence Grant Program established by section 141 of this Act, and coordinating the program under this section with other grant programs administered by components of the Department of Justice.

(i) DEFINITION.—For purposes of this section, "domestic violence" includes any act of criminal violence in which the offender and the victim are members of the same household or relatives, or in which the offender and the victim are present or former spouses or cohabitors or have a child in common.

(j) REPORT.—The Attorney General shall submit an annual report to Congress concerning the operation and effectiveness of the program under this section.

(k) AUTHORIZATION OF APPROPRIATIONS.—There are authorized to be appropriated, in each of fiscal years 1994, 1995, and 1996, $250,000,000 to carry out this section, and such sums as may be necessary in each fiscal year thereafter.

## TITLE III—NATIONAL TASK FORCE ON VIOLENCE AGAINST WOMEN

### SEC. 301. ESTABLISHMENT.

Not later than 30 days after the date of enactment of this Act, the Attorney General shall establish a task force to be known as the "National Task Force on Violence Against Women" (referred to in this title as the "task force").

### SEC. 302. DUTIES OF TASK FORCE.

(a) GENERAL PURPOSE OF TASK FORCE.—The task force shall recommend Federal, State, and local strategies aimed at protecting women against violent crime, punishing persons who commit such crimes, and enhancing the rights of victims of such crimes.

(b) DUTIES OF TASK FORCE.—The task force shall perform such functions as the Attorney General deems appropriate to carry out of the purposes of the task force, including—

(1) considering the reports and recommendations of past Federal and State studies of violent crime, family violence, and the treatment of crime victims, including the Report of the Attorney General to the President on Combating Violent Crime (1992), the Report of the Attorney General's Task Force on Family Violence (1984), the Report of the President's Task Force on Victims of Crime (1982), and the reports and recommendations of the task forces and commissions established by the States of Alabama, Alaska, Arkansas, Hawaii, Idaho, Indiana, Kansas, Louisiana, Michigan, Minnesota, Nebraska, New Mexico, New York, North Carolina, Rhode Island, Virginia, Texas, and Wyoming;

(2) developing strategies for Federal, State, and local law enforcement designed to protect women against violent crime, and to prosecute those responsible for such crime;

(3) evaluating the adequacy of rules of evidence, practice, and procedure to ensure the effective prosecution and conviction of violent offenders against women and to protect victims from abuse in legal proceedings, and making recommendations for the improvement of such rules;

(4) evaluating the adequacy of pre-trial release, sentencing, incarceration, and post-conviction release in relation to violent offenders against women, and making recommendations designed to ensure that such offenders are restrained from causing further harm to the victim and others and receive appropriate punishment, including means of ensuring that the efficacy of criminal sanctions will not be undermined by parole or other early release mechanisms;

(5) assessing the issuance, formulation, and enforcement of protective orders, whether or not related to a criminal proceeding, and making recommendations for the effective use of such orders to protect women from violence;

(6) assessing the problem of stalking and persistent menacing of women, and recommending effective means of response to the problem;

(7) assessing the problem of sexual exploitation of women and youths through prostitution and in the production of pornography, and recommending effective means of response to the problem; and

(8) generally evaluating the treatment of women as victims of violent crime in the criminal justice system, and making recommendations designed to improve such treatment.

### SEC. 303. MEMBERSHIP.

(a) IN GENERAL.—The task force shall consist of up to 10 members, who shall be appointed by the Attorney General not later than 60 days after the date of enactment of this Act. The Attorney General shall ensure that the task force includes representatives of State and local law enforcement, the State and local judiciary, and groups dedicated to protecting the rights of victims.

(b) CHAIRMAN.—The Attorney General or the Attorney General's designee shall serve as chairman of the task force.

### SEC. 304. PAY.

(a) NO ADDITIONAL COMPENSATION.—Members of the task force who are officers of employees of a governmental agency shall receive no additional compensation by reason of their service on the task force.

(b) PER DIEM.—While away from their homes or regular places of business in the performance of duties for the task force, members of the task force shall be allowed travel expenses, including per diem in lieu of subsistence, at rates authorized for employees of agencies under sections 5702 and 5703 of title 5, United States Code.

### SEC. 305. EXECUTIVE DIRECTOR AND STAFF.

(a) EXECUTIVE DIRECTOR.—

(1) APPOINTMENT.—The task force shall have an Executive Director who shall be appointed by the Attorney General not later than 30 days after the task force is fully constituted under section 303.

(2) COMPENSATION.—The Executive Director shall be compensated at a rate not to exceed the maximum rate of the basic pay payable under GS-18 of the General Schedule as contained in title 5, United States Code.

(b) STAFF.—With the approval of the task force, the Executive Director may appoint and fix the compensation of such additional personnel as the Executive Director considers necessary to carry out the duties of the task force.

(c) APPLICABILITY OF CIVIL SERVICE LAWS.—The Executive Director and the additional personnel of the task force appointed under subsection (b) may be appointed without regard to the provisions of title 5, United States Code, governing appointments in the competitive service, and may be paid without regard to the provisions of chapter 51 and subchapter III of chapter 53 of such title relating to classification and General Schedule pay rates.

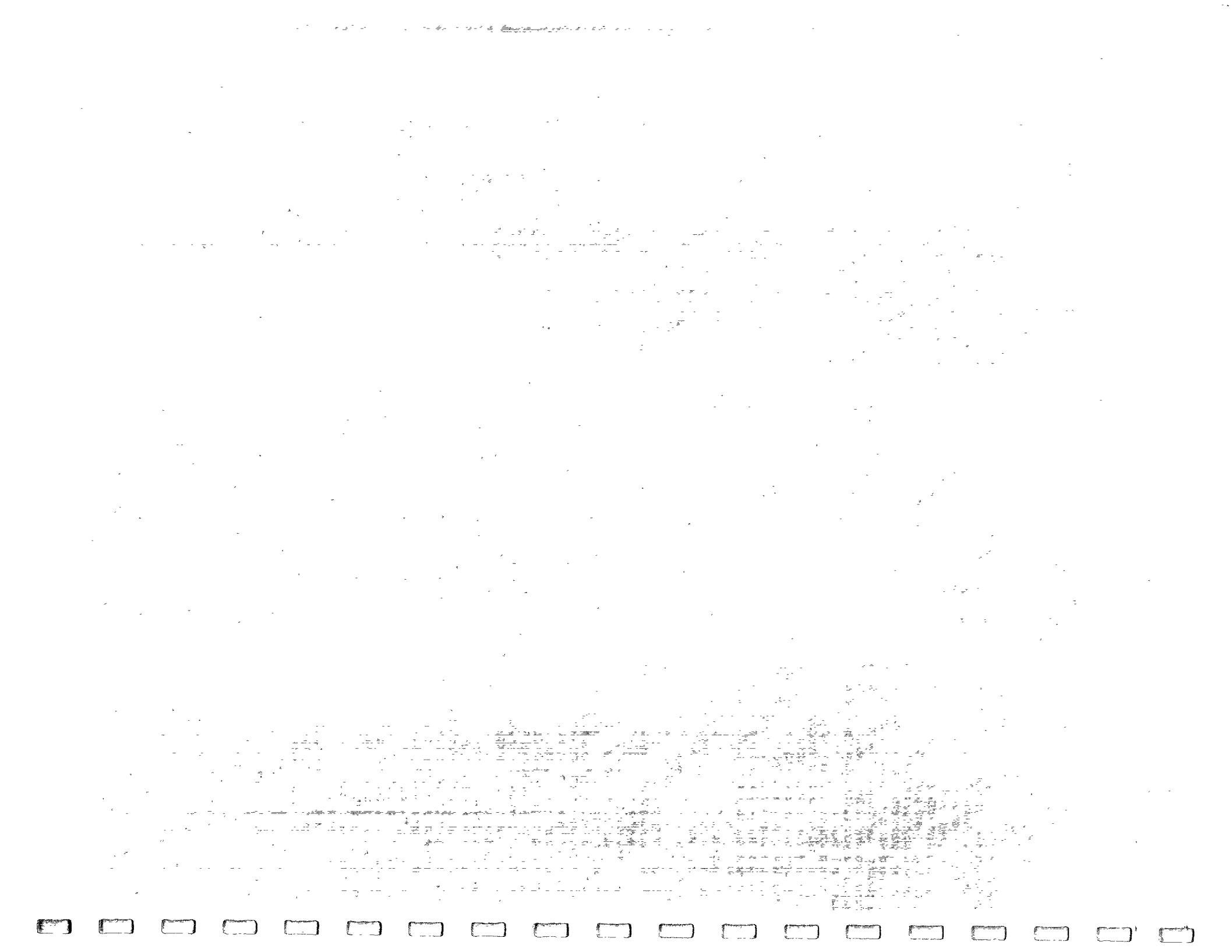
(d) CONSULTANTS.—Subject to such rules as may be prescribed by the task force, the Executive Director may procure temporary intermittent services under section 3109(b) of title 5, United States Code, at rates for individuals not to exceed $200 per day.

### SEC. 306. POWERS OF TASK FORCE.

(a) *Hearings.*—For the purpose of carrying out this title, the task force may conduct such hearings, sit and act at such times and places, take such testimony, and receive such evidence, as the task force considers appropriate. The task force may administer oaths before the task force.

(b) DELEGATION.—Any member or employee of the task force may, if authorized by the task force, take any action that the task force is authorized to take under this title.

(c) ACCESS TO INFORMATION.—The task force may secure directly from any executive department or agency such information as may be necessary to enable the task force to carry out this title, to the extent access to such information is permitted by law. On request of the Attorney General, the head of such a department or agency shall furnish such permitted information to the task force.



(d) MAIL.—The task force may use the United States mails in the same manner and under the same conditions as other departments and agencies of the United States.

SEC. 307. REPORT.

Not later than 1 year after the date on which the task force is fully constituted under section 303, the Attorney General shall submit a detailed report to the Congress on the findings and recommendations of the task force.

SEC. 308. AUTHORIZATION OF APPROPRIATION.

There is authorized to be appropriated for fiscal year 1994, $500,000 to carry out the purposes of this title.

SEC. 309 TERMINATION.

The task force shall cease to exist 30 days after the date on which the Attorney General's report is submitted under section 307. The Attorney General may extend the life of the task force for a period of not to exceed one year.

Mr. MCCAIN. Mr. President, I am very pleased to again be a cosponsor of the Sexual Assault Prevention Act, and I commend the Republican leader for his zeal and expedience in reintroducing this bill early in this session of Congress.

The phrase "increased crime in America" is no longer met with wide-eyed surprise. There was a time when law-abiding citizens reacted with skepticism at the idea that our Nation could be so riddled with crimes committed in our cities, our streets, and our homes. Now, the American people have become so accustomed to hearing over and over again that crime is on the rise that they no longer respond with surprise, but instead cry out in anger and frustration.

This outrage is especially strong against the cruel, perverse crimes committed against women. One of the most disturbing crimes infecting our society is that of sexual assault and forcible rape. These acts of violent, demented, bald-faced aggression are tantamount to terrorism against women, and the number of forcible rapes in this country is staggering. There were approximately 106,593 rapes reported in 1991, 4 percent higher than that in 1990. In my State of Arizona alone 1,590 rapes were reported.

We cannot, and must not, tolerate violence of this nature. Women in this country are singled out for this kind of violent aggression by criminals who know that our legal system is bogged down with loopholes which only succeed in keeping criminals from serving time behind bars. It is abhorrent to me that women live in fear of rape, and the victims of rape and sexual assault experience the fear and frustration of knowing that their assailant walks the streets freely where law-abiding citizens cannot.

Women in this country face distinct types of crime which need to be addressed specifically. For this reason, I believe that it is imperative that Congress enact the Sexual Assault Prevention Act. This legislation would address the crimes facing women in several ways. First, it authorizes the death penalty for murders committed by sex offenders. Second, the bill would double the maximum penalty for repeat offenders of sexual assaults. Third, it would require the testing of those accused of sexual assaults for the acquired immune deficiency syndrome [AIDS] virus, and disclosing the results of those tests to the victim. Fourth, it authorizes the admission of evidence of prior sexual assault offenses by the defendant in sexual assault trials. Fifth, it designates spousal abuse, including violation of protective orders, and "stalking," as a Federal crime. Finally, the bill would establish a comprehensive grant program to assist State and local efforts to combat sexual violence and domestic violence, and to enforce child support obligations.

Crimes against women are rampant, and this legislation would send a clear, strong message: Those who commit sexual assaults against anyone will be met with swift, stiff penalties.

Mr. President, it is untenable that the greatest democracy in the world should also suffer from this kind of cruel violence. We must use our democratic system as a tool to turn this trend around and make our lives safe again.

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By Mr. DOLE (for himself, Mr. MCCONNELL, Mr. PACKWOOD, Mr. LOTT, Mr. GORTON, Mr. THURMOND, Mr. DOMENICI, Mr. LUGAR, Mr. D'AMATO, Mr. SIMPSON, Mr. STEVENS, Mr. NICKLES, and Mr. CHAFEE):

S. 7. A bill to amend the Federal Election Campaign Act of 1971 to reduce special interest influence on elections, to increase competition in politics, to reduce campaign costs, and for other purposes; to the Committee on Rules and Administration.

COMPREHENSIVE CAMPAIGN FINANCE REFORM ACT

Mr. MCCONNELL. Mr. President, the distinguished Republican leader this morning in his remarks made reference to S. 7, the Republican campaign finance bill.

Mr. President, the Republican leader and I believe that this proposal is clearly in the best interests of the country as we seek to improve how elections are handled in the United States.

Mr. President, in 1992 voter turnout increased. Electoral competition increased. Congressional turnover increased. And campaign spending increased.

Most objective observers would say these are indications of a thriving political system. Less objective participants will twist it to fit their objective—partisan revision of campaign finance laws.

All indications are that campaign finance reform is on a fast-track—seemingly easily achievable. Something for the President and Congress to have to show for the next 100 days.

Keeping in mind that the reverberations of whatever passes likely will extend far beyond 100 days, I urge my colleagues to take great care in putting a final bill together.

Mr. President, we should not pass something that is reform in name only just for the sake of passing something

"Change" and "reform" are terms used rather loosely around here. They are not interchangeable, not synonymous. To change is to alter. To reform is to improve.

Democratic campaign finance bills based on spending limits and taxpayer financing do indeed constitute change. They do not, however, reform. They do not improve the electoral process.

The democratic bills we have seen in the past were good public relations, but lousy legislation. Spending limits have been totally discredited in the Presidential system. Mandatory spending limits are unconstitutional. A taxpayer funded congressional campaign system to provide inducements, or penalties, is not palatable to American taxpayers. In fact, the Presidential Election Campaign Fund is on the verge of bankruptcy, because taxpayers have resoundingly voted no on their annual tax returns.

In the most extensive poll we ever take in this country, every April 15 taxpayers get a chance to vote on how they feel about the public funding of elections. In overwhelming numbers, they are increasingly voting no.

Mr. President, the Democratic campaign finance bills that passed in the last two Congresses were unconstitutional, If the majority goes down that road again and the President signs such a bill into law, then my colleagues can be assured that final disposition will rest with the Supreme Court.

Republicans will not stand by while the first amendment is sacrificed for a facade of reform.

Mr. President, campaign finance reform need not be unconstitutional, partisan, bureaucratic, or taxpayer-funded.

The minority leader and I, joined by Republican colleagues, have today introduced the Comprehensive Campaign Finance Reform Act—the most extensive and effective reform bill before this Congress, bar none.

It bans PAC's, the epitome of special interest influence and a major incumbent protection tool. Our bill bans soft money. All soft money—party, labor, and that spent by tax exempt organizations. It cuts campaign costs. Provides seed money to challengers, paid for not by taxpayers, but by the political parties. It constricts the millionaire's loophole; restricts and regulates independent expenditures; fights election fraud; and restricts gerrymandering.

Real reform. In stark contrast to the Democrats' bill, the Republican bill puts all the campaign money on top of the table where voters can see it. Nothing would have a more cleansing effect on the electoral process.

Mr. President, I ask unanimous consent that at this point in the RECORD S.7 appear in its entirety. I am intro-

PROPOSED AMENDMENTS

Glen Weissenberger, *Character Evidence Under The Federal Rules: A Puzzle with Missing Pieces*, 48 Cincinnati Law Review 1, 12 (1979).

**Rule 404**

a) **Noninferential use of character evidence; character in issue.** Evidence of a person's character or a trait of a character is admissible when the issue of a person's character is substantially required by a charge, claim or defense such that the person's character or trait of a character is not used as a basis for inferring other facts.

b) **Inferential use of character evidence to prove inferred facts other than conforming conduct.** Evidence of a person's character or a trait of a character is admissible for proving inferred facts other than conduct which conforms to such person's character or trait of character.

c) **Inferential use of character evidence to prove conforming conduct.** Evidence of a person's character or his trait of a character is not admissible for the purpose of proving that he acted in conformity therewith on a particular occasion, except:

1) **Character of accused.** Evidence of a pertinent trait of his character offered by an accused, or by the prosecution to rebut the same.

2) **Character of victim.** Evidence of a pertinent trait of character of the victim of the crime offered by an accused, or by the prosecution to rebut the same, or evidence of a character trait of peacefulness of the victim offered by the prosecution in a homicide case to rebut evidence that the victim was the first aggressor;

3) **Character of witness.** Evidence of the character of a witness, as provided in rules 607, 608, and 609.

d) **Method of proving character.**

1) Where evidence of character or a trait of character is admissible pursuant to subdivisions (a), (b), (c)(1) or (c)(2) of this rule, proof may be made by testimony as to reputation or

by testimony in the form of opinion. On cross-examination, inquiry is allowed into specific instances of conduct.
2) Where evidence of character or a trait of character is admissible pursuant to subdivision (a) of this rule, proof may also be made of specific instances of the person's conduct.
3) Except as provided in rules 608 and 609, evidence of other crimes, wrongs or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. Such evidence may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

U. S. Department of Justice
*Criminal Division*

SECTION IIIA
EVID 9-10/93

*Washington, D.C. 20530*

JUN 15 1993

Honorable Ralph K. Winter, Jr.
Audubon Court Building
55 Whitney Avenue
New Haven, Connecticut 06511

Dear Judge Winter:

I am writing on behalf of the Department of Justice to request inclusion on the agenda of the Advisory Committee on the Federal Rules of Evidence at its upcoming meeting of a proposal to create a new Rule of Evidence under which an expert's report of the analysis of a substance, object, or writing would be admissible as a kind of business record, unless either party wished to call the expert.

The proposal, which originated with the Drug Enforcement Agency (DEA), was inspired by a provision in Chapter 33 of the District of Columbia Code relating to controlled substance violations. The DEA is responsible for analyzing all drug evidence seized by the Washington, D.C. Metropolitan Police Department. Because of the nature and volume of the seizures and subsequent prosecutions, DEA encouraged the enactment some years ago of what is now D.C. Code § 33-556, which provides as follows:

> In a proceeding for a violation of this chapter, the official report of chain of custody and of analysis of a controlled substance performed by a chemist charged with an official duty to perform such analysis, when attested to by that chemist and by the officer having legal custody of the report and accompanied by a certificate under seal that the officer has legal custody, shall be admissible in evidence as evidence of the facts stated therein and the results of that analysis. A copy of the certificate must be furnished upon demand by the defendant or his or her attorney in accordance with the rules of the Superior Court of the District of Columbia or, if no demand is made, no later than 5 days prior to trial. In the event that the defendant or his or her attorney subpoenas the chemist for examination, the subpoena shall be without fee or cost and the examination shall be as on cross-examination.

The constitutionality of this provision under the Confrontation Clause has been upheld by the District of Columbia Court of Appeals. See Howard v. United States, 473 A.2d 835 (1984). The court described the provisions of D.C. Code § 33-556 as "within the ambit of the business records exception" to the hearsay rule. 473 A.2d at 838. In discussing whether evidence admitted pursuant to the provision bore sufficient indicia of reliability to satisfy the purpose of the Confrontation Clause, the court noted that identifying a controlled substance is determined by a well recognized chemical procedure and the reports thus produced contain objective facts rather than opinions. Moreover, chemists who conduct such examinations do so routinely, generally have little interest in the outcome of a case, and are under a duty to make accurate reports. Finally, D.C. Code § 33-556 does not preclude the defendant from inquiring into the reliability of the test, since he may subpoena the chemist and subject him to crossexamination.

The same or similar factors are present with respect to other expert examinations such as ballistics and handwriting examinations: recognized standards exist for the analyses which therefore result in reports that contain objectively obtained facts, and such experts normally have no interest in or reason to falsify the outcome of a particular analysis. Most important, the amendment we are suggesting has a provision allowing the defendant in a criminal case to subpoena the expert and subject him or her to cross-examination.

The practical significance of the District of Columbia statute on which our proposal is modeled is that DEA chemists -- unless subpoenaed -- do not have to appear personally in court to testify to the results of their tests of controlled substances, thereby saving not only their time but that of the parties and the courts. No witness is even required to authenticate the report because the D.C. Code provision has been interpreted as "extend[ing] admissibility of a chemist's report from the business records exception to a business records-type subset of the official records exception to the hearsay rule." Giles v. District of Columbia, 548 A.2d 48, 54 (D.C. App. 1988). Thus, in cases where a defendant has no desire to contest the chemist's report, but for tactical reasons does not want to stipulate to its conclusions, the D.C. Code provision sets out an efficient way to introduce the evidence. [1]

The same is true with similar reports of other experts. Frequently in federal trials the results of expert analyses are not contested. Our proposal would allow the introduction, by either side, of the expert's testimony in such a situation without the necessity (but preserving the opportunity) of calling the expert,

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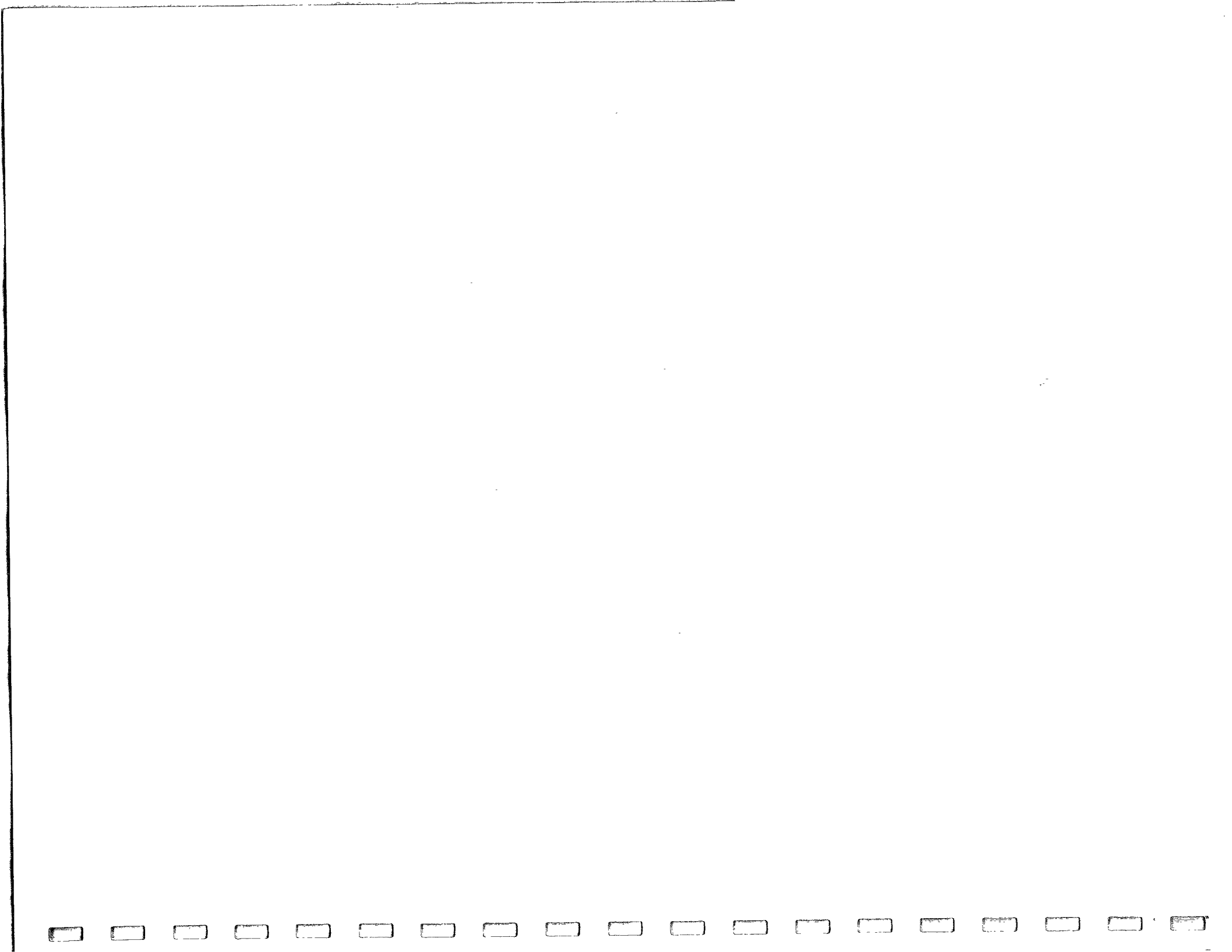
[1] Of course, there may also be situations in which the government does not wish to introduce the evidence by stipulation but would prefer not to take the time to call the chemist.

a saving of time for both the court and the expert. Since the rationale for the amendment does not depend on whether the expert is employed by the government, our proposal would allow such an uncontested introduction in cases of tests by private sector experts as well.

We think that the best way to accomplish this is to amend Rule 803(6) of the Federal Rules of Evidence. Specifically, we recommend that the current Rule 803(6) be redesignated 803(6)(a), and that new subsections (b), (c), and (d) be added as follows:

> (b) An official report of chain of custody and of an analysis of a substance, object, or writing, performed by an expert with an official duty to perform such analysis, shall, when attested to by that expert and by another person (if any) having legal custody of the report, be admissible as evidence of the facts stated therein and the results of that analysis. Authentication of an official report offered under this subsection may be made pursuant to Rule 902.
>
> (c) A report of chain of custody and of an analysis of a substance, object, or writing, performed by an expert who performed such analysis in the course of a regularly conducted business activity, shall, when attested to by that expert and by another person (if any) having custody of the report, be admissible as evidence of the facts stated therein and the results of that analysis.
>
> (d) If a party plans to offer a report pursuant to subsections (b) or (c), a copy of the report shall be furnished to every other party or his attorney not later than five days prior to trial. If the expert is subpoenaed for examination, the expert must be found qualified as such before the introduction of the report. If the expert or custodian is subpoenaed for examination, the subpoena shall be without fee or cost and the examination shall be as on cross-examination.

We note that the final sentence of subsection (b) of our proposal, which states that authentication of such an official report may be accomplished pursuant to Rule 902, is to make clear that such a report, although allowed into evidence under the "business records" exception to the hearsay rule, is to be treated as if it were admitted under exception 8 (public records), and self-authenticated, such as with an official seal, rather than by calling a witness. This is consistent with the court's statement in Giles, quoted above with respect to reports admitted under the D.C. rule, that the rule is really a subset of the official records exception.



Your and the other Committee members' consideration of this matter is deeply appreciated.

Sincerely,

Roger A. Pauley, Director
Office of Legislation
Criminal Division

cc: Margaret A. Berger

TO: Members of the Advisory Committee on Federal Rules of Evidence

FROM: Margaret A. Berger, Reporter

RE: Rule 405

DATE: September 21, 1993

SECTION III B 9-10/93 EVID

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Rule 405 contains a number of ambiguities, some of which are the result of rules changes since its enactment.

1. Relationship to Rule 404. Rule 405's placement after Rule 404 and some of the language in the rule and accompanying note suggest to the casual reader that Rule 405's coverage parallels that of Rule 404 -- that is, that Rule 405 deals with proving the different categories of evidence explicitly made admissible by Rule 404. That of course is not the case. The only evidence specifically treated in Rule 404 to which Rule 405 relates is evidence that falls into the two exceptions stated in subdivisions (a)(1) and (a)(2). Rule 405 also relates to evidence not made inadmissible by Rule 404 -- i.e. character evidence not being used with a propensity inference -- and does not apply to the other crimes evidence treated in Rule 404(b). Suggestions for amending Rule 404 to make the relationship between the two rules clearer are contained in the memorandum on Rule 404 issues.

2. Problems with subdivision (a).

a. The failure to mention Rule 412. Rule 412 currently states in both subdivisions (a) and (b) that opinion and reputation evidence are not admissible "notwithstanding any other provision of law." The Committee's proposed amendment to Rule 412 limits reputation evidence to a civil case and then only "if it has been placed in

controversy by the alleged victim." The proposed Rule 412(b)(2) exception for evidence of prior sexual behavior between the victim and the accused to prove consent authorizes use of prior sexual behavior for a propensity inference; it is therefore an instance in which it is no longer correct to state, as Rule 405(a) does, that reputation and opinion evidence are always admissible to prove character. Louisiana has recognized this problem by placing "Except as provided in Article 412" at the beginning of Rule 405(a).

b. Reputation and opinion evidence are not admissible with regard to all forms of impeachment. Rule 404(a)(3) states correctly that evidence of a witness' character may be admissible despite the propensity rule as provided in Rules 607, 608 and 609. Certainly reputation and opinion evidence are inapplicable when impeachment proceeds pursuant to Rule 609 -- another instance in which the sweeping statement in Rule 405(a) is not correct.

3. Subdivision (b). Problems with regard to the "essential element" language have already been discussed in connection with Rule 404. See pp. 17-18.

4. The Advisory Committee Note. The Note suggests somewhat tangentially that expert opinion evidence is admissible. Should the note be expanded to explain how the courts have treated this type of evidence, and to discuss Rule 405's interrelationship with Rule 704(b) which bars expert proof with regard to ultimate mental states of an accused. Rule 704(b) was added after the enactment of Rule 405.

**TO:** Members of the Advisory Committee on Federal Rules of Evidence

**FROM:** Margaret A. Berger, Reporter

**RE:** Rule 407

**DATE:** September 21, 1993

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**There is a conflict among the circuits as to how Rule 407, which bars evidence of subsequent remedial measures, should be applied in strict liability litigation.[1] The problem arises because the rule provides for exclusion when the evidence is used to prove "negligence or culpable conduct." In deciding whether and how to amend Rule 407 to deal explicitly with strict liability claims, the rule's underlying rationale, the impact of substantive doctrine, and the desirability of uniformity in the federal courts versus conformity with state law all bear on possible choices.**

Current law and incentives for forum shopping. **Although the majority of the circuits have extended Rule 407 to apply to all strict liability causes of action,[2] the**

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[1] Rule 407 provides:

> When, after an event, measures are taken which, if taken previously, would have made the event less likely to occur, evidence of the subsequent measures is not admissible to prove negligence or culpable conduct in connection with the event. This rule does not require the exclusion of evidence of subsequent measures when offered for another purpose, such as proving ownership, control, or feasibility of precautionary measures, if controverted, or impeachment.

[2] Raymond v. Raymond Corp., 958 F.2d 1518, 1522 (1st Cir. 1991); In re Joint Eastern District and Southern District Asbestos Litigation v. Armstrong, 995 F.2d 343, 345 (2d Cir. 1993); Cann v.

Tenth Circuit resolves this issue in terms of state law which is often to the contrary.[3] The positions of the Eighth[4] and Eleventh[5] circuits are not clear, but at least some opinions in those circuits indicate a willingness to admit evidence of some post-accident remedial measures in strict liability actions.

With the exception of the Tenth Circuit, the federal courts have rejected Erie concerns in interpreting Rule 407. They assume that the Supreme Court's opinion in Hanna v. Plummer authorizes federal courts to apply an arguably procedural rule.[6] They classify Rule 407 as dealing with the ascertainment of truth rather than with furthering a forum's substantive tort law policies.[7]

Since a majority of state courts permit the introduction of subsequent remedial

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Ford Motor Company, 658 F.2d 54, 60 (2d Cir. 1981), cert. denied, 456 U.S. 960 (1982); Kelley v. Crown Equipment Co., 970 F.2d 1273, 1275 (3d Cir. 1992); Werner v. Upjohn, 628 F.2d 848 (4th Cir. 1980), cert. denied, 449 U.S. 1080 (1981); Grenada Steel v. Alabama Oxygen Co., 695 F.2d 883 (5th Cir. 1983); Bauman v. Volkswagenwerk Aktiengesellschaft, 621 F.2d 230, 232 (6th Cir. 1980); Flaminio v. Honda Motor Company, Ltd., 733 F.2d 463, 469 (7th Cir. 1984); Gauthier v. AMF, Inc., 788 F.2d 634, 636-37 (9th Cir. 1986).

[3] Moe v. Avions Marcel Dassault Brequet Aviation, 727 F.2d 917, 932 (10th Cir. 1984); Herndon v. Seven Bar Flying Service, Inc., 716 F.2d 553 (10th Cir. 1983), cert. denied, 466 U.S. 958 (1984).

[4] Compare DeLuryea v. Winthrop Labs, 697 F.2d 222 (8th Cir. 1982) (bars subsequent remedial measures evidence in a failure to warn case involving a drug) with R.W. Murray Co. v. Shatterproof Glass Corp., 758 F.2d 266 (8th 1985); Unterburger v. Snow Co, 630 F.2d 599, 603 (8th Cir. 1980); Robbins v. Farmers Union Grain Terminal Association, 552 F.2d 788 (8th Cir. 1977) (all assuming that evidence of subsequent remedial measures may be admissible).

[5] Ebanks v. Great Lakes Dredge & Dock Co., 688 F.2d 716 (11th Cir. 1982) (applies Rules 401 and 403).

[6] 380 U.S. 460, 472 (1965).

[7] See the extensive discussion in Flaminio v. Honda Motor Co., 733 F.2d 463 (7th Cir. 1984) (Posner, J.).

measure evidence in strict liability cases,[8] the extension of Rule 407 to strict liability claims frequently affords defendants an incentive to remove to federal court. The split in the circuits may also inspire horizontal forum-shopping by defendants who are within the federal system. Transfers pursuant to 28 U.S.C. §1404 may result as defendants in product liability actions are often amenable to personal jurisdiction in more than one forum. Because circuits other than the Tenth view Rule 407 as procedural, the transferee court will apply its circuit's interpretation of Rule 407 to strict liability claims.

Rationale. Rule 407, like the other special relevancy rules in Article IV, rests on two grounds: that the barred evidence has low probative value with regard to a particular inference, and that public policy dictates exclusion of the evidence. Evidence of post-accident remedial measures offered to prove negligence or culpable conduct is inadmissible partly because of relevancy concerns, but primarily so as not to discourage

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[8] 1 Trial Evidence Committee, Section of Litigation, American Bar Association, Evidence in America: The Federal Rules in the States § 17.5 (1992). The leading case holding that the traditional remedial measure rule should not be applied in strict liability cases is Ault v. International Harvester Co., 528 P.2d 1148 (1974). Some states have reached this result by statute or rule, see e.g., Me. R. Evid. 407 and R.I. R. Evid. 407 (both states allow evidence of subsequent measures in all types of cases); Alaska R. Evid. 407 and Hawaii R. Evid. 407 (specifically providing that evidence is admissible to prove defect in products liability actions) and others by case law interpreting a rule substantially similar to FRE 407, see, e.g., Jeep Corp. v. Murray, 708 P.2d 297 (Nev. 1985); Hallmark v. Allied Product Corporation, 646 P.2d 319 (Ct. App. Ariz. 1982), or by commentary to the rule (see Committee Comment to Colo. R. Evid. 407).

defendants from making repairs after an accident occurred.[9] How these grounds operate in product liability cases is a subject of dispute.

a. Relevancy concerns. Advocates of extending the exclusionary policy of Rule 407 to products liability cases contend that the probative value of the evidence is too low to meet a Rule 403 balancing test: "[C]hanges in design or manufacturing process might be made after an accident for a number of reasons: simply to avoid another injury, as a sort of admission of error, because a better way has been discovered, or to implement an idea or plan conceived before the accident."[10] They further argue that the introduction of evidence of subsequent remedial measures would confuse the jury. In a product liability action, the jury is to determine if the product or design was defective at the time that the product was made and sold, and the jury's

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[9] The Advisory Committee Note to Rule 407 provides:

> The rule rests on two grounds. (1) The conduct is not in fact an admission, since the conduct is equally consistent with injury by mere accident or through contributory negligence. Or, as Baron Bramwell put it, the rule rejects the notion that "because the world gets wiser as it gets older, therefore it was foolish before." Hart v. Lancashire & Yorkshire Ry. Co., 21 L.T.R. N.S. 261, 263 (1869). Under a liberal theory of relevancy this ground alone would not support exclusion as the inference is still a possible one. (2) The other, and more impressive, ground for exclusion rests on a social policy of encouraging people to take, or at least not discouraging them from taking, steps in furtherance of added safety.

[10] Grenada Steel v. Alabama Oxygen Co., 695 F.2d 883, 888 (5th Cir. 1983).

attention should be directed to this time period.[11]

On the other hand, proponents of admissibility assert that a blanket rule of exclusion is over-inclusive -- that there will be contexts in which the evidence is relevant, and that the issue should be handled pursuant to Rules 401 and 403 rather than by extending Rule 407's scope to product liability actions.[12]

b. Promoting repairs. The majority of federal courts has determined that the reasons for excluding the evidence as proof of negligence apply equally in strict liability actions. These courts reason, whatever legal theory applies, that defendants will be less likely to undertake remedial measures if they know that evidence of their actions will be admitted because of fear that jurors will draw an adverse inference about the cause of the accident. On the other hand, courts that admit this evidence have pointed out that a manufacturer is not likely to forego repairs to avoid liability in one case when the failure to act could expose the manufacturer to liability in many other lawsuits.[13]

c. The inter-relationship with substantive doctrine. A number of courts have resolved the admissibility of subsequent repair evidence by analyzing the differing causes of action that pertain in product liability litigation. The New York state courts, for

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[11] S. Saltzburg & K. Redden, Federal Rules of Evidence Manual 181 (3d ed. 1982). See also Grenada, 695 F.2d at 887.

[12] See discussion in Herndon v. Seven Bat Flying Services, Inc., 716 F.2d 1323, 1327 (10th Cir. 1983).

[13] Herndon v. Seven Bar Flying Service, Inc., 716 F.2d 1323, 1327 (10th Cir. 1983) ("It is unrealistic to think a tort feasor would risk innumerable additional lawsuits by foregoing necessary design changes simply to avoid the possible use of those modifications as evidence by persons who have already been injured.").

instance, have concluded that failure to warn and design defect cases really sound in negligence, and that only manufacturing defect cases rest on a true strict liability analysis in which evidence of subsequent repairs should be admissible.[14] The Eighth Circuit's cases suggest a similar approach.

Some courts have a special rule of admissibility for recall letters sent by manufacturers to owners of their product on the ground that the arguments for admitting this type of evidence are particularly compelling.[15] When the plaintiff seeks recovery because of the very defect that is the subject of the letter, the evidence has considerable probative value as an admission that the product was defective. Further, the policy of encouraging defendants to make repairs is not implicated as a recall order usually issues from a third party or is mandated by statute.[16]

Possible Solutions.

1. The initial question is whether the present situation with regard to Rule 407 has become intolerable? Should the rule be rewritten because it invites vertical and horizontal forum shopping? Should the rule be more responsive to Erie concerns? Do the majority of the circuits reach an inappropriate result by extending the rule to all

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[14] See Cover v. Cohen, 473 N.Y.S.2d 378 (1984); Rainbow v. Albert Elia Bldg. Co., 449 N.Y.S.2d 967 (1982); Caprara v. Chrysler Corp., 436 N.Y.S.2d 251 (1981).

[15] Rozier v. Ford Motor Co., 573 F.2d 1332 (5th Cir. 1978); Farner v. Paccar, Inc., 562 F.2d 518 (8th Cir. 1977).

[16] See, e.g., Farner v. Paccar, Inc., 562 F.2d at 527 (8th Cir. 1977) (it would be unreasonable "to assume that the manufacturers will risk wholesale violation of the National Traffic and Motor Vehicle Safety Act and liability for subsequent injuries caused by defects known by them to exist in order to avoid the possible use of recall evidence as an admission against them.").

strict liability actions? A "yes" answer to any of these questions suggests the need for an amendment.

2. If Rule 407 is revised, should the rule defer to applicable state law?[17] Two arguments favor such a choice. In the first place, some states view the admission of subsequent remedial measures in products liability actions as integral to their substantive policies with regard to these types of actions. If the consequence of admitting evidence of subsequent remedial measures is to tip the scales somewhat in plaintiffs' favor, then this choice should perhaps be honored in diversity litigation. Second, a federal rule that provides incentives for removing actions based on state law to the federal courts may well be undesirable. These reasons lose some of their strength if product liability law is likely to be federalized in the near future, or if the trend in the states is towards greater protection of defendants with regard to Rule 407-type evidence in strict liability actions.[18]

Rule 407 could be amended to require conformity to state law by adding a new second sentence. For example:

> When evidence of subsequent measures is offered in connection with a claim based on strict liability in tort, or breach of warranty, the admissibility of the evidence shall be determined in accordance with State law.

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[17] Three evidentiary rules -- Rule 302 (presumptions); Rule 501 (privileges) and Rule 601 (competency, e.g. the applicability of a Deadman's Act) -- now require a determination in accordance with state law.

[18] The American Law Institute is working on a restatement of product liability law. The Reporter, Aaron Twerski, advised me that the issue of subsequent remedial measures evidence will ultimately be addressed but not before 1995 at the earliest. He has previously recommended extending the subsequent measures exclusion at least to design defect and failure to warn cases.

or

> When evidence of subsequent measures is offered in connection with a products liability claim, the admissibility of the evidence shall be determined in accordance with State law.

or

> When evidence of subsequent measures is offered to prove strict liability, the admissibility of the evidence shall be determined in accordance with the law of the State governing the strict liability claim.

3. If the Committee chooses to opt for federal uniformity rather than conformity to state law, it has three choices: 1) to extend Rule 407 explicitly to all strict liability cases; 2) to make Rule 407 inapplicable to all strict liability cases; or 3) to make Rule 407 selectively applicable in strict liability cases. This choice is obviously dictated by an assessment of the consequences.

a. Exclude all subsequent measure evidence. The easiest rule to apply is to exclude all subsequent measure evidence in all strict liability cases, the current majority approach. The first sentence of Rule 407 could be amended as follows:

> When, after an event, measures are taken which, if taken previously, would have made the event less likely to occur, evidence of the subsequent measures is not admissible to prove strict liability, negligence or culpable conduct in connection with the event.

(Tenn. R. Evid. 407)

b. Make Rule 407 inapplicable in the strict liability case. On the other hand, the guiding principle of the Federal Rules of Evidence is a disposition in favor of admitting all relevant evidence. In negligence cases, the probative value of subsequent measures evidence as proof of defendant's prior culpability is deemed so low that the policy of liberal admissibility is abandoned lest defendants be deterred from making

essential repairs. The crucial question is whether the probative value of subsequent measures evidence is sufficiently high in strict liability cases when offered to prove the existence of a defect so that the usual general preference for admissibility stated in Rule 401 should apply, subject to case specific exclusion via Rule 403. This solution would make Rule 407 inapplicable to strict liability claims. Admissibility would not, however, always follow because application of the balancing test in Rule 403 might result in exclusion.

Texas makes Rule 407 inapplicable in strict liability cases by adding a new third sentence to the rule:

> Nothing in this rule shall preclude admissibility in products liability cases based on strict liability.

Iowa reaches this result by adding the underlined language to the second sentence of Rule 407:

> This rule does not require the exclusion of evidence of subsequent measures when offered <u>in connection with [a] claim based on strict liability in tort or breach of warranty or</u> for another purpose, such as proving ownership, control, or feasibility or precautionary measures, if controverted, or impeachment.

c. <u>Selective admissibility</u>. Instead of admitting evidence of subsequent measures on a case-by-case basis when probative value is sufficiently high, the third alternative is to authorize admissibility (subject of course to Rule 403) only in those instances in which probative value is generically high. The two most likely candidates for special treatment are subsequent measures offered to prove a manufacturing defect and evidence of recall letters. In both of these instances the evidence relates to the defect that is at issue.

One possible way of making subsequent measures evidence admissible in manufacturing defect cases is to add the following language to the first sentence of Rule 407:

> or to prove that the product was defective in design or that a warning or instruction should have accompanied the product at the time of the manufacture.

Another possibility would be to add to the second sentence:

> such as proving the existence of a defect in a product liability action based on strict liability.

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John Rabiej

SECTION IV
EVIDENCE
4-16/93

September 21, 1993

John K. Rabiej
Chief Rules Committee Support Office
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Washington, DC 20544

Dear Mr. Rabiej:

Professor Margaret Berger asked me to mail this manuscript to you directly, for distribution to the Committee members.

Thank you.

Yours truly,

Roger C. Park
Fredrikson & Byron
Professor of Law

Enclosure

:pb

September 19, 1993

# "OTHER CRIMES" EVIDENCE IN SEX OFFENSE CASES

David P. Bryden* and Roger C. Park**

It is fundamental to American jurisprudence that "a defendant must be tried for what he did, not for who he is."

United States v. Foskey[1]

[B]ehavior science research . . . shows that, by and large, the best way to predict anybody's behavior is, his behavior in the past . . . .

Paul Meehl[2]

A fundamental tenet of Anglo-Saxon criminal jurisprudence is that the prosecution must prove that the accused committed a specific crime, not merely that he is dangerous or wicked. So strong is our attachment to this principle that we carry it a step further: as a rule, courts exclude evidence of the defendant's bad character, even when it is relevant to his guilt of the crime charged.[3]

This rule has come under sharp attack, in Congress and the courts, on the ground that it enables sex offenders to escape punishment. Public awareness of the problem was heightened by the televised trial of William Kennedy Smith. He was accused of

raping a woman whom he met in a bar in Palm Beach. She had gone with him back to the vacation house at which he was staying, and the two went for a walk along the beach. She testified that he took off his clothes, tackled her when she tried to leave, and raped her. He admitted having intercourse but claimed that she consented, and that she started to behave irrationally when he called her by the wrong name. At a pretrial hearing, the prosecution offered testimony by three other women that they had been sexually assaulted by Smith.[4] The trial judge excluded the evidence under Florida law, and Smith was ultimately acquitted.[5]

Although there is a division of authority on the issue, exclusion of evidence about Smith's alleged prior crimes was consistent with Florida law and with the law of many, but not all, jurisdictions.[6]

The same issue often arises in "stranger rape" cases, where the defendant claims that he was misidentified by the victim and the prosecution seeks to introduce evidence that he committed other rapes. Here too the uncharged misconduct evidence is sometimes excluded as contrary to the rule against character evidence,[7] though some courts have been more ready to admit the evidence than they are in consent defense cases.[8]

A third type of case involves child sex abuse. Again, there is no defense of consent. The defendant may or may not have been

an acquaintance of the alleged victim. The defense may claim that no sexual abuse occurred, or that it was committed by another person. The prosecution offers evidence that on other occasions the accused molested the same child or other children. Courts often admit this type of evidence, though there are still a number of cases excluding it.[9]

Congress is now considering legislation that would allow the prosecution to introduce evidence of the accused's other crimes in most prosecutions for sex offenses.[10] Meanwhile, the courts are wrestling with the same issue.

This article will reconsider the rule against evidence of uncharged misconduct by the accused, as it pertains to sex offenses. Although we will focus primarily on rape, much of the analysis will also have implications for child abuse cases. We will begin by examining traditional exceptions to the rule, and the circumstances in which those exceptions have been applied to sex crimes. We will then consider whether the rule should be discarded. In the last section of the article, we will evaluate the alternative of retaining the rule but creating a general or limited exception for sex offenses.

## I. THE STATE OF THE LAW: UNCHARGED MISCONDUCT EVIDENCE IN SEX OFFENSE CASES

The rule against character evidence prohibits the reception of evidence in whatever form (opinion, reputation, or specific acts) to show that a person has a trait of character, if the evidence is offered for the further purpose of showing action in conformity with that trait. This rule, broadly speaking, forbids the introduction of evidence that a defendant now charged with one sex offense has also committed sex offenses on other occasions. However, there are several exceptions that can apply to sex offense evidence. Evidence that the defendant committed sex offenses other than the one charged may become admissible to impeach a defense witness or to rebut defense evidence. It may fall outside the character evidence ban altogether because it is offered to show motive, plan, intent or identity. Moreover, in some jurisdictions a "depraved instinct" exception to the character evidence ban applies in child molestation cases. We will start by examining these various theories of admissibility.

**A. Uncharged Misconduct Offered as Character Evidence to Impeach Defense Testimony or Rebut Defense Evidence**

Impeachment of defendant with prior convictions. When a defendant has been convicted of another sex crime, some courts allow the prosection to introduce evidence of the conviction in order to impeach the defendant's testimony. The theory is that the prior misconduct shows that the defendant is the sort of person who would lie on the witness stand, not that it shows that

he is the type of person who would commit rape. Accordingly, the defendant is entitled to a limiting instruction telling the jury that it should use the evidence only for its bearing on the defendant's credibility, and not as evidence of guilt.[11]

In most jurisdictions, the trial judge has the authority to prevent the use of other-crime convictions to impeach in situations in which the evidence is likely to be used prejudicially in violation of the instruction. One factor to be considered in deciding whether the prior conviction is prejudicial is the similarity of the other crime to the charged crime. The closer the similarity, the greater the danger that the jurors will give the other crime its common sense weight as evidence of a propensity to commit the charged crime, rather than limiting their use of the evidence to the highly artificial way mandated by the instruction. Thus, similarity is a factor weighing <u>against</u> admissibility when evidence is offered on an impeachment theory, though it weighs <u>in favor</u> of admissibility if offered under the theory, later to be discussed, that it shows a plan or modus operandi. (If one takes this web of doctrine seriously, there is a middle area in which a prior felony is too similar to be offered to impeach, but not similar enough to be offered for substantive purposes, and hence is inadmissible). Thus, one would expect that evidence of a prior rape would often or usually be excluded when offered on an impeachment theory in a rape case, on the ground that there is too much danger that the

jury will draw the natural inference that the evidence shows a tendency to rape, rather than merely drawing the permissible inference that it shows a tendency to lie. Nevertheless, a number of courts have upheld, as within discretion, trial court decisions to admit prior sex crimes to impeach a defendant accused of rape or another sex crime. [12]

This theory of admission verges on being a transparent fiction. It would be hard to find anyone who believes that juries actually follow the limiting instruction, or even understand it. For that matter, it is doubtful that the evidence has much value for its permitted purpose of determining credibility. It may be true that a convicted rapist is generally more likely to lie than a law-abiding person. However, when evidence is offered to impeach a defendant who testifies in his own defense at trial, the proposition that felons have a general propensity to lie is beside the point. If the accused is in fact innocent, he presumably will have no occasion to lie even if he is a dishonest person. If on the other hand he is guilty in fact, but has pleaded not guilty and testified on his own behalf, he presumably will lie about the rape, even if he is a generally truthful person. On either hypothesis, then, his prior conviction is unhelpful to the jury except for the forbidden purpose of determining whether he has a propensity to rape.

To put it another way: If the accused is innocent of the

crime at bar, then prior-conviction impeachment is affirmatively harmful because it makes his denial seem like a lie when it is not. If the accused is guilty, then prior-conviction impeachment still does nothing to illuminate his truthfulness unless one assumes that a guilty person with a clean record would be less likely to lie to save himself. In view of the strong incentive that a person who is guilty of a serious crime has to lie on the stand, it is doubtful that there is much difference between those with clean records and those with prior convictions.[13]

In short, the danger that the jury will use the evidence for the powerful and appealing, but forbidden, inference that the defendant has a tendency to rape outweighs its feeble probative value for the permitted inference that the defendant has a greater-than-average propensity to lie in order to exonerate himself. In any event, instructing a jury to follow only the permitted thought-path is like telling someone to ignore every taste in a Hershey bar except the nuts.[14]

Impeachment of a testifying defendant by cross-examination about sexual misconduct not resulting in conviction. The trial judge has discretion to permit impeachment of a witness by cross-examination about misconduct by the witness that reflects on the witness's truthfulness, even though the misconduct has not resulted in a criminal conviction.[15] The attorney doing the questioning must "take the witness's answer" and cannot introduce

extrinsic evidence of the uncharged misconduct.[16] Under the generally prevalent rule, the trial judge should sustain an objection to the cross-examination if the probative value of the evidence on the issue of truthfulness is substantially outweighed by prejudice, confusion, or waste of time.[17] For the reasons that we have advanced in our discussion of prior convictions, it is hard to imagine uncharged sex offense evidence that would have much value on the issue of whether the defendant, if guilty, would nevertheless try to save himself by false testimony. If one genuinely believes that evidence of uncharged sex offenses is misleading when used as evidence of propensity to commit sex offenses, then the evidence should be excluded because it is likely to be used by the jury as evidence of a propensity to commit sex crimes, not of a propensity to lie.[18]

Rebuttal of defense character evidence and cross-examination of defense character witnesses. Under an exception to the rule against character evidence, the defendant is entitled to offer exculpatory reputation evidence or opinion testimony[19] by character witnesses, but is not entitled to offer evidence of specific acts, such as dates on which he behaved "like a gentleman." If a defendant offers a character witness who gives reputation or opinion testimony leading to an inference that the defendant was peaceable, law-abiding, respectful to women or the like, then the prosecutor can rebut with character witnesses who offer evidence in the form of reputation or opinion to the

contrary. More potently, the prosecutor, with a good faith basis, can cross-examine the defendant's character witness by asking whether the witness had heard that the defendant had committed specific bad acts on other occasions. The ostensible theory that supports allowing this cross-examination is that the evidence impeaches the character witness by showing either that the witness does not really know of the defendant's true reputation or that the witness has an unusual definition of good reputation.[20] Because the adverse impact of this cross-examination would outweigh the benefit to the defendant from the character testimony, we doubt that defense character evidence is often offered in sex offense cases where there is any evidence of other acts of the defendant.

Curative admissibility. When a defendant opens the door by asserting that he has never been involved in similar incidents or by otherwise managing to convey to the jury inadmissible denials of similar conduct, the prosecution is allowed to rebut by offering relevant evidence of uncharged misconduct. The difference between this use of character evidence and that described in the preceding paragraph is that in this case the prosecution is "fighting fire with fire"[21]--combattingthe interjection of inadmissible evidence, as opposed to responding to admissible evidence in a fashion permitted by the rule. (The defense evidence is inadmissible because the exception permitting the defense to offer character evidence only covers reputation

and opinion testimony, not testimony about defendant's conduct.)[22]

State v. Banks[23] illustrates this principle in the context of sex crimes. The defendant in Banks was charged with a sex crime against his daughter, a girl of less than 13 years of age. When questioned by his lawyer about the charges, he responded with broad denials of any sexual conduct with children. For example, he said, "There is no truth to that, I haven't, never in my entire life ever had sex with any child, with any person that was not of legal age and without their consent." He also called a former girlfriend to the stand to testify that his sexual behavior was normal and that she had never known him to engage in sexual conduct with children. The Ohio Court ruled that such testimony opened the door to prosecution evidence about the defendant's sexual misconduct with other children.[24]

**B. Uncharged Misconduct Offered to Show Something Other than Character: Rule 404(b) Evidence**

The character evidence rule only prohibits a certain type of reasoning about uncharged misconduct--reasoning that involves inferring bad character from bad acts, and then inferring guilt of the crime charged from the bad character.[25] Uncharged misconduct may be admissible, subject to balancing for prejudice, when it is offered for a purpose that does not require character

reasoning. Rule 404(b) gives examples of such purposes: showing knowledge, identity, plan, preparation, opportunity, motive, intent, or absence of mistake or accident.[26]

Occasionally the application of this rule is easy because the uncharged misconduct evidence plainly does not require the trier of fact to make any inference about disposition or propensity. Suppose, for example, that the defendant is accused of growing marijuana in his back yard. He claims that he thought that the plants were just ordinary weeds. To show his knowledge that the plants were marijuana, the prosecutor would be allowed to put in evidence that the defendant had previously been convicted of growing marijuana. The evidence would not be offered to show that the defendant had the character of being a drug dealer, but merely to show that he knew what marijuana looked like. This example does not require us to infer anything at all about any personality disposition of the defendant, although of course there is a considerable likelihood that the jury will do so.[27]

The permissible use of uncharged misconduct evidence under Rule 404(b) usually does, however, involve to some degree an inference about a propensity of the defendant, a tendency to act similarly in similar situations. This is almost always the way the evidence is used when the defendant is charged with sexual assault or child abuse.

Of the exceptions[28] specifically listed in Rule 404(b), only "motive," "intent/absence of mistake," "plan," and "identity" commonly arise in sex crime cases.

### 1. Motive

"Motive" evidence is evidence about the state of mind or emotion that influenced the defendant to desire the result of the charged crime.[29] Uncharged misconduct evidence can show motive in either of two ways.[30] First, the uncharged misconduct can cause the motive to arise. For example, suppose that the uncharged crime is robbery, and the charged crime is murder. The prosecution's theory is that the defendant murdered the victim because the victim was a witness to the robbery. The robbery gives rise to the motive for the murder. Admission of this uncharged misconduct evidence does not require the trier to infer that the defendant has a violent character, but only that he had a reason to want to commit the crime. Use of uncharged misconduct evidence to show motive is not controversial in this situation.

Sometimes the uncharged misconduct is evidence of a pre-existing motive that caused both the uncharged act and the charged crime. For example, suppose that the defendant is charged with the murder of Mr. X. On a prior occasion, defendant

vandalized Mr. X's car. The vandalism would be admissible on the theory that it manifests hatred for Mr. X, and that the hatred was the motive for the murder.[31]

Commentators have criticized the reception of this second type of motive evidence on the ground that it amounts to propensity evidence.[32] But the evidence does not plainly violate the rule against using character to prove conduct. To say that Jones hates Smith is not necessarily to say that Jones has the character of being a hater. The word "character" carries a connotation of an enduring general propensity, as opposed to a situationally specific emotion.[33]

To be sure, the policy arguments justifying exclusion of the evidence in a typical character evidence case are arguably applicable to this type of case. One might contend, for example, that the evidence will "prejudice" the jury against the defendant. But the genuine probative value of evidence that the defendant hates X is usually much greater than the value of evidence that he is a hater in general.

In child sex abuse cases, evidence that the defendant previously abused the same child is often admitted to show that he was motivated by a lustful desire for that particular child.[34] This use of motive evidence in sex crime cases is analogous to the use of evidence of crimes against the same person in other

contexts, for example the use of vandalism to show the defendant's hatred for Mr. X. Sometimes, however, courts have given the motive concept astonishing breadth in child sex abuse cases. For example, the Supreme Court of Iowa held that evidence of uncharged acts against other adolescent girls was admissible in a sex crime case, on the ground that the evidence showed defendant's motive "to gratify lustful desire by grabbing or fondling young girls."[35] That reasoning has been compared to saying, in a burglary case, that other acts of thievery show a "'desire to satisfy his greedy nature by grabbing other people's belongings.'"[36] In either case there is nothing left of the rule against character reasoning, because it is a trait of character that supplies the motive.

This type of reasoning seems to have greater appeal in child sex abuse cases[37] than in adult rape cases.[38] In either type of case, there is no real need to explain motive. Motive can sometimes be a mystery in a murder case, but not in a sex crime case. Courts that admit the evidence of acts against third paries on a motive theory are really using "motive" as a euphemism for character.

### 2. Identity

Proof of "identity" is one of the permissible purposes listed in Rule 404(b). An identity issue does not automatically

open the door to evidence of all uncharged misconduct, but it does allow identification of the defendant as the perpetrator by showing that he committed prior crimes using the same modus operandi as the perpetrator of the charged crime.[39] Courts often say that the modus must be like a "signature" or even "unique"[40] but there are many cases where less has been required.[41] For example, in a robbery case, the Arizona Supreme Court admitted prior robberies even though the only similarity noted by the court between the uncharged crimes and the charged crime was that they all involved similar convenience stores.[42]

As a rule, identity will be in dispute in stranger rape cases, but not in acquaintance rape cases.[43] This circumstance has led some courts to hold that modus evidence is not admissible in acquaintance rape consent-defense cases.[44] Sometimes this reasoning results in exclusion even in situations where the uncharged misconduct and the charged acts have very substantial similarities. For example, in People v. Tassell,[45] the California Supreme Court concluded that the trial court erroneously admitted evidence, in a consent-defense case, that the defendant had committed two other rapes.[46] According to the state's evidence, the victim was a waitress who had given the defendant a ride home after she finished work. The defendant forced her to drive to another location and then raped her in her van. There were commonalities between that rape and the uncharged rapes: they all took place in vehicles; they all

involved the use of a similar thumbs-against-windpipe choke hold; and, in one uncharged instance, the perpetrator used the same false first name as that used by the defendant in the charged incident.[47] Holding that the evidence should have been excluded, the court remarked that, "[t]here being no issue of identity, it is immaterial whether the modus operandi of the charged crime was similar to that of the uncharged offenses."[48]

### 3. Plan

Under Rule 404(b), evidence of uncharged misconduct is also admissible to prove "plan." This result is consistent with the general rule against character evidence. Inferring that someone had a plan is different from inferring that he had a character trait. The concept of "plan," however, has proven to be as protean as the concept of "motive."

The concept can refer to a plan conceived by the defendant in which the commission of the uncharged crime is a means by which the defendant prepares for the commission of another crime, as in Wigmore's example of stealing a key in order to rob a safe.[49] Or it can refer to a pattern of crime, envisioned by the defendant as a coherent whole, in which he achieves an ultimate goal through a series of related crimes. For example, in the movie Kind Hearts and Coronets,[50] Alec Guinness plotted to acquire a title by killing off everyone with a superior claim.

Each of the bizarre killings was different, but each was in pursuit of the same plan. This use of uncharged misconduct evidence to show multi-crime plans whose parts are linked in the planner's mind is not very controversial.[51]

The concept "plan," and its frequent companion "common scheme," have also been used to refer to a pattern of conduct, not envisioned by the defendant as a coherent whole, in which the defendant repeatedly achieved similar results by similar methods.[52] These plans could be called "unlinked" plans--the defendant never pictures all the crimes at once, but rather has a "plan" in the sense of saying to himself, "it worked before, I'll try the same plan again." Some commentators have dubbed this evidence as "spurious plan" evidence and have criticized cases receiving it.[53] In a California acquaintance rape case the court described "common scheme or plan" as merely an unacceptable euphemism for "disposition."[54] Yet this concept of "plan" is a textually plausible interpretation of the rule against character reasoning. The concept of "character" can be construed to refer only to traits manifesting a general propensity, such as a propensity toward violence or dishonesty. Under this interpretation, a situationally specific propensity, such as a propensity to lurk in the back seats of empty cars in a shopping center as a prelude to a sexual assault on the owner,[55] can be considered too specific to be called a trait of character. The probative value of the evidence is, of course, enhanced by the

situational similarity.

Evidence of situationally specific propensities is accepted in other contexts despite the rule against character reasoning. Evidence of "habit"[56] or of "modus operandi" to show identity[57] are examples of evidence that requires propensity reasoning, but that is not considered to be character evidence. So a tolerant attitude toward evidence of unlinked plans does not really break new ground.

In sex crime cases, the "plan" concept is usually used in its broadest sense. One rarely finds linked-plan sex crime cases in which it is possible that the defendant conceived of one continuous plan and carried it out. To be sure, a defendant's initial acts of kissing or fondling a child might be part of an overall plan to have invasive sex.[58] Usually, however, the "plan" rubric is applied to sex crime cases in the unlinked or "spurious" sense. That is, it is applied to cases in which the defendant repeatedly committed the same crime with the same technique and objective, and in that sense followed the same "plan" or "scheme."[59]

The "plan" theory has sometimes been employed to justify admission of evidence of prior rapes in consent defense cases. For example, in People v. Oliphant[60] the Supreme Court of Michigan used an unlinked plan theory to uphold reception of

evidence against a defendant who repeatedly employed an unusual rape scheme. In Oliphant, the defendant met the victim while she was windowshopping. After a friendly chat, they visited several bars.[61] He then took her to an isolated place and raped her.[62] Charged with rape and gross indecency, he entered a defense of consent. At trial, the prosecution was allowed to put in evidence of three prior rapes, including two for which the defendant had previously been tried and acquitted.[63]

The Michigan Supreme Court held that evidence of the prior rapes was properly admitted to show a common plan, under which the defendant orchestrated circumstances so that if his sexual advances met resistance he would rape the woman, but the encounter would appear to be consensual.[64] All four attacks occurred during a five-month period; all involved college-age women; all began with a friendly introductory conversation in public; all involved discussions of race and marijuana; all victims willingly entered the defendant's car; invariably the defendant deviated from the expected route, offering an excuse that did not arouse fear in the victim; the rapes did not involve much force, and the victim's clothing was not ripped; and the defendant took each victim to an unfamiliar place for intercourse.[65] In addition, he intentionally weakened his victims' credibility by the same audacious act of providing them with or insisting that they remember his name, address, college identification card, and license plate number.[66] The victims all

had few bodily injuries and many opportunities to escape during the encounters.[67]

The court concluded that evidence of this plan was relevant to the issue of consent. In the charged crime, the defendant's plan made it appear that an ordinary social encounter that ended in consensual sex simply went sour after the defendant complained about the woman's body odor. In Oliphant, then, the absence of an identity issue did not preclude evidence of a similar modus operandi, but merely caused a change in terminology. Rather than characterizing the case as one in which identity was proven by a similar modus, the Michigan court characterized it as one in which the defendant's consent defense was refuted by showing that the defendant had a "plan [or] scheme . . . to orchestrate the events surrounding the rape . . . so that she could not show nonconsent."[68]

People v. Tassel[69] exemplifies a narrower construction of the concept of "plan." The defendant had committed three rapes, using a similar scheme for each crime. The Supreme Court of California considered and rejected the "plan" theory. It held that there had to be a "'single conception or plot' of which the charged and uncharged crimes are individual manifestations," and that "[a]bsent such a 'grand design,' talk of 'common plan or scheme' is really nothing but the bestowing of a respectable label on a disreputable basis for admissibility -- the

defendant's disposition."[70]

### 4. Intent/absence of mistake or accident

Many courts liberally admit uncharged misconduct evidence to show intent or absence of mistake or accident. For these purposes, they have required less of a showing of similarity than when evidence is offered to show that the criminal act was committed.[71]

Sometimes intent can be shown with uncharged misconduct evidence in a fashion that doesn't involve any inference of a propensity for misconduct. For example, in a murder case, if the defendant bludgeoned a guard on the way to killing the victim, the uncharged misconduct of assaulting the guard would tend to show that the subsequent murder was premeditated, without the necessity of an inference that the defendant had a general propensity for committing violent or murderous acts.

Usually, however, the evidence is offered to prove intent by way of proving that the defendant had a propensity to commit the crime. The inference of intent is reached by a necessary inference of propensity. This is true even in some frequently-cited examples of the intent/mistake concept--for example, in cases in which the fact that the defendant previously bought stolen goods is deemed admissible to show that he had guilty

intent when he bought stolen goods on the occasion charged.[72] What the trier is being asked to do is to infer that because the defendant has a continuing propensity to buy stolen goods, he had the forbidden intent on the occasion in question.

Although proof of intent almost always involves proof of propensity, this does not necessarily mean that the rule against character reasoning is wholly extinguished by the exception for evidence to show intent. Many courts, when the evidence is offered to prove intent, require some special degree of similarity between the acts.[73] Thus, intent may not be shown by using, as a bridge from mental state to mental state, the general propensity to be dishonest. The propensity to deal in stolen goods, by contrast, is thought to be narrow enough. In general, the degree of similarity required to permit use of uncharged misconduct evidence to show intent is less than when the ultimate fact sought to be shown is the doing of the criminal act. Perhaps lack of intent should be regarded as a disfavored defense, which is fair game for rebuttal by evidence that would otherwise be excluded.

There is a second limit on using the intent exception as a way around the rule against character reasoning, and it is this limit that is most important in sex crime cases. In order for uncharged misconduct evidence to be admissible to show intent, intent must actually be in issue. Sometimes intent is in issue

in a fairly straightforward fashion in sex crime cases. This is so when the criminal sexual contact is based upon touching the intimate parts of the victim, and the defendant claims that the touching was accidental, or that it was for a nonsexual purpose, such as bathing or giving medical treatment to a child.[74] The prosecutor can then introduce uncharged acts of the defendant to show that he intended to derive sexual gratification from the touching.

In many cases, however, the defendant denies that the act took place and makes no claim about intent. Courts sometimes admit the evidence anyway, especially in child abuse cases. For example, in United States v. Hadley,[75] the defendant, a teacher, was accused of sexually abusing young boys who were his students. After two students, aged 9 and 11, had testified and been impeached on cross-examination, the trial judge admitted the testimony of two young adult men that Hadley had repeatedly molested them while they were minors. Hadley argued that the acts were inadmissible because he did not contend that he lacked intent, but instead denied participation in the acts charged.[76] His counsel had offered not to argue the issue of intent to the jury.[77] Nevertheless, the Ninth Circuit held that the evidence was admissible because it went to criminal intent, and the government had the burden of proving intent whether the defendant relied on that defense or not.[78] There is, however, a conflict on this point, with a number of courts holding that there must be

a significant dispute over the issue before uncharged conduct can be received to show intent.[79]

In adult rape cases, most decisions hold that intent is not in issue.[80] In Wigmore's words,

> Where the charge is of rape, the doing of the act being disputed, it is perhaps still theoretically possible that the intent should be in issue; but practically, if the act is proved, there can be no real question as to intent; and therefore the intent principle has no necessary application.[81]

In the great majority of rape trials, the defense is either alibi (mistaken identity) or consent. If he offers an alibi, the defendant denies committing the act and therefore his mens rea is not an issue; in such a case, the exception for evidence of intent is plainly inapplicable. If the defense is consent, the propriety of evidence of intent is more problematic. In a sense, the consent defense is tantamount to saying "yes, we had intercourse, but I intended to have consensual sex, not to rape." Conceptualized thus, the case is arguably analogous to the paradigmatic cases of counterfeiting and receiving stolen goods, where evidence of prior crimes is commonly admitted to show criminal intent. The pawnbroker says, "Yes, I meant to buy that ring, but I didn't intend to buy a <u>stolen</u> ring"; the rape-

defendant says "Yes, I meant to make love, but I didn't intend to make love to an unwilling partner."

There is some authority that a defendant puts intent in issue when he claims consent as a defense.[82] A Texas Appeals Court, for example, held that a rape defendant who pleads consent necessarily denies that he intended to have sexual intercourse without the consent of the complainant.[83]

The contrary view, that intent is not an issue in the absence of a defense actually based on mistake about consent, also has some support in the case law. In People v. Tassell[84] the California Supreme Court decided that the intent theory was not available to the prosecution in a rape case. The trial court had admitted evidence of other rapes to show a common plan and to corroborate the victim's testimony.[85] The court took the opportunity to discuss many exceptions to the rule against prior crimes evidence. The exception for evidence of intent, said the court, was irrelevant in this case. Intent becomes an issue when the defense is a mistake or accident. Here the defendant undoubtedly intended intercourse; the issue was simply consent.[86] If the trier believed defendant's version, the complaining witness freely consented; if the trier believed her version, defendant forced her to have intercourse with threats and violence. No defense of reasonable mistake was ever suggested.

In most consent-defense cases, the real issue is what the defendant (and the alleged victim) did, not what he or she intended to do. Typically, the testimony does not suggest that he made an innocent mistake, misinterpreting her signals. This problem, though interesting and perhaps common, appears in only a minuscule fraction of the reported cases. It is usually impossible to reconcile the conflicting accounts by supposing that the defendant misunderstood his alleged victim's desires, except in the sense that some rapists may believe that subconsciously "all women want it," or that the victim, by behaving in an adventurous way--say, by visiting his apartment at 2:00 a.m.--was "asking for it." Nearly always, if the defendant's testimony is true then the complaining witness's version must be perjurious, and vice-versa. The defendant, in other words, testifies that "she consented," not that "I thought that she consented" and typically the woman's testimony affords no basis for an inference that the parties misunderstood each other.

### 5. Other non-character purposes

Rule 404(b) expressly indicates that the purposes listed there are only illustrative by preceding the list of examples with the words "such as."[87] Evidence can be admitted for a purpose not enumerated, so long as that purpose does not involve character reasoning.[88]

Although the list is fairly comprehensive, courts sometimes invent additional labels.[89] For example, one finds statements that evidence of a "pattern" of criminal conduct is admissible. In a 1987 Minnesota case[90] involving rape of an adult, the court upheld the admission of evidence that the defendant had committed two sex crimes against children on the ground that the evidence showed a "pattern" of "opportunistic sexual assault" on "vulnerable" victims.[91] Here the "pattern" is so broad that admitting pattern evidence is indistinguishable from admitting character evidence.[92]

### C. Beyond Rule 404(b): Uncharged Misconduct Evidence Offered as Character Evidence under the Lustful Disposition Exception

Some jurisdictions have gone beyond Rule 404(b), and admitted evidence of uncharged misconduct to show "lustful disposition" or "depraved sexual instinct" in cases involving sex crimes against children.[93] Rightly or wrongly, such decisions represent a partial rejection of the rule against character evidence. As Professor Imwinkelreid has said, "In these jurisdictions, intellectual honesty triumphed, and the courts eventually acknowledged that they were recognizing a special exception to the norm prohibiting the use of the defendant's disposition as circumstantial proof of conduct."[94] Other courts

have rejected the "depraved sexual instinct" exception because it violates the prohibition against using character to show conduct, and they have sometimes treated the Federal Rules of Evidence as shutting off the option of admitting evidence on a "lustful disposition" or "depraved sexual instinct" theory.[95]

The leading recent case is State v. Lannan,[96] a decision that abolished Indiana's "depraved sexual instinct" exception to the rule against character evidence.[97] The court noted that the exception had been based on two rationales: First, that there is a high rate of recidivism in child molestation cases, and second, that there is a special need "to level the playing field by bolstering the testimony of a solitary child victim-witness."[98] The Lannan court was willing to accept the proposition that there is a high recidivism rate among sex offenders, but believed it to be no higher than for drug offenders, and hence concluded that sex offenses are not special enough to justify an exception.[99] In its discussion of the bolstering rationale, the opinion noted that sex crimes against children are now thought to be common, and said that the depraved instinct exception had its origins "in an era less jaded than today." The decision that created the exception was a 1930s case in which a Superior Court judge had been charged with child sex abuse. The Lannan court thought that at that time the idea that a man who was a pillar of the community would force himself sexually upon a child "bordered on the preposterous." The court added that, "Sadly, it is our

belief that fifty years later we live in a world where accusations of child molestation no longer appear improbable as a rule. This decaying state of affairs in society ironically undercuts the justification for the depraved sexual instinct exception at a time when the need to prosecute is greater."[100]

Although a few states have abandoned the "depraved sexual instinct" exception, many continue to recognize it in child sex cases, though not in adult rape cases.[101] The judges may feel that a desire for heterosexual intercourse with an adult, even when forced, is not as unusual or depraved as a desire for sex with a child. Even if this dubious proposition were true, it would be an inadequate justification for admission of uncharged misconduct evidence. Murder, after all, is rarer and more depraved than child abuse, but no one suggests that therefore a murder defendant's prior homicides should be routinely admissible.

### D. The State of the Law, Concluded

It is hard to generalize about this body of law. In many jurisdictions it is in a state of confusion. However, two general conclusions are warranted. First, there are still plenty of reversals for letting in sex crime evidence. Despite the willingness of some courts to manipulate the Rule 404(b) categories in order to receive evidence of uncharged sex

offenses, the courts do not universally or uniformly treat sex offenses differently from other crimes. Second, courts in a number of states are less likely to admit uncharged misconduct evidence in acquaintance rape cases than in stranger rape or child abuse cases. One finds this result in opinions that reason that in consent defense cases identity is not in issue, so modus evidence is not admissible. These courts tell us that they would decide differently in a stranger rape-alibi defense case.[102] Similarly, in child sex cases in which identity is not in issue, some courts invoke the "depraved sexual instinct" exception, which does not apply to adult rape cases.[103]

## II. POSSIBILITIES FOR REFORM

### A. Abolition of the Rule Against Character Evidence

The simplest way to resolve the conflicts and ambiguities in this body of law would be to abolish the rule against character evidence, freely admitting testimony about the accused's prior crimes for the purpose of showing criminal propensities. Although wholesale abolition of the rule is not on the immediate legal horizon, one's attitude toward the general rule inevitably influences one's attitude toward piecemeal reform. If one believes that the rule against character reasoning rests on shaky grounds, then

relaxing it piecemeal is easier to accept. Ad hoc exceptions can be viewed as incremental reforms, with the eventual goal of receiving the evidence generally.

Much can be said in favor of abandoning the rule against character evidence. To begin, the character evidence doctrines are extremely complicated and confusing. They produce huge quantities of appellate litigation[104] that seems to do little to dispel the unclarity.

Evidence about past misconduct is the type of information that one would want to have in making judgments in everyday life. If nothing else, the refusal of the law to receive the evidence undermines the legitimacy and acceptability of fact-finding.[105]

The rule excluding uncharged misconduct is contrary to the trend in evidence law toward free proof. There has been a centuries-long movement toward abolition of those exclusionary rules that are based upon the danger of misleading the fact-finder. Evidence scholars and jurists have increasingly come to agree with Bentham that technical rules of evidence designed to protect the fact-finder from misdecision are, at best, more trouble than they are worth.[106]

Yet there are also several arguments in favor of retaining the rule. Support for the rule against character reasoning can be found in the literature on personality theory.[107] Character reasoning makes sense only if human behavior is consistent across situations because of a person's underlying traits of character. Many psychologists are skeptical about "trait theory" and prefer a "situationist" perspective, maintaining that humans react very particularistically to different events, and that character traits do not produce cross-situational stability of behavior.[108] Some of the research relied upon by situationists is interesting and suggestive. For example, research indicates that there is little consistency in deceitful behavior by children--a child may lie at school but not at home, or cheat on an exam but not in sports.[109]

While this research is instructive, situationism is by no means a consensus position. Some scholars support trait theory and reject the situationist position.[110] Others argue for another approach to the study of behavior, interactionism, which emphasizes the need to consider both trait and situation in predicting behavior.[111] Others have maintained that stability can be observed for certain traits, such as aggressiveness.[112]

Even if a defendant's character is an invalid basis for

some superficially plausible inferences it may be a valid basis for others. Heinrich Himmler, for example, disapproved of hunting on the ground that "every animal has a right to live."[113] This startling fact shows that--contrary to what one would expect--he did not possess a general trait of "cruelty toward living creatures." It is a dramatic illustration of the danger of over-generalizing character traits. But it does not follow that Himmler lacked the trait of "cruelty toward Jews" or even the more general trait of "cruelty toward humans."

Even if behavior is strongly influenced by situational considerations, and even if the studies showing this can be generalized to particular offenses, one must still, in supporting exclusion, face the question whether it has been shown that juries are give too much weight to this sort of information. There is support for this proposition in studies of fundamental attribution error--studies that suggest that research subjects tend to attribute too much influence to disposition, and not enough to situation, in assessing causes of human behavior.[114] For example, even if told that a debater had no choice about which side to take in a debate, research subjects tend to believe that the debater is arguing the side that he or she actually believes.[115]

On the other hand, this research is mainly directed toward showing the process by which people make social judgments, not the external validity of judgments about character. Attribution error researchers have tended either to ignore the accuracy question, or to assume, without actual testing, that character attributions are inaccurate.[116] Moreover, some critics have charged that there is a bias in the professional literature in favor of reporting human error--either because it is easier to study, or simply because it makes a better story.[117]

On the whole, personality theory probably does lend some support to the idea that character evidence is prejudicial. But the research has not achieved the level of acceptance that one sees, for example, in eyewitness testimony research, and its generalizability to legal issues is sometimes questionable.

The real danger in admission of character evidence is that the jury will give it more weight than it deserves, either by overestimating its probative value on the crime charged or by concluding that even if the defendant is innocent of the crime charged he is a "bad man" who belongs in jail. At the very least, jurors (and police and prosecutors) who know about the defendant's prior crimes may be insufficiently diligent in trying to resolve gaps and

conflicts in the other evidence about the crime charged.

A fact-finder wants to be able to sleep soundly after finding a defendant guilty or not guilty. Expressed in terms of decision theory, decision-makers will seek to minimize their expected regret over reaching incorrect decisions.[118] They will weigh the regret they expect from a conviction against the regret they expect from an acquittal. Jurors will experience less expected regret over finding the defendant wrongfully guilty if they believe that the defendant committed other crimes.

A subsidiary, but significant, benefit of the rule against propensity evidence is that it limits the scope of the proceedings. It saves time and money by preventing the trial of collateral issues. Moreover, it protects the parties from surprise. The accused should not be forced to defend his whole life without an adequate chance to prepare. While the danger of surprise could be reduced by notice and discovery, these features also add complexity and cost to the system.

The cost of the rule against propensity evidence is that a certain number of criminals go free, and different observers will have different opinions about whether this price is worth paying for the benefits of the rule. For our

part, we are not prepared to scrap the general rule, but are willing to consider novel exceptions on their individual merits.

### B. A General Exception for Sex Crimes

Some courts and reformers contend that, although the general rule against uncharged misconduct evidence makes sense, an exception should be created for cases involving sex crimes.

Such a proposal is now pending in Congress, in the form of a bill to amend the Federal Rules of Evidence.[119] This bill would add three new rules. New Rule 413 would provide that when the defendant is accused of an offense of sexual assault, evidence of his commission of another sexual assault is admissible, and may be considered for its bearing on any matter to which it is relevant. New Rule 414 would make the same provision for criminal child molestation cases, and new Rule 415 would do so for civil cases involving sexual assault or child molestation. The proposed rules provide for notice to the accused of the nature of the alleged prior misconduct before trial.

Whether Rule 403[120] would still be available to an accused seeking to challenge the admissibility of this

evidence is unclear. The proposed rules do not mention Rule 403, and the text of the bill could be construed to create an exception to Rule 403. Instead of saying that the evidence "may" be admissible, as in Rule 404(b), the language of the proposed rules says that the sexual history evidence "is" admissible and that it may be considered for its bearing "on any matter to which it is relevant." One of the sponsor statements in favor of the bill's predecessor legislation claims, however, that Rule 403 would still be available as a backup.[121]

Assuming that Rule 403 would survive, the new rules would still broaden the admissibility of sexual history evidence. In cases covered by the new rules, the rule against character reasoning would be abolished, and in its place one would have a rule permitting character reasoning, subject to exclusion if the prejudicial effect of the evidence "substantially" outweighs its probative value.

The new rules do not go so far as to make all uncharged sexual misconduct freely admissible in sex offense cases. The uncharged misconduct must itself be a serious offense.[122] Sexual misconduct that does not rise to the level of serious crime would still be subject to the existing Rule 404(b) screening. On the other hand, the rule would have some potentially broad effects. For example, if proposed Rule

414 is read literally and without qualification, evidence that the defendant had previously had consensual intercourse with a 13-year-old girl would be admissible in a subsequent case in which the defendant was accused of sex with a 5-year-old boy.

One question is whether this legislation creates anomalies or inconsistencies. Does the view that such evidence is not unduly prejudicial conflict with the way we treat character evidence in other areas?

The first possible anomaly is in the different treatment of the accused's sexual propensities and those of the alleged victim. Under rape shield legislation, the victim is entitled to protection from revelation of her sexual history, subject to certain exceptions, such as evidence of sexual intimacy with the accused.[123] One might argue, therefore, that since the law excludes the sexual history of the alleged victim, it should also exclude the sexual history of the accused.

This analogy, though superficially cogent, ignores [illegible] To begin with a relatively minor point, the rape shield laws are grounded not only in a desire for accurate verdicts, but also in considerations of extrinsic policy. They are

designed to protect victims from embarrassment in order to encourage them to report rape.[124] The encouragement rationale does not apply to evidence about a defendant's sexual misconduct.

In addition, victims have a legitimate privacy interest in keeping facts about their sexual history secret. No similar purpose is served by suppressing evidence of prior sex offenses of an accused. One who commits a crime is not entitled to keep that fact secret.[125]

The most important distinction is between the probative value of the two types of evidence. Contrary to Wigmore's opinion,[126] a woman's sexual history rarely sheds light on whether she has falsely accused the defendant of rape. The main problem is not that nowadays single women usually are sexually experienced.[127] That fact merely establishes a higher threshold of sexual experience; it does not rebut the argument that relatively unselective women (by today's standards) are relatively prone to consent and that therefore evidence of promiscuity is relevant on the issue of consent. Nor is the problem that "she's still entitled to say 'no.'" That claim, though incontestable, is irrelevant when the issue is whether or not she in fact said no. Likewise, it is fallacious to justify rape shield laws on the ground that "rape is a crime of violence, not of

sex." That proposition, even if wholly accepted, goes to why rather than whether a rape occurred. It is equally misleading to assert that "just because she consented to one man doesn't mean she consented to another."[128] That truism confuses relevance with conclusiveness.

If the issue were simply whether the defendant and a certain woman had voluntary sex on a certain date, there is no escaping the conclusion that it would be relevant--though of course far from conclusive--to know that she has often done so before, with the same man or even with other men. Suppose, for example, that the woman were being tried for burglary and her defense was an alibi: "On that night I was having sex with a fellow I had just met in a bar." In evaluating her story, it would surely be useful--though not conclusive--to know whether she never, sometimes or frequently had done this with other men.

The issue in a consent-defense rape case, however, is not simply the likelihood that the alleged victim had consensual sex on a particular occasion. Rather, the question is whether she consented to sex and then falsely accused the defendant of rape--or instead was raped. On that ultimate issue her promiscuity, however extreme, cuts both ways. On the one hand, it tends, however slightly, to show that she is the sort of person who might well have

consented to casual sex. On the other hand, her failure to accuse her numerous other lovers of rape tends, however slightly, to show that she does not readily make that accusation in a fit of pique or because of pathological delusions. More important, it seems likely that unselective women, though more inclined to consent, are also more likely to be raped, because some men perceive them as more vulnerable ("nobody will believe you") or as less entitled to decline sex, and because they are more likely to live in high-crime areas or to engage in high-risk behavior, or both.[129] For all these reasons, even a prostitute's accusation of rape is just as plausible, all else being equal, as that of a more sexually-restrained woman.

Admittedly, the defendant's prior rapes are not conclusive evidence that he is guilty of the rape charged. Just as a woman may consent to sex with one man but not with another, so a man may force himself upon one woman but not another. But his prior rapes do not cut both ways. We may disagree about their precise significance, but they do have at least some probative value, and it is all on the side of the prosecution. There is, therefore, no inconsistency in admitting evidence of his prior rapes while excluding evidence of her prior consensual sex.

There is, however, another, more truly anomalous effect

of the proposed federal statute. It would create a special rule of free admissibility for sex offenses, while preserving the rule against character evidence for other offenses. Why should the rules about admissibility of prior offenses be more liberal when sex crimes are involved than they are when the charged crime is murder, manslaughter, robbery, drug-dealing or nonsexual assault? In a case in which a defendant is accused of both rape and murder, would one wish to admit a prior rape by the accused without any showing of special similarity, while excluding a prior homicide by the accused unless it is shown to involve a closely similar modus operandi?

The available data on recidivism does not support different treatment of sex crimes. It fails to provide a clear answer to the question whether sex crimes are more frequently repeated than other crimes. In a 1989 Bureau of Justice Statistics Report that followed 100,000 prisoners for three years after release, the recidivism rate was lower for sex offenders than for most other categories. According to these figures, 31.9% of released burglars were rearrested for burglary; 24.8% of drug offenders were rearrested for a drug offense; 19.6% of violent robbers were rearrested for robbery. In comparison, 7.7% of rapists were rearrested for rape. (Of the offenses studied, only homicide had a lower recidivism rate--2.8%.)[130] However, there are a number of

reasons for caution in appraising this data. For example, a follow-up period of longer than three years might have yielded a much higher recidivism rate for sex offenders,[131] though of course it might have yielded a higher rate in other categories as well. Other studies of sex offenders with smaller groups and different periods of follow-up have shown both higher and lower recidivism rates for certain populations of sex offenders, but without demonstrating that sex offenders have a consistently higher or lower recidivism rate than other major crime categories studied for the same time period with the same methods.[132]

Some commentators have suggested, plausibly, that studies based on rearrest or reconviction vastly understate the rate of recidivism for sex offenders, because sex offenders may commit hundreds of acts without getting caught,[133] but this may also be true of other criminals, such as purse-snatchers, illegal gamblers, burglars, shoplifters, reckless drivers and drug offenders. Although there is reason to believe that acquaintance rape is a grossly underreported offense,[134] that may be even more true of drug crimes which, being consensual, are notoriously hard to detect.[135]

Even if we were to assume, arguendo, that the recidivism rate for all types of sex crimes is far greater

than for any other crime, it would not follow that evidence of prior sex crimes should be admitted. The genuine probative value of the evidence, however high, may be lower than the value that the jury is likely to assign to it. Perhaps the recidivism rate for stranger rape or child molestation is both high (in comparison with other offenses) and lower than jurors commonly suppose. Conversely, the recidivism rate for some other offense--say, murder--might be low but not as low as jurors suppose. On that hypothesis, the case for admitting a prior sex offense would be weaker than for admitting a prior homicide.

The sponsor statement in support of the proposed amendments to the Federal Rules of Evidence stresses the inherent improbability that a person whose prior acts show him to be a rapist or child molester would have the bad luck to later be the victim of a false accusation.[136] Wouldn't it be an incredible coincidence for that to happen by chance? Our answer is that the plausibility of such a coincidence does not turn on whether sex crimes are involved, but rather upon other factors. One major factor is whether the accusations are independent, so there is no chance that one accusation caused the other. Other factors include the number of separate accusations and of course their similarity.[137] If the defendant is accused of arson, wouldn't it be a bizarre coincidence for him to just happen to have

been independently (but falsely) accused by three unrelated victims of three other acts of arson? If a probabilistic exception is to be made to the rule against character evidence in cases involving multiple accusations, then consistency requires that the exception be applied to all types of cases in which the probative force of multiple accusations is equally great.[138]

By now, the astute reader has undoubtedly detected some ambivalence on the authors' part, both in our attitude toward the character evidence ban and in our attitude toward the proposed exception for sex crimes. Although we ultimately reject wholesale abolition of the rule against character reasoning, we see some merit in the argument for abolition. That being so, we can also see merit in an argument for partial abolition in sex crime cases. One of the frequently heard arguments against receiving such evidence--that it would be inconsistent to reject victim sexual history while admitting the sexual history of the accused--does not withstand careful scrutiny. We do, however, believe that a blanket exception for sex crime cases would be inconsistent with retention of the rule in other types of cases, such as nonsexual assault and robbery. So on balance we believe that the proposed legislation creates an untenable distinction between sex crime cases, as a class, and other types of cases.

We will now turn to our own more limited proposal--that the exclusion of uncharged misconduct be relaxed for acquaintance rape cases.

**C. Admitting evidence more freely in acquaintance rape cases**

The argument for receiving uncharged misconduct evidence is much stronger in acquaintance rape cases than in stranger rape cases. First, there is a danger in stranger rape cases that does not exist in acquaintance rape cases: that the defendant became a suspect <u>because</u> of prior rapes. The police may have shown the victim photographs of persons thought to have committed prior rapes, or otherwise have focused their investigation on suspected sex offenders. So what appears to be an unbelievable coincidence--that a person who actually committed prior rapes had the misfortune to be falsely accused of a subsequent one--is in fact a fairly plausible scenario, just as it is in the case of, say, a burglary. Since suspicion focused on the defendant in the first place because of the other crime, his chance of being accused, even if innocent, was fairly high.[139] The accusations of the various crimes, in other words, were not wholly independent.

The danger of a false accusation in stranger rape cases

is chiefly due to the problematic nature of identification evidence. For one thing, police sometimes strongly suggest to the victim that certain people in the "mug shot" book are the most likely perpetrators.[140] Even without such prodding, eyewitness identification is a hazardous enterprise. A strong body of social science research demonstrates that such identifications--especially in sudden emergencies--are fraught with all sorts of difficulties and chances for error,[141] and that jurors tend to overrate the ability of witnesses to make identifications.[142] In stranger-rape cases, evidence of prior rapes may distract the jury from the important task of evaluating problematic identification evidence.

Of course, there are ways to guard against these dangers. The defense could be allowed to present evidence that the identification stemmed from the defendant's status as a "usual suspect," and also to present expert testimony about identification flaws. These options, however, multiply the cost and complexity of the proceeding, are not always available as a practical matter, and do not always correct the underlying misapprehensions.[143]

In acquaintance rape cases, the misidentification problem does not arise. Moreover, in the great majority of reported cases, no other honest and legally relevant mistake

is a plausible explanation of the conflicting testimony. Judging by the reported cases, the defendant who alleges consent almost always tells a story that flatly contradicts the alleged victim's account, so that there is no genuine possibility of an honest mistake as to consent. Unless his accuser is lying, the defendant is guilty as charged. Although the possibility of a perjurious accusation always exists, the well-known ordeals of rape complainants, including the embarrassing nature of the crime, a potentially unpleasant investigation, and predictable attacks on the woman's character and vigorous cross examination, must serve as powerful deterrents against baseless charges. It seems highly probable, therefore, that the rate of false accusations of rape is far lower in consent-defense cases than in stranger rape-alibi cases, where the woman may have made an honest misidentification.

The critical question, after all, is whether the prior crimes evidence creates an unacceptable risk that an innocent man will be convicted. The question is not whether such evidence is likely to sway the jury, but whether it will be given more weight then it deserves. In most types of cases, including stranger rapes, this is a serious risk. But in consent-defense rape trials, the risk is relatively low, because of the synergistic effect of the several independent charges. If Patricia accuses Frank of raping her on a date, he may raise a reasonable doubt by pointing

to minor inconsistencies in her story, the absence of bruises, or conduct on her part that is thought to be suggestive of consent, or of a motive for a vendetta against him. If Mary and Jane also accuse him of date rape, Frank may be able to raise similar doubts about each of their individual accounts as well. But if all three accusations are considered together, and there is no reason to suspect collaboration among the women, each of their charges will tend to corroborate the other's, to a much greater degree than they do in cases involving eyewitness identifications that derive from "mugshot books" of rapists or lineups of "known burglars." While it remains conceivable that the defendant is innocent of the crime charged, the danger of an erroneous conviction appears to be less in this type of case than in many types of ordinary criminal cases.[144]

Then too, in acquaintance rape (consent-defense) cases the evidence of prior sexual assaults may be helpful in combatting prejudice against victims. There is strong evidence that jurors are too ready to blame the victim in acquaintance rape cases. The classic Kalven & Zeisel jury study contains data suggesting jurors nullify the law of rape by taking account of legally irrelevant contributory negligence of victims in acquaintance rape cases. Kalven and Zeisel measured the judge-jury disagreement rate (reflecting situations in which the jury acquitted, but the

judge felt that it should have convicted) in different types of cases, including two types of rape cases. In "aggravated" rape cases (stranger rape, or extra violence, or multiple assailants) the disagreement rate was only 12 percent.[145] In "simple" rape cases, it went up to 60 percent.[146] Juries acquitted much more often than judges in the "simple" rape cases--primarily, judges thought, because of jurors' tendency to believe that the victim had brought the event on herself by excessively risky behavior such as hitchhiking or wearing provocative clothing.[147] Evidence that the defendant raped other victims can show the jury that the rape could have occurred without this victim's "contributory" behavior.

The consent-defense rape trials, like the child sex abuse trials, are cases in which there is a need for additional evidence. Since the accused admits the act of intercourse, physical evidence that it occurred is obviously unhelpful. In some cases the complaining witness's version of events may be subject to partial corroboration by physical evidence such as bruises, but such evidence is often inconclusive. Basically, consent-defense cases are swearing matches between the defendant and his accuser.

In an influential article,[148]Professor Dale Nance argued that the organizing principle of evidence law is not,

as Wigmore and Thayer postulated, the desire to control the jury in order to prevent it from making foolish or irrational decisions.[149] Instead, he suggested, the fundamental principle is to encourage the parties to put forward the best evidence that they can feasibly obtain. Although no single foundational principle explains all of evidence law, the Nance hypothesis probably does identify one of the several driving forces behind the rules excluding various sorts of evidence.

Where does the Nance hypothesis lead us if we apply it to rape cases? In stranger rape cases, one might be concerned that admitting uncharged misconduct would have a harmful effect on the development of proof. If the uncharged misconduct rule were relaxed, prosecutorial resources might unwisely be diverted from the search for better evidence to the search for or reliance on uncharged misconduct. There are often other sources of evidence in stranger rape cases. The defendant's alibi might be disproved. The defendant might be connected to the crime by analysis of hair, blood, or semen. Some of these analyses are quite expensive,[150] and might be foregone if the prosecution could have the same chance for a conviction by relying on uncharged misconduct evidence. In acquaintance rape cases, on the other hand, there is little reason to fear that other sources of evidence might be bypassed.

Aside from the testimony of the alleged victim, the uncharged misconduct is likely to be the best evidence available.[151]

The evidentiary problems in consent-defense cases are analogous to the problems faced by the government in prosecutions for receiving stolen goods, a type of case in which prior crimes are usually deemed admissible as evidence of the defendant's criminal intent.[152] Such evidence amounts to propensity evidence, supposedly forbidden by the general rule. But the courts seem to be sympathetic to the difficulties that prosecutors face in proving beyond a reasonable doubt that the recipient of the stolen goods knew that they were stolen. They have created what might loosely be described as a rebuttable presumption of guilty knowledge in cases in which the accused has previously been guilty of receiving stolen goods.

The most obvious difference between the two types of cases is the direct evidence of guilt furnished by the complaining witness in a rape trial. This testimony, while it might be thought to obviate the need for propensity evidence, might also be characterized as creating a stronger guaranty against an erroneous conviction than exists in some of the receiving stolen goods cases.

Despite these considerations, some courts have been less willing to admit prior crimes evidence in consent-defense cases than in stranger-rape and child-molestation cases.[153] The differential treatment of consent-defense cases may be a vestige of bias against date-rape complainants. The fact that the rather fluid categories of Rule 404(b) and its predecessors have proved too narrow to let in evidence in acquaintance rape cases may stem from an attitude that defendants in these types of cases deserve more protection than stranger rapists and child molesters. In some of the consent-defense cases, one hears courts even denying the minimal relevance of the evidence, saying that "the fact that one woman was raped has no tendency to prove that another woman did not consent."[154] While that astounding statement is true so far as it goes, it is a red herring; for certainly the fact that the defendant was willing to use force to obtain sex or humiliate women in one instance has some tendency to indicate that he was willing to do it again. Police, prosecutors, and especially jurors are influenced by extralegal considerations in letting off acquaintance rapists without punishment;[155] it would be surprising if the same attitudes did not influence appellate court judges to some extent. Date rape may get different treatment because of the same attitudes that led to the requirement that rape complaints be corroborated,[156] to the idea that rape complainants should automatically be

subjected to a mental examination,[157] to instructions warning the jury that rape is easy to fabricate and hard to disprove,[158] and to the requirement of "utmost resistance" that once hampered the prosecution of date rape cases.[159] Treating acquaintance rape cases the same way as stranger rape cases for purposes of uncharged misconduct evidence is consistent with the pattern of changes elsewhere in rape law, which now tends to treat acquaintance rape as a crime fully as deserving of punishment as other forms of sexual assault.

At a minimum, then, the different treatment of acquaintance rape cases should be abandoned. Beyond question the justifications for admitting uncharged misconduct in those cases are at least as strong as in stranger rape cases. To the extent that uncharged misconduct evidence is admissible to show identity in stranger rape cases because of similarities between the different sexual assaults, it should also be admissible under the modus operandi exception to show that the man acted with force in acquaintance rape cases. Indeed, it would make sense to admit prior misconduct evidence in consent-defense cases even in circumstances in which it would not be admissible if the defense were alibi.

For similar reasons, prior misconduct evidence ought to

be admissible in some child abuse cases, provided that the current accusation seems to be independent of the other uncharged accusation. But these cases are more problematic than consent-defense rape cases. The youth of the alleged victim magnifies the need for some "other evidence," but also magnifies the danger that admission of that evidence will divert the jury's attention from weaknesses in the prosecution's case. The involvement of other children and of adults--parents and therapists--creates a danger that the child's accusation will not be truly independent of the adults' suspicion, which in turn may have been fueled by rumors of the defendant's alleged prior crimes. When they make their initial accusations, the children probably are unaware that they are commencing a process that will be an ordeal for them; this is one of the reasons why the danger that they are lying is greater than in cases of adult victims.. Moreover, in some cases identification problems make the issues more analogous to stranger rape cases than to consent-defense rapes.

## CONCLUSION

The rule against character evidence in criminal cases should be retained. It forces prosecutors and juries to focus on the evidence directly pertaining to the crime

charged, reducing the risk that the defendant will be convicted merely because he is a "bad man." This great virtue of the rule does, however, have a price: by excluding relevant evidence, the rule makes it harder to convict the guilty.

Recognizing this reality, courts have created several exceptions to the rule. Most of these exceptions can be justified on the ground that the character evidence is not being admitted in order to show the defendant's criminal propensities but rather for some ulterior purpose such as establishing his motive. Evidence of prior sex crimes, however, usually cannot be justified in this fashion and therefore should generally be excluded unless a new rationale can be found.

In stranger-rape cases, there is no adequate justification for creating a new exception to the rule against character reasoning. In child abuse cases, and even more so in consent-defense rape cases, on the other hand, strong arguments can be advanced in favor of admitting such propensity evidence.

As a practical matter, probably all of the arguments discussed in this paper are unimportant in comparison with one's substantive attitude toward sex offenses. If one

thinks of rape as a crime that is like other serious felonies--comparable to homicide or nonsexual assault, for example--then one is more likely to accept the idea that the character reasoning rules should be consistent across various crimes. If one regards rape as a society-defining crime--as a systemically harmful crime that promotes a society of male dominance and female oppression--then one might think that the need to increase the conviction rate is greater than the need to maintain consistency across the law of character evidence, or greater than the need to avoid speculative dangers of prejudice in the fact-finding process. As usual, attitudes about substance overwhelm attitudes about process.

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1. 636 F.2d 517, 523 (D.C.Cir. 1980), cited and quoted in John W. Strong, ed., McCormick on Evidence, § 190, at 797 n.1 (4th ed. 1992) [hereinafter McCormick on Evidence].

2. Paul E. Meehl, Law and the Fireside Inductions (with Postscript):Some Reflections of a Clinical Psychologist, 7 Behavioral Sci. & L. 521, 532 (1989).

3. See Fed. R. Evid. 404 and advisory committee's note.

4. In two cases, the women reported that Smith suddenly became aggressive and pinned them down and pawed them, but that they were able to repulse him. A third reported that while she was intoxicated and sleeping on his bed during a party in his apartment, he made sexual advances, and despite the fact that she said no and tried to fight him off, he forced her to have intercourse with him. Larry Tye et al., Alleged Assaults by Smith Described: Accounts by 3 Women are Similar to Charges in Palm Spring Rape Case, Boston Globe, July 24, 1991, at 1.

5. See Michael Hedges, Other Women Paint Smith as Violent, 'Not Too Bright', Wash. Times, Dec. 7, 1991, at A4 (describing exclusion of evidence); Paul Richter, Jury Acquits Smith of Rape at Kennedy Estate, L.A. Times, Dec. 12, 1991, at A1 (describing acquittal).

6. See State v. Saltarelli, 655 P.2d 697, 700-701 (Wash. 1982)(defendant, charged with rape of acquaintance, raised consent defense; held, reversible error to receive evidence of defendant's prior attempted rape of a different woman); People v. Tassell, See infra text accompanying notes 45-48 (error, though harmless, to admit evidence of two prior rapes by defendant charged with acquaintance rape); Reichard v. State, 510 N.E.2d 163, 165 (Ind. 1987)(defendant accused of knife-point rape of woman with whom he had a dating relationship; held, reversible error to receive evidence of "prior alleged rapes perpetrated by him upon various individuals"; court remarks that "the trial court incorrectly categorized rape of an adult woman as depraved sexual conduct"); Lovely v. United States, 169 F.2d 386, 390 (4th Cir. 1948)(Parker, J.)(defendant accused of rape of acquaintance after driving her to remote part of federal base; rape 15 days earlier on same base excluded; court states that fact that one woman was raped had no tendency to prove that another woman did not consent); Brown v. State, 459 N.E. 2d 376, 378-379 (Ind. 1984)(defendant met victim in gas station, drove her to cornfield where he threatened, raped and beat victim; two other victims testified to rapes by defendant in secluded areas after getting or giving him rides in vehicle; held, receiving evidence was reversible error; court indicates that evidence might be admissible were identity in issue, but holds that it is not admissible in case at bar because defense is consent: court also

distinguishes depraved sexual instinct cases involving children). But see State v Crocker, 409 N.W.2d 840 (Minn. 1987)(not error to admit evidence of prior sex crimes against children in case where defendant raises consent defense in response to accusation of rape of adult victim; evidence shows a "pattern" of opportunistic assaults on vulnerable victims).

7. See, e.g., Vaughn v. State, 604 So. 2d 1272, 1273 (Fla. Dist. Ct. App. 1992)(defendant accused of rape of sixty-year-old victim whom he had awakened in her bedroom; evidence of prior rape of prostitute in alley excluded); People v. Sanza, 509 N.Y.S.2d 311, 314-315 (N.Y. App. Div. 1986)(in prosecution for rape-murder in New York state, evidence that accused had raped three victims in Florida inadmissible); White v. Commonwealth, 388 S.E.2d 645, 649 (Va. Ct. App. 1990)(defendant accused of raping woman in women's rest room; evidence that three hours earlier defendant had approached another woman, knife in hand, in another women's rest room inadmissible).

8. Some of the courts that have rejected the evidence in consent-defense cases have indicated in dictum that they would accept it in alibi-defense cases because of its relevance to identity. See People v. Tassell, See infra text accompanying notes 45-48 and 69-70; Brown v. State, 459 N.E. 2d 376, 378-379 (Ind. 1984). Other courts have held prior sex crime evidence admissible in cases in which identity is in issue without making an explicit comparison to consent-defense cases. See, e.g., State v. Hanks, 694 P.2d 407 (Kan. 1985)(defendant accused of raping victim while wearing a ski mask; held, evidence of three other rapes, in which defendant had used threats, violence and had wielded a knife, though not wearing a mask, sufficiently similar to be admitted for the purpose of establishing the rapist's identity); Coleman v. State, 621 P.2d 869, 875 (Alaska 1980) (similarities in race and age of victims, along with similar situs of attack and manner of subduing victim from behind sufficiently like prior rape to allow evidence of that crime to prove identity), cert. denied, 454 U.S. 1090 (1981); Jenkins v. State, 356 S.E.2d 525, 526 (Ga. Ct. App. 1987)(evidence of defendant's prior sexual assault admissible to establish identity for attempted rape charge where there is no dispute that defendant committed prior assault, and both prior assault and charged crime involved sexual assault upon woman who had no prior personal connection with defendant and who frustrated assault by screaming); Copeland v. State, 455 S.2d 951, 954-955 (Ala. Crim. App. 1984)(prior rape and charged rape sufficiently similar to meet admissibility standard for establishing identity where both incidents occurred in the same neighborhood, attacks were late at night, muscular attacker entered homes by breaking window, wore a mask, brandished a weapon, and smelled bad), cert. denied, 455 So.2d 956 (Ala. 1984); Humphrey v. State, 304 S.2d 617, 618 & 622 (Ala. Crim. App. 1974)(similarity linking two rapes and one attempted rape was that the attacker walked unarmed into the victim's bedrooms

to attack them; held, evidence admissible to prove identity). Cf. State v. Mason, 827 P.2d 748 (Kan. 1992)(defendant accused of attempted rape of 89-year-old victim; held, evidence of prior murder of 76-year-old victim, where defendant asked to use the phone to gain entry and strangled victim with sock, was sufficiently similar to charged crime in which person gained entry to home by asking to use the phone and prepared stocking in his hands before fleeing victim's house to be admissible to establish identity).

9. Cases admitting the evidence include: Hall v. State, 419 S.E.2d 503, 505 (Ga. Ct. App. 1992)(in defendant's trial for molestation of his teenage daughter, testimony that 16 years earlier defendant had molested his teenage sister was admissible, even though his sister alleged penetration whereas his daughter did not, and daughter alleged continuing contacts whereas his sister alleged only one incident); State v. Floody, 481 N.W.2d 242, 254 (S.D. 1992)(in prosecution for rape of six-year-old, evidence of other sexual contact between defendant and victim when parents of victim left the house admissible to show plan or course of criminal activity); State v. Miller, 632 P.2d 552, 554-555 (Az. 1981)(evidence of prior molestation of another child victim was admissible to prove identity where victim in charged crime was unable to identify defendant, where both incidents were similar in that they occurred at the same time of day, man bore same description, and both children were fondled in the same way after man broke into residence through a bedroom window).

Cases excluding the evidence include: State v. Winget, 310 P.2d 738, 738-39 (Utah 1957)(defendant was accused of sexual abuse of his eight-year-old daughter; held, reversible error to allow his 17-year-old stepdaughter to testify that she had been abused by him as a child); People v. Ponce de Leon Jones, 335 N.W.2d 465, 466 (Mich. 1983)(the accused was charged with a crime arising from sexual intercourse with his 15-year-old stepdaughter; held, reversible error to admit testimony by his natural daughter and by another stepdaughter of sexual activity with them); Government of Virgin Islands v. Pinney, 967 F.2d 912 (3d Cir. 1992)(in prosecution of 18-year-old defendant for rape of seven-year-old girl, receiving testimony of victim's sister that she had also been raped by accused six years earlier, when she was six, was reversible error); People v. Woltz, 592 N.E.2d 1182 (Ill. App. 3d 1992) (defendant accused of digital penetration and other forcible touching of 12-year-old girl; prior forcible rape of 14-year-old inadmissible); Kelly v. Texas, 828 S.W.2d 162 (Tex. Crim. App. 1992)(defendant charged with sexual assault on nine-year-old girl; reversible error to admit testimony by nine-year-old witness who was friend of complainant about other acts with complainant and about acts with witness); Owens v. State, 827 S.W.2d 911 (Tex. Cr. App. 1992) (reversible error in prosecution for sexual assault of defendant's daughter to admit testimony of the defendant's alleged rape of his older daughter); Bolden v. Alaska, 720 P.2d 957 (Alaska Ct. App.

1986)(defendant accused of sexual conduct with two underage girls, one of them his daughter; held, reversible error to admit evidence of defendant's sexual conduct with other daughters and their underage friends; court notes that identity and intent are not in issue, the only defense being that the acts were not committed).

10. S. 6, 103d Cong., 1st Sess. § 112 (1993).

11. For a typical instruction, see State v. Schwab, 409 N.W.2d 876, 882 (1987)(Randall, J., concurring)(quoting 10 Minnesota Practice, CRIM.JIG, 3.15(1) (1985)):

> In the case of defendant, you must be especially careful to consider any previous conviction only as it may affect his credibility; you must not consider any previous conviction as evidence of guilt of the offense for which he is on trial here.

Judge Randall, concurring specially in Schwab, commented on this instruction as follows:

> Problem: Is it reasonable and fair to assume that a jury will understand there is supposed to be a subtle difference between the questions "Is a defendant guilty?" and, "Is the defendant lying when he says he is not guilty?" My perception and the perception, I believe, shared by the trial bench, prosecutors and defense attorneys who work in the area of criminal trials, is different. In reality, the evidence that the defendant has committed the same crime in the past is so prejudicial (read: substantive and credible) that the jury is apt to believe that he has also committed this one.

Id. at 882.

12. See State v. Trejo, 825 P.2d 1252 (N.M. App. 1991)(held, extrinsic conviction for attempted criminal sexual penetration and kidnapping admissible to impeach defendant accused of same crimes in separate incident with separate victim; court states that defendant's dishonesty is indicated by fact that defendant testified denying offense in prior trial, and was nonetheless convicted), cert. denied 828 P.2d 957 (N.M. 1992); State v. Schwab, 409 N.W.2d at 877-78 (held, not error to deny defendant's motion to exclude prior conviction for intrafamilial sexual abuse in case in which defendant was accused of sexual abuse of his girlfriend's five-year-old son; the prior conviction "has legitimate impeachment value" and trial judge was within discretion in ruling that it would be admissible if defendant testified); People v. Hall, 453 N.E. 2d 1327, 1335-37 (Ill. App. 1983)(held, not error to deny defendant's motion to exclude prior conviction for rape in case in which defendant was accused of

attempted rape, armed robbery, and armed violence; conviction admissible to impeach despite similarity to charged crime); State v. Grubb, 541 N.E.2d 476 (Ohio App. 1988)(held, not abuse of discretion to admit 24-year-old sodomy conviction to "impeach" defendant charged with gross sexual imposition); Jackson v. State, 447 N.W. 2d 430, 434 (Minn. App. 1989)(held, in prosection for criminal sexual contact of 14-year-old girl staying with defendant's family, not error to admit evidence of defendant's prior conviction for sexual abuse of his daughter to impeach the defendant because the jury "had to choose to believe either [the defendant] or [the victim]"). But cf. United States v. Beahm, 664 F.2d 414 (4th Cir. 1981)(Winter, J.)(reversible error to admit prior convictions for sodomy (11 years before trial) and unnatural sexual practices (9.5 years before trial) to impeach defendant accused of child molestation; court bases decision on failure to specify why convictions more probative than prejudicial, but indicates great doubt that convictions could be shown to be admissible).

13. For a persuasive argument on this point, see Richard Friedman, Character Impeachment Evidence: Psycho-Bayesian [!?] Analysis and A Proposed Overhaul, 38 UCLA L. Rev. 637, 655-64 (1991).

14. For an example of a social science study indicating that the limiting instruction does not work, see Rosell L. Wissler & Michael J. Saks, On the Inefficacy of Limiting Instructions: When Jurors Use Prior Conviction Evidence to Decide on Guilt, 9 Law & Hum. Behavior 37 (1985).

15. See, e.g., Fed. R. Evid. 608. Rule 608 codified the common law rule that prevailed in a number of jurisdictions, see 3A John Henry Wigmore, Evidence in Trial at Common Law, § 982 (Chadbourn Rev. 1970). Wigmore reports that a minority of courts at common law restricted impeachment evidence to evidence of misconduct that indicated a lack of veracity - "fraud, forgery, perjury, and the like." Other jurisdictions allowed cross-examination as to "any kind of misconduct, as indicating general bad character . . . thus, a robbery or an assault or an adultery may be used, although none of these directly indicates an impairment of the trait of veracity." Id.

16. Fed. R. Evid. 608; 3A Wigmore, supra note 15, at §§ 979, 986.

17. Fed. R. Evid. 403.

18. For cases holding that it is error to allow cross-examination on an impeachment theory about prior sex offenses, see State v. Clemmons, 353 S.E.2d 209 (N.C. 1987) (in prosecution for rape, it was error, though harmless, to allow cross-examination of defendant about prior attempted rape of another woman; trial judge's theory that evidence was admissible to

impeach defendant's testimony under Rule 608 was invalid because the evidence was not probative of character for truthfulness or untruthfulness); State v. Scott, 347 S.E.2d 414, 416-18 (N.C. 1986) (in prosecution for child molestation, trial judge committed reversible error by allowing cross-examination of defendant about other acts of sexual misconduct; Rule 608(b) theory fails because evidence is not sufficiently probative of truthfulness); Summerlin v. State, 643 S.W.2d 582 (Ark. Ct. App. 1982) (in prosecution for sexual contact with young boy, cross-examination concerning the defendant's discharge from the Navy for the same type of sexual activity as the charged offense constitutes reversible error; Rule 608 theory of admission fails because evidence not probative of truthfulness).

19. Common law jurisdictions usually allowed reputation testimony, but not opinion testimony. See 3A Wigmore, supra note 15, at § 921; Advisory Committee's Note to Fed. R. Evid. 405(a). The Federal Rules of Evidence allow proof in either form. Fed. R. Evid. 405(a).

20. Michelson v. United States, 335 U.S. 469 (1948). See also Fed. R. Evid. 405(a) advisory committee's note.

21. For a useful discussion of fighting fire with fire, see McCormick on Evidence, supra note 1, § 57, at 229. The authors conclude that in situations in which the adversary made a timely objection to the inadmissible evidence and the inadmissible evidence was damaging, the adversary should be entitled to give answering evidence as a matter of right. The adversary should also be entitled to put in answering evidence as a matter of right in situations in which the inadmissible evidence, or the question asking about it, was so prejudice-arousing that an objection would not have erased the harm. In other situations, they conclude, the trial judge should have discretion whether to allow the answering evidence.

22. See, e.g., Fed. R. Evid. 405(a).

23. 593 N.E.2d 346 (Ohio App. 3d 1991).

24. In the court's words,

> In the case before us, the defendant, in his case-in-chief, interjected the issue of his prior sexual acts into the case. Consequently, as the defendant elected to rely upon the absence of prior acts of sexual misconduct or "perversion" as a defense in his case-in-chief, the state was entitled to introduce testimony in rebuttal to meet the defense interposed by the defendant.

Id. at 219-20.

Accord, State v. Sonnenberg, 344 N.W.2d 95 (Wis. 1984) (in prosecution for child molestation, defendant "opened the door" to cross-examination about his propositioning an adult woman ten days before trial when he testified he never sought sexual satisfaction outside of his marriage); Quimby v. State, 604 So.2d 741 (Miss. 1992)(defendant "blurted out" on direct examination, "I have never abused my daughter or any other child ever in any way, shape, form or fashion"; held, this assertion opened the door to specific act evidence about prior sexual abuse of daughter); Many states would admit the Quimby evidence on grounds that it shows a "motive" arising from lust for the particular victim. See infra text accompanying note 34. See also State v. Anderson, 686 P.2d 193, 204 (Mont. 1984). There, the defendant offered an amalgam of evidence that included opinion testimony as to character, reputation evidence, and broad denials of specific acts. He offered testimony about his reputation for "morality and personal truthfulness"; he offered his wife's testimony that he had "orthodox" sexual mores and that the charges did not comport with her knowledge of him; and he offered his denial of improper sexual conduct with the alleged victims or with anyone else. The Montana Supreme Court approved admission of counter-evidence in the form of testimony by a young girl that she had slept with defendant while defendant was naked.

25. 1A John Henry Wigmore, Evidence in Trials at Common Law, § 55, at 1160-1161 (Tillers rev. ed. 1983)[hereinafter Wigmore on Evidence].

26. See infra note 87.

27. In an article that characterizes practically all 404(b) evidence as propensity evidence, Professor Kuhns characterizes evidence offered to show knowledge as propensity evidence on grounds that it depends on the inference that "a person who has obtained knowledge of some fact has a propensity to retain that knowledge." See Richard B. Kuhns, The Propensity to Misunderstand the Character of Specific Acts Evidence, 66 Iowa L. Rev. 777, 790 (1981). The evidence does not, however, require that the trier assume that the defendant has an individualized propensity that marks him as different from humanity in general. Use of inferences that the defendant shares the capacities of human beings in general does not raise the dangers of prejudice at which the character evidence rule is aimed. In the context of character evidence discussions, the term "propensity" probably refers to individualized traits rather than capacities, such as memory, that are almost universally shared.

In any event, Professor Kuhns offers two examples of bad acts evidence that even he is willing to concede "arguably [are] not dependent on a propensity inference." They are (1) in a prosecution for murder, the prosecutor offers to prove that

defendant stole the pistol with which the murder was committed; (2) in a prosecution for theft from a liquor store, the prosecutor offers evidence that two hours earlier the defendant held up a filling station in the same neighborhood. Id. at 792.

28. Though evidence experts might prefer to call this latter use an example of evidence that falls outside the rule, rather than an "exception" to the rule, we have for the sake of verbal economy referred to this sort of use as an "exception." See Charles A. Wright & Kenneth W. Graham, Jr., 22 Federal Practice and Procedure, § 5240, at 469 (1978) [hereinafter Wright & Graham](same usage). In fact, the "exception" language may be a correct characterization, even as a technical matter, of the results reached in much of the case law. For example, the cases in which other crimes evidence is used to show intent are often ones that permit an inference of intent by means of an inference that the defendant had a propensity to commit the crime charged, thus in effect making cases in which intent is in issue an exception to the rule against character reasoning, rather than an example of a use that does not involve character reasoning. See infra text accompanying notes 72-79.

29. For similar definitions of motive, see 22 Wright & Graham, supra note 28, § 5240, at 479: "'motive' is . . . an emotion or state of mind that prompts a person to act in a particular way." See also Wigmore on Evidence, supra note 25, at § 117; John Henry Wigmore, The Science of Judicial Proof As Given by Logic, Psychology, and General Experience and Illustrated in Judicial Trials §69, at 146-47 (3d ed. 1937)[hereinafter Wigmore, Proof].

30. See Edward J. Imwinkelreid, Uncharged Misconduct Evidence, § 3:15 (1984)[hereinafter Imwinkelreid]. Cf. 22 Wright & Graham, supra note 28, § 5140 at 481 (1978)("First, the other act can be one that caused the mental state [that provides the motive]; for example, a desire for revenge against witnesses produced by a prior conviction. Second, the other act may be offered as another consequence of the same emotion, as when proof that the defendant stole from his wives is offered to show motive for bigamy.").

31. See, e.g., State v. Green, 652 P.2d 697, 701 (Kan. 1982)(prior assaults on wife admissible to show defendant's motive for murdering her).

32. Richard O. Lempert & Stephen A. Saltzburg, A Modern Approach to Evidence, 226 (2d ed. 1982)[hereinafter Lempert & Saltzburg].

33. Cf. Wigmore, Proof, supra note 29, at 103:

> Under Character are here included any and every quality or tendency of a person's mind, existing originally or developed from his native substance, and more or less permanent in their existence. Character is thus contrasted with Habit, a quality or tendency later formed from time to time, but not permanent; and with Emotion or Design, a condition having only a temporary existence.

The concept of character as an enduring, cross-situational propensity is consistent with the purposes of the character rule. The danger that the jury will give the conduct too much weight is reduced when the conduct is situationally specific, because situationally specific conduct is in fact more likely to be consistently repeated. See infra text accompanying notes 107-115. The danger of punishing the defendant for the uncharged acts is less severe where the jury is being asked to not to infer a consistent prolonged tendency, but a temporary emotion.

34. See State v. Scott, 828 P.2d 958 (N.M. App. 1991)(evidence of defendant's repeated fondling and sexual intercourse with victim for ten years prior to the charged crime was properly admitted to show defendant's "lewd and lascivious" disposition towards the victim; Padgett v. State, 551 So.2d 1259 (Fla. App. 5th 1989)(evidence of defendant's prior sexual assaults against victim was admissible to show his "lustful attitude" toward the victim); State v. Ferguson, 667 P.2d 68 (Wash. 1983)(evidence of photographs showing that defendant made the child victim put her mouth on his penis was admissible to prove a lustful disposition towards the child).

35. State v. Schlak, 111 N.W.2d 289 (Iowa 1961) (dicta; conviction reversed because trial judge admitted act too remote in time).

36."One wonders whether the Iowa court would have condoned the admission of evidence of other thefts in a trial for theft on the grounds that it showed the defendant's 'desire to satisfy his greedy nature by grabbing other people's belongings.'" Lempert & Saltzburg, supra note 32, at 230.

37. See State v. Friedrich, 398 N.W.2d 763, 772 (Wis. 1987)(defendant raised alibi defense in response to charge of sexual contact with 14-year-old niece who was babysitting for his children, claiming he was working at time of charged acts; prior sexual touching of victim and of another young girl admissible to show motive of obtaining sexual gratification, an element of the offense; alternatively, admissible as evidence of plan, because

defendant was involved in a system of criminal activity in seeking sexual gratification from young girls with whom he had a familial or quasi-familial relationship); Elliott v. State, 600 P.2d 1044 (Wyo. 1979)(prior acts of child sex abuse admissible to show "motive"); United States v. Herbert, 35 M.J. 266 (CMA 1992) (defendant charged with crime arising from oral sex with adolescent stepson; held, not abuse of discretion to admit evidence of attempt to fondle one nephew and oral sex with another; though showing of desire for sexual gratification is not element of crime charged, "[e]vidence of a specific state of mind on the part of an accused on occasions prior to charged acts may be admissible to show circumstantially that the charged acts later occurred as an expression of or outlet for this mental state . . . . Here, appellant's nephews testified to his sexual acts or attempted sexual acts with both of them which indicated his peculiar incestual interest for young boy family members.").

38. See, e.g., State v. Saltarelli, 655 P.2d at 700 ("[I]t is by no means clear how an assault on a woman could be a motive or inducement for defendant's rape of a different woman almost five years later . . . . [T]he evidence seems to achieve no more than to show a general propensity to rape, precisely forbidden by ER 404(b)."); People v. Tassell, infra text accompanying notes 69-70 (prior rapes inadmissible; motive theory not pursued). But see Carey v. State, 715 P.2d 244, 249 (Wyo. 1986)(uncharged misconduct held admissible in adult rape case; the court observed, as an alternative ground, that the evidence showed that the defendant had "something within him" that motivated him to use force to achieve sexual gratification), cert. denied, 479 U.S. 882 (1986).

39."[T]he need to prove identity should not be, in itself, a ticket to admission. Almost always, identity is the inference that flows from . . . [other] theories . . . . [L]arger plan, . . . distinctive device, . . . and motive seem to be most often relied upon to show identity." McCormick on Evidence, supra note 1, § 190, at 808.

40."[C]ourts use a variety of terms to describe the uniqueness needed to invoke the modus operandi theory, including 'distinguishing,' 'handiwork,' 'remarkably similar,' 'idiosyncratic,' 'signature quality,' and 'unique.' Myers, infra note 59 at 550 (citing cases).

41. See generally Imwinkelreid, supra note 30, at § 3:13 (discussing cases).

42. State v. Smith, 707 P.2d 289, 297 (Ariz. 1985). Cf. People v. Massey, 196 Cal.App.2d 230, 16 Cal.Rptr. 402 (Dist. Ct. App. 1961) (evidence of similar burglary admitted, though similarities hardly enough to justify analogy to "signature.").

43. Although these generalizations nearly always hold true, the lines between stranger rapes (with an alibi defense) and acquaintance rapes (with a consent defense) are occasionally blurred. For example, in a recent case, the defendant, who claimed to know the victim, entered the victim's apartment surreptitiously, raped her at knife-point, and argued at trial that the sex was consensual because she asked him to use a condom, a contention that the jury sensibly rejected. See N.Y. Times, May 15, 1993, at 6; Houston Chron., November 25, 1992, at 19. One can imagine a rapist who was an admitted stranger telling a similar story. It is also conceivable that an "acquaintance" who had met the victim briefly on a prior occasion might, when charged with rape, claim --perhaps plausibly--that he had been misidentified.

44. See, e.g., People v. Tassell, infra text accompanying note 45 (held, prior rape inadmissible in consent defense case; modus evidence not admissible unless identity is in issue); People v. Barbour, 436 N.E.2d 667, 672-73 (Ill. Ct. App. 1982)(modus evidence not admissible in consent defense cases, there being no issue of identity); Velez v. State, 762 P.2d 1297 (Alaska Ct. App. 1988)(error to admit modus evidence in consent defense case, because identity not in issue); United States v. Ferguson, 28 M.J. 104 (C.M.A. 1989)(held, when defendant charged with sexual abuse of one adolescent stepdaughter, testimony of another stepdaughter about similar abuse not admissible to show "modus operandi" because identity of the perpetrator was not in dispute)(alternative holding). But see State v. Willis, 370 N.W.2d 193, 198 (S.D. 1985)(modus evidence admissible in consent defense case as showing intent and plan; prior case holding that modus evidence not admissible because identity not in issue overruled).

45. 679 P.2d 1 (Cal. 1984)(en banc).

46. Id. at 8.

47. Id. at 3.

48. Id. at 8.

49. Wigmore, supra note 15, at § 216 at 1883.

50. (EAL/GFD 1949).

51. For a similar example in the case law, see State v. Wallace, 431 A.2d 613 (Me. 1981)(defendant had plan to reconstitute a gun collection previously owned by his father; held, evidence of uncharged burglary in which one gun was recaptured was admissible to show the defendant's involvement in charged burglary in which another was recaptured).

52. "In effect, these courts convert the doctrine into a plan-to-commit-a-series-of-similar-crimes theory." Imwinkelreid, supra note 30, at § 3:23. For example, this approach was used in a case in which prior acts of accepting kickbacks from third parties were admitted to show a "common scheme" to use one's position to acquire kickbacks. See Commonwealth v. Schoening, 396 N.E.2d 1004 (Mass. 1979) (held, evidence that defendant took kickbacks on two other occasions, even if from a different party, is admissible to show motive, plan, common scheme: "[t]he defendant's use of his position to guarantee contracts to particular firms and thus to guarantee kickbacks to himself provided the common or general scheme underlying all three transactions."). But see United States v. O'Connor, 580 F.2d 38, 42 (2d Cir. 1978) (bribes taken from third parties not sufficiently probative of "definite project" of committing present crime).

53. See, Note, Admissibility of Similar Crimes, 1901-51, 18 Brook. L. Rev. 80, 104-05 (1951)(labelling the category "spurious common scheme or plan"); Imwinkelreid, supra note 30, at § 3:23 (noting that "commentators have been almost uniformly critical of the [spurious plan] doctrine" and stating that "[t]heir criticism is well-founded.").

54. People v. Tassell, 679 P.2d 1 (Cal. 1984).

55.See Williams v. State, 110 So.2d 654 (Fla. 1959), cert. denied, 361 U.S. 847 (1959).

56. See Fed. R. Evid. 406.

57. See supra text accompanying notes 39-40.

58. See State v. Paille, 601 So.2d 1321 (Fla. App. 1992) ("[t]he fact that the incidents began with kissing and continued over a period of three months is relevant to prove that Paille planned and intended to lure the victim into sexual activity over time. We believe this is relevance beyond mere propensity.").

59. State v. Friedrich, 398 N.W.2d 763, 772-773 (Wis. 1987)("the defendant was involved in a system of criminal activity in seeking sexual gratification from young girls with whom he had a familial or quasi-familial relationship"); People v. Oliphant, 250 N.W.2d 443, 449 (Mich. 1976)(upholding admission of three uncharged rapes in consent defense case; "[t]he many similarities in all four cases tend to show a plan and scheme to orchestrate the events surrounding the rape of complainant so that she could not show nonconsent and the defendant could thereby escape punishment. Defendant's plan made it appear that an ordinary social encounter which culminated in voluntary sex had simply gone sour at the denouement due to his reference to complainant's unpleasant body odor."). But see But see, People v. Tassell, discussed in text accompanying notes 45-48, supra; Getz v. State, 538 A.2d 726 (Del. 1988)("[t]he evidence of prior sexual contact [between the defendant and his daughter, the victim] in this case, even if it had adhered to the State's proffer, involved two other isolated events within the previous two years depicting no common plan other than multiple instances of sexual gratification."); United States v. Rappaport, 22 MJ 445, 447 (CMA 1986) (psychologist accused of sexual affairs with patients; evidence of uncharged affair with another patient not admissible; "[e]vidence that the accused previously had a similar affair with one of his patients did not tend to establish a plan or overall scheme of which the charged offenses were part.").

Commentators have noted that in sex crime prosecutions some courts often give prosecutors greater latitude under the "spurious" plan rubric than in other kinds of crimes. See James M. H. Gregg, Other Acts of Sexual Misbehavior and Perversion as Evidence in Prosecutions for Sexual Offenses, 6 **Ariz. L. Rev.** 212, 230 (1965) [hereinafter Gregg]; **Imwinkelreid**, supra note 30, at § 4:13, n. 4 and accompanying text; John E. B. Myers, Uncharged Misconduct Evidence in Child Abuse Litigation, **1988 Utah L. Rev.** 478, 544 n. 220 (citing State v. Bennett, 36 Wash. App. 176, 672 P.2d 772 (1983)(plan to harbor and abuse runaway girls); Scadden v. State, 732 P.2d 1036 (Wyo. 1987)(plan to gain confidence of volleyball team member coached by defendant, then molest them). State v. Moore, 819 P.2d 1143 (Idaho 1991) (defendant charged with sexual abuse of six-to-seven-year-old granddaughter; prior acts of abuse of daughter when age nine-to-thirteen and stepdaughter when age eight and nine admissible; common scheme shown by "a continuing series of alleged similar sexual encounters directed at the young female children living within [the accused's] household.").

60. 399 Mich. 472; 250 N.W.2d 443 (1976). Oliphant subsequently brought a writ of habeas corpus in federal court, claiming a double jeopardy violation because two of the prior crimes had been tried and resulted in acquittals. The Sixth Circuit denied the writ, holding that there was no violation of the

constitutional right to be free from double jeopardy. See Oliphant v. Koehler, 594 F.2d 547 (6th Cir. 1979), cert. denied, 444 U.S. 877 (1979).

61. Oliphant, 594 F.2d at 548.

62. Id.

63. This is not a violation of the Double Jeopardy Clause. See supra note 60.

64. Id. at 552.

65. Id. at 550-552.

66. Id. at 552.

67. Id.

68. Id. at 552. See also State v. Valdez, 534 P.2d 449 (1975)(uncharged rape admissible to show common plan where in both cases appellant acquainted with victim, went to victim's residence on pretence of looking for someone in early-morning hours, and both rapes involved a "sexual tour-de-force").

69. 679 P.2d 1 (Cal. 1984).

70. Id. at 570-71.

71. 22 **Wright & Graham**, supra note 28, § 5240, at 482 ("Courts seem to be more willing to assume that one mental state will generate another than they are to infer that it will produce action.").

72. See, e.g., Huddleston v. United States, 485 U.S. 681, 683 (1988)(in prosecution for selling stolen goods, evidence of prior "similar acts" admissible to show defendant knew goods he sold were stolen if such evidence is sufficient to allow the jury to find that the defendant committed the act).

73. **Wright & Graham**, supra note 28, § 5242, at 490-91.

74. See, e.g., State v. Wermerskirchen, 497 N.W.2d 235 (Minn. 1993)(held, where defendant denies act of touching child in intimate parts, jury should be instructed that evidence of

uncharged sexual touching of others is admissible to show intent); United States v. Beahm, 664 F.2d 414 (4th Cir. 1981)(evidence of other child molestation admitted to show intent where defense counsel argued government had burden of showing beyond reasonable doubt that touching not accidental). But cf. People v. Thomas, 573 P.2d 433, 438 (Cal. 1978)(father convicted of abusing daughter testified he was merely rubbing cream on her chest for treatment of a cold; held, even if defendant put his intent in issue, his alleged prior contact with another daughter was too remote to be probative of his "present intent to gratify his passions" through sexual contact with his daughters)(emphasis in the original).

75. 918 F.2d 848 (9th Cir 1990), cert. granted, 112 S. Ct. 1261 (1992), cert. dismissed as improvidently granted, 113 S. Ct. 486 (1992). See also United States v. Bender, 33 M.J. 111 (C.M.A. 1991)(in case where charged crime was fondling and digital penetration of ten-year-old daughter, and element of crime charged was deriving sexual gratification from act, testimony by another young girl that defendant had fondled her on numerous occasions is admissible to show intent and motive, despite lack of defense of that acts were accidental or medicinal).

76. Hadley, 918 F.2d at 851-852.

77. Id at 851.

78. Id. at 852.

79. See United States v. Gamble, 27 M.J. 298, 304 (CMA 1988)(quoting with approval a passage from the Military Rules of Evidence Manual stating that, in case where kind of act accused committed is almost always an intentional act, court should decline to receive uncharged misconduct evidence on issue of intent until after defendant has put in evidence, in order to see whether defendant challenges intent); Thompson v. United States, 546 A.2d 414, 423 (D.C. Ct. App. 1988)("where intent is not controverted in any meaningful sense, evidence of other crimes to prove intent is so prejudicial per se that it is inadmissible as a matter of law")(emphasis in the original); Getz v. State, 538 A.2d 726, 733 (Del. 1988)("The defendant denied any sexual contact with his daughter. While the defendant's plea of not guilty required the State to prove an intentional state of mind as an element of the offense, the plea itself did not present a predicate issue concerning intent sufficient to justify the State in attempting to negate lack of intent as part of its case-in-chief.").

Commentators generally agree that intent ought to actually be in dispute. See, e.g., Lempert & Saltzburg, supra note 32, at

224-25. Kenneth Graham agrees that intent should be in serious dispute, but recognizes that there is authority to the contrary. **Wright & Graham**, supra note 28, at § 5242, at 489.

See also People v. Thomas, 573 P.2d 433, 443 (Cal. 1978)(Clark, J. dissenting)(defendant claimed he was rubbing vaporizing cream on daughter's chest; dissent argued that other daughters should be allowed to testify that they were molested to illuminate defendant's true intent or absence of mistake); State v. Wermerskirchen, 497 N.W.2d 235 (Minn. 1993)(defendant denied sexually touching his eight-year-old daughter, saying he only gave her a hug; testimony from his nieces and twenty-year-old daughter as to similar touching when they were children admissible to show intent).

80. See Susan Estrich, **Real Rape**, 94-95 (1987)(citing cases); State v. Saltarelli, 655 P.2d 697, 700-701 (Wash. 1982)(defendant, charged with rape of acquaintance, raised consent defense; held, reversible error to receive evidence of prior attempted rape of different woman; evidence not admissible on theory that it shows intent). But see United States v. Reynolds, 29 M.J. 105 (CMA 1989)(consent-defense rape case; prosecution evidence indicated that the defendant took his date to his room, showed her a slide show that included music, and then forcibly raped her; "the theory of the defense was that appellant was experienced and successful with women, that he was a romantic, a poet, an amateur 'photojournalist,' and a 'Top Gun' pilot, who would never resort to rape to overcome the will of a woman" and that complainant either consented or misled him into thinking she was consenting; held, evidence of other similar sexual assaults admissible to show "intent, scheme or design" to have intercourse with date whether or not she consented).

81. **Wigmore on Evidence**, supra note 25, at § 357.

82. See, e.g., State v. Gardner, 391 N.E.2d 337, 342 (Ohio 1979)(per curiam); State v. Willis, 370 N.W.2d 193, 198 (S.D. 198)(held, defense of consent "begets the establishment of intent as a material issue" and other crimes evidence may be used to establish intent), rev'g State v. Houghton, 272 N.W.2d 788 (S.D. 1978).

83. Rubio v. State, 607 S.W.2d 498, 501 (Tex. Crim. App. 1980).

84. 679 P.2d 1 (Cal. 1984)(en banc).

85. Id. at 4.

86. Id. at 8.

87.Rule 404(b) provides, in relevant part:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. (Emphasis added).

88. See 22 **Wright & Graham**, supra note 28, at § 5240 (general principle that list is illustrative, not exhaustive); Getz v. State, 538 A.2d 726 (Del. 1988)(same).

89. See 22 **Wright & Graham**, supra note 28, at § 5248 (listing other purposes, such as proof of guilty knowledge through evidence of spoilation).

90. State v Crocker, 409 N.W.2d 840 (Minn. 1987).

91. Id. at 843.

92. Some cases achieve a similar breadth and vagueness by merely reciting a laundry list of permissible purposes without identifying a particular one or explaining why it is in issue. See, e.g., Rivera v. State, 840 P.2d 933, 941 (Wyo 1992)(repeated preying on teenaged girls who were too intoxicated to consent is admissible to show "intent, motive, plan and identity").

93. See State v. Tobin, 602 A.2d 528 (R.I. 1992)(lewd disposition exception to rule against character evidence recognized in case in which evidence of prior acts involved same victim); State v. Raye, 326 S.E.2d 333, 335 (N.C. App. 1985), review denied, 332 S.E.2d 183 (N.C. 1985)(prior sexual abuse of victim's sister admissible to show intent and "unnatural lust" of defendant-stepfather); Maynard v. State, 513 N.E.2d 641 (Ind. 1987)(in child sex crime case, uncharged child abuse of third party by defendant admissible to show "depraved sexual instinct" as well as defendant's "continuing plan" to exploit and abuse the victim), overruled in relevant part by State v. Lannan, 600 N.E.2d 1334, 1339 (Ind. 1992)(depraved sexual instinct exception no longer recognized in Indiana); State v. Edward Charles L., 398 S.E.2d 123, 131 (W.Va. 1990)(held, in federal rules state, uncharged misconduct evidence admissible to show, inter alia, lustful disposition toward the defendant's children); State v. Lachterman, 812 S.W.2d 759 (Mo. App. 1991)(homosexual sodomy with young boys; prior acts admitted on "depraved sexual instinct" theory), cert. denied, 112 S.Ct. 1666 (1992); State v. Tarrell, 247 N.W. 2d 696, (Wis. 1976)(sexual abuse of child; evidence that defendant had made obscene remark to female child and had masturbated in presence of other young females admissible

as showing defendant's "propensity to act out his sexual desires with young girls"), overruled in part by State v. Fishnick, 378 N.W.2d 272, 277 (Wis. 1985)(language in Tarrell stating that evidence could be received to show sexual propensity is "withdrawn"). See generally, Myers, supra note 59, at 540.

94. Imwinkelreid, supra note 30, at § 4:14, 4-37.

95. See, e.g., Getz v. State, 538 A.2d 726, 733-734 (Del. 1988)("The sexual gratification exception proceeds upon the assumption that a defendant's propensity for satisfying sexual needs is so unique that it is relevant to his guilt. The exception thus equates character disposition with evidence of guilt contrary to the clear prohibition of D.R.E. Rule 404(b).").

96. 600 N.E.2d 1334 (Ind. 1992); accord, Getz v. State, 538 A.2d 726, 733-34 (Del. 1988)(overruling prior case recognizing sexual gratification exception); State v. Fishnick, 378 N.W.2d 272, 277 (Wis. 1985)(withdrawing language in prior case that endorsed use of other crimes evidence to prove sexual propensity).

97. However, the Indiana Legislature recently passed a statute which reinstates an exception for evidence of sex crimes similar to the charged crime. See Ind. House Enrolled Act No. 1342, §2, IC 35-37-4-15 (1993)(to be codified at IND. CODE §15).

98. Lannan, 600 N.E.2d at 1335.

99. Id. at 1336-1337.

100. Id. at 1337.

101. Cases recognizing a form of the lustful disposition exception include: State v. Edward Charles L., 398 S.E.2d 123 (W.Va. 1990)(held, in federal rules state, uncharged misconduct evidence admissible to show lustful disposition toward children); State v. Jerousek, 590 P.2d 1366, 1372-73 (Ariz. 1979)(upholding "the emotional propensity for sexual aberration exception" in child sexual abuse case where act is similar to charged crime, committed shortly before charged crime and involves sexual aberration); State v. Tobin, 602 A.2d 528 (R.I. 1992)(although reversing conviction on other grounds, the court upheld its "lustful disposition" exception, at least in cases involving prior incestuous relations between the defendant and the victim). For cases that decline to apply a recognized lustful disposition exception to adult rape cases, see State v. McFarlin, 517 P.2d 87, 90 (Ariz. 1973)(lustful disposition exception is limited to cases involving sexual aberration; "as one court pointed out, the fact that one woman was raped is not substantial evidence that another did not consent"); State v. Valdez, 534 P.2d 449, 452 (Ariz. Ct. App. 1975) (dictum; lustful disposition exception not available in adult rape case, but evidence admitted on common

plan rationale); Lehiy v. State, 501 N.E.2d 451, 453 (Ind. App. 1987)(in case decided before the Indiana Supreme Court abolished depraved sexual instinct exception, Court of Appeals of Indiana holds that heterosexual rape evidence is not admissible under the exception, although evidence of incest or "sodomy" would be admissible), aff'd, 509 N.E.2d 1116 (Ind. 1987); Reichard v. State, 510 N.E.2d 163 (Ind. 1987)(consent-defense case in which defendant was accused of raping woman, with whom he had had a dating relationship, in her apartment; reversible error for trial judge to admit unspecified "evidence of prior alleged rapes perpetrated by [defendant] upon various individuals"; court states that rape of an adult woman does not fit the then-recognized "depraved sexual instinct" exception because rape of an adult woman is not depraved sexual conduct).

102. See supra note 44 (cases cited); Lovely v. United States, 169 F.2d at 388; Brown v. State, 459 N.E.2d at 379. Of course, there some counter-examples -- jurisdictions where the evidence seems to be admitted equally in both situations, because courts use the "spurious plan" reasoning. See infra note 59 and accompanying text.

103. See supra note 101 and accompanying text.

104. **Imwinkelreid**, supra note 30, at § 1:04 (LEXIS search reveals over 3,000 cases); **Wright & Graham**, supra note 28, at § 5239. On our topic of the admissibility of uncharged sex crimes in sex crime cases, there were 95 published appellate opinions in the year 1992 alone.

105. See generally, Charles Nesson, The Evidence or the Event? On Judicial Proof and the Acceptability of Verdicts, 98 **Harv. L. Rev.** 1357 (1985)(arguing that the need to promote public acceptance of verdicts can better explain many evidentiary rules); David P. Leonard, The Use of Character to Prove Conduct: Rationality and Catharsis in the Law of Evidence, 58 **U. Colo. L. Rev.** 1 (1986-87)(same).

106. See **William L. Twining, Theories of Evidence: Bentham and Wigmore** (1985).

107. See, e.g., Miguel A. Mendez, California's New Law on Character Evidence: Evidence Section 352 and the Impact of Recent Psychological Studies, 31 **UCLA L. Rev.** 1003 (1984), and Leonard, supra note 105, as examples of commentators who find considerable support for the rule against character reasoning in the psychology literature. For a more permissive view of character evidence based on an interactionist perspective, see Susan M. Davies, Evidence of Character to Prove Conduct: A Reassessment of Relevancy, 27 **Crim. L. Bull.** 518 (1991).

108. Leonard, supra note 105, at 25-29. See generally Walter Mischel, Personality and Assessment (1968); 1 Hugh Hartshorne and Mark A. May, Studies in the Nature of Character 411-412 (1928) [hereinafter Hartshorne & May].

109. The results of the Hartshorne study show that deceit and honesty are not "unified character traits, but rather specific functions of life situations. Most children will deceive in certain situations and not in others." Hartshorne & May, supra note 108, at 411. See also Peter D. Spear, Steven D. Penrod and Timothy B. Baker, Psychology: Perspectives on Behavior 574-576 (1988).

110. John M. Darley, Sam Glucksberg, and Ronald A. Kinchla, Psychology, 464-65 (5th ed. 1991)(undergraduate textbook published by Prentice-Hall)[hereinafter Darley]; James J. Conley, Longitudinal Stability of Personality Traits: A Multitrait-Multimethod-Multioccasion Analysis, 49 J. Personality & Soc. Psychol. 1266 (1985)("The data of this longitudinal study carried out over five decades strongly indicate that there is a set of personality traits that are generalizable across methods of assessment and are stable throughout adulthood."). See generally David C. Funder & Daniel J. Ozer, Behavior as a Function of the Situation, 44 J. Personality & Soc. Psychol. 107 (1983)[hereinafter Funder & Ozer]; David Crump, How Should We Treat Character Evidence Offered to Prove Conduct?, 58 U. Colo. L. Rev. 282-284 (1987)("social science is by no means monolithic in condemning trait theory.").

111. Darley, supra note 110; Davies, supra note 107.

112. "[T]he evidence essentially shows that some people are indeed apt to act the same way whenever an aggressive opportunity arises. If they are relatively free to do what they want in a given situation, there is a good chance that these individuals will behave in the same manner on many occasions. They will try to hurt someone if they have an underlying aggressive disposition, or they will not attack a target if they have a non-aggressive personality." Leonard Berkowitz, Aggression: Its Causes, Consequences, and Control 128-29 (1993) (emphasis in original).

113. Alan Bullock, Hitler and Stalin: Parallel Lives 654 (1992).

114. See Teree E. Foster, Rule 609(a) in the Civil Context: A Recommendation for Reform, 57 Fordham L. Rev. 1, 33 (1988)("The function of character traits is exaggerated, whereas the function of situational variances as pivotal factors influencing the behavior of others is minimized."); Robert G. Lawson, Credibility and Character: A Different Look at an Interminable Problem, 50 Notre Dame L. Rev. 758, 778 (1975)("It is predictable, therefore, that when jurors receive information

about prior criminal acts of an accused they impute to him a dispositional quality and give inadequate attention to the possibility of situationally oriented explanations for his conduct."). Cf. Robert G. Spector, Rule 609: A Last Plea for Its Withdrawal, 32 Okla. L. Rev. 334, 352-53 (1979)("The jury, like any individual, is incapable of segregating [evidence of prior bad acts] to just one trait. It will inevitably use it to form a complete picture of the [defendant]."). Commentators have also pointed out that research subjects also display a tendency to judge character in a reductionist fashion, concentrating on one or two salient personality traits and ignoring complexities. See Mendez, supra note 107.

Perhaps the factor that most induces jurors to overestimate the probative value of character evidence is what psychologists term the "halo effect." In the present context it might be more aptly called the "devil's horns effect." The term refers to the propensity of people to judge others on the basis of one outstanding "good" or "bad" quality. This propensity may stem from a tendency to overestimate the unity of personality -- to see others as consistent, simple beings whose behavior in a given situation is readily predictable." This use of "implicit personality theory" is questioned by Davies, supra note 107, at 528-29, on grounds articulated by Funder--that the social perception research on which it is based was intended to show the process by which social judgments were made, but not the external validity of those social judgments, and that "social perception researchers have tended either to assume that personality assessments are inaccurate, or to ignore the accuracy question altogether." Davies, supra note 107, at 529.

115. In one well-known experiment, for example, subjects were asked to form a judgment about whether a debater favored Fidel Castro. Even if told that the debater had no choice--that the debate team advisor had instructed the debater whether or not to support Castro--the subjects would be more likely to attribute a pro-Castro attitude to the debater if the debate spoke in favor of Castro than if the debater spoke against Castro. See Edward E. Jones, The Rocky Road from Acts to Dispositions, 34 Am. Psychologist 107 (1979)(describing Castro experiments).

116. Funder & Ozer, supra note 110; Davies, supra note 107.

117. See David C. Funder, Errors and Mistakes: Evaluating the Accuracy of Social Judgement, 101 Psychol. Bull. 75, 75-77 (1987)[hereinafter Funder]. One researcher, who has a relatively optimistic view of the ability of humans to make judgments about dispositions, has gone so far as to complain that:

> Studies of error appear in the literature at a prodigious rate, and are disproportionately likely to be cited (Christensen-Szalanski & Beach, 1984) . . . . (p. 75) [T]he current Zeitgeist emphasizes purported flaws in human judgment to the extent that it might

well be "news" to assert that people can make global judgments of personality with any accuracy at all." (p. 83).

See id.

118. See Lempert & Saltzburg, supra note 32, at 162 (discussion of prejudice in terms of regret matrix of jurors).

119. S. 6, 103d Congress, 1st Session, 1993.

120. Fed. R. Evid. 403 gives the opponent of evidence a basis for challenging it when none of the more specific exclusionary rules applies. It provides that "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."

121. See 137 Cong. Rec. E3503-02 (Extension of Remarks, Oct. 22, 1991)(statement of Rep. Molinari)[hereinafter Molinari](referring to Rule 403 as possible basis for exclusion). Cf. Statement by Senator Strom Thurmond, on behalf of 27 sponsors of the Comprehensive Violent Crime Control Act of 1991, inserting a section-by-section analysis of the bill [hereinafter Section-by-Section Analysis] in the Congressional Record. The analysis applicable to proposed Fed. R. Evid. 413-15 is at 137 Cong. Rec. S 3192, *S3237-42 (February 13, 1991). The 1991 bill's proposed Rules 413-415 are identical to the 1993 bill's proposed evidence rules, and the sponsors of the 1991 bill overlap with those of the 1993 bill.

122. The proposed rule would apply to evidence that the defendant had previously committed a federal child molestation offense, any other child molestation offense involving anal or genital contact, any offense against an adult for a nonconsensual sex crime involving anal or genital contact, any offense that involves deriving sexual gratification from the infliction of death, bodily injury, or physical pain on another person, and any attempt of conspiracy to engage in the above-described conduct. See S.6, § 121.

123. For a comprehensive review of the provisions of rape shield statutes, see Galvin, Shielding Rape Victims in the State and Federal Courts: A Proposal for the Second Decade, 70 Minn. L. Rev. 763 (1986).

In its strongest form, rape shield legislation protects the victim from disclosure of sexual history except in cases where the evidence concerns other sexual acts with the defendant himself, or where the evidence is necessary to show the source of semen or injury. See Fed. R. Evid. 412. Even in these jurisdictions, however, reception of other evidence will

sometimes be constitutionally required, as when the evidence suggests a motive to fabricate a charge of rape. See Olden v. Kentucky, 488 U.S. 227 (1988) (unconstitutional to prevent defendant from cross-examining accuser about fact that she lived with R., when R. saw accuser disembarking from defendant's car after alleged rape, and defense was based on claim that accuser fabricated rape in order to protect relationship with R.); State v. Jalo, 27 Or. App. 845, 557 P.2d 1359 (1976) (unconstitutional to exclude evidence of child complainant's prior sexual conduct when adult defendant claimed that she had falsely accused him because he told her that he was going to inform her parents of her sexual conduct with his son and others).

124. Studies indicate that rape is underreported. See Estrich, supra note 80, at 9; John Monahan & Laurens Walker, Social Frameworks: a New Use of Social Science in Law, 73 Va. L. Rev. 559 (1987).

125. See Section-by-Section Analysis, supra note 120, at S 3241-42.

126. "The character of the woman as to chastity is of considerable probative value in judging the likelihood of consent." John Henry Wigmore, Evidence §62 (3d ed. 1940). However, Wigmore also believed that, "The fact that a woman may have been guilty of illicit intercourse with one man is too slight and uncertain an indicator to warrant the conclusion that she would probably be guilty with any other man who sought such favors of her." Id. at §200.

127. The "evolving mores have made extramarital sex normal" argument has been made by numerous commentators. E.g., Evelyn Sroufe, Evidence Admissibility of the Victim's Past Sexual Behavior Under Washington's Rape Evidence Law -- Wash. Rev. Code §979.150, 52 Wash. L. Rev. 1011, 1032 (1976); If She Consented Once, She Consented Again -- A Legal Fallacy in Forcible Rape Cases, 10 Val. U. L. Rev. 127, 138 (1976); Lisa Van Amburg and Suzanne Rechtin, Rape Evidence Reform in Missouri: A Remedy for the Adverse Impact of Evidentiary Rules on Rape Victims, 22 St. Louis U. L.J. 367, 385 (1978); Vivian Berger, Man's Trial, Woman's Tribulation: Rape Cases in the Courtroom, 77 Colum. L. Rev. 1, 56 (1977).

128. The claim that prior consent is relevant to whether subsequent consent was given to another man is usually rejected out of hand by authors defending rape shield laws. "One can presume that a woman will freely choose her partners, picking some and rejecting others, in line with highly personal standards not susceptible of generalization." Berger, supra note 126, at

56. The fact remains, however, that if the question is whether X and Y had consensual sex on a certain date, it would be relevant to know that they have often done so with others, just as similar information would be relevant to analogous inquiries such as whether they went fishing with each other on a certain date, or went to church together, or played cards. Whether the evidence, in the context of a rape trial, cuts both ways is a different question, as is the danger that the jury will overvalue the evidence.

129. Although the hypothesis in the text cannot be proved valid with available data, and raises several difficult methodological problems, it is consistent with the data. Two studies indicate that college rape victims have more (voluntary) partners than non-victims, but this may be because of increased post-rape sexual activity (which we think unlikely) or merely because a larger number of dates leads to a larger chance of encountering a rapist, rather than because unselective women are more vulnerable on any single social encounter. See Philip Belcastro, A Comparison of Latent Sexual Behavior Patterns Between Raped and Never Raped Females, 7 Victimology: Int'l J. 224, 225-26 (1982) (raped students had more partners and were more likely to have had heterosexual coitus on their first date); Mary P. Koss, The Hidden Rape Victim: Personality, Attitudinal, and Situational Characteristics, Psychol. Women Q. 193, 201-202 (1985) ("acknowledged rape victims reported significantly more liberal sexual values and a greater number of sexual partners than nonvictimized woman did").

Both rape victims and those with large numbers of sexual partners tend to be younger, and more urban, and poorer than the general population. Kost and Forrest, American Woman's Sexual Behavior and Exposure to Risk of Sexually Transmitted Diseases, 24 Family Plan. Persp. 244-54 (1992) (women most likely to have more than 2 partners are 20-34 years of age, with income below the poverty level, living in urban area). Similarly, rape victims are disproportionately urban, young and poor. Bureau of Justice Statistics, Sourcebook of Criminal Justice Statistics (Washington, D.C., U.S. Dept of Justice) 259 (urban), 274 (young), 280 (poor) (1991).

130. Allen J. Beck, Bureau of Justice Statistics, Recidivism of Prisoners released in 1983, at 1 (1989).

131. For scholars who have argued for a longer follow-up period, see Joseph J. Romero and Linda M. Williams, Recidivism Among Convicted Sex Offenders: A 10-Year Followup Study, 49(1) Fed. Probation 58, 63 (1985)(number of sex offenders rearrested for a sex offense 4 years after their release from prison equals the number of sex offenders rearrested for a sex offense within the first year of the follow-up study; the authors concluded that "5 years is minimal as an effective [follow-up] period when

investigating recidivism among sex offenders."); Lita Furby, et. al., Sex Offender Recidivism: A Review, 105 Psychol. Bull. 3, 27 (1989)(recommending follow-up periods of "at least a decade."); R.G. Broadhurst and R.A. Maller; The Recidivism of Sex Offenders in the Western Australian Prison Population, 32(1) Brit. J. Criminology 54, 72 (1992); David Finkelhor, A Sourcebook for Child Sex Abuse, 89, 134-141 (Finkelhor ed. 1986).

132. Furby et al., supra note 130, at 22. See also Finkelhor, supra note 130, at 134. For an example of a study showing a higher recidivism rate, see Marnie E. Rice et al., Sexual Recidivism Among Child Molesters Released From A Maximum Security Psychiatric Institution, 59(3) J. Consulting & Clinical Psychol. 381 (1991) (This study tracked extrafamilial child molesters incarcerated in a maximum security psychiatric institution for an average 6.3 year follow-up period; 31% of the subjects were convicted of a new sex offense. However, the authors noted that the nature of their subjects, maximum security inmates, may have inflated their recidivism results). In their comprehensive review of sex offender recidivism studies, Furby et al. noted that "The differences in recidivism across these studies is truly remarkable; clearly by selectively contemplating the various studies, one can conclude anything one wants.'" Furby, supra note 129, at 27 (citation omitted).

133. See, e.g., A. Nicholas Groth, Robert E. Longo and J. Bradley McFadin, Undetected Recidivism among Rapists and Child Molesters, 28(3) Crime & Delinq. 450 (1982)(anonymous questionnaire given to convicted and incarcerated rapists and child molesters; on average, the subjects indicated they committed two-to-five times as many sex crimes for which they were not apprehended); Finkelhor, supra note 130, at 132 (in analyzing ten studies of child molestation recidivism, the authors noted that these studies "probably gravely understate the amount of subsequent offending committed by the men who were studied. The investigators routinely used as their criteria of recidivism subsequent offenses that came to the attention of the authorities.") (emphasis in the original); Judith V. Becker and John A. Hunter, Jr., Evaluation of Treatment Outcome for Adult Perpetrators of Child Sexual Abuse, 19(1) Crim. Just. & Behav. 74, 82 (1992)("undetected crime is quite extensive among sex offenders and . . . official data may reveal only a small percentage of the total sexual offenses committed.").

134. Furby, supra note 130, at 27 (no more than 10% of sex offenses are reported).

135. "'The differences in recidivism across these studies is truly remarkable; clearly by selectively contemplating the various studies, one can conclude anything one wants.'" Furby, supra note 130, at 27 (citation omitted).

136. Section-by-Section Analysis, supra note 120, at S3240 (analysis applicable to predecessor bill, introduced in 1991, with same evidence provisions as 1993 bill).

137. Of these three factors, only similarity is regularly recognized in the case law as a basis for admission of other crimes evidence. If the acts are sufficiently similar, then they may be admitted as showing modus operandi, plan, or "common scheme." See supra text accompanying notes 39-41 and 49-70.

138. If one assumes that the base rate of false accusations in consent defense cases is very low, then a case can be made for treating them differently, especially when there are multiple accusations. This line of reasoning requires an a priori judgment about the likelihood of falsity -- but this sort of judgment is certainly not unprecedented in evidence law, and is simply the reverse side of the a priori judgment (that women lie) on which the corroboration requirement was once based. See 7 Wigmore on Evidence § 2062 (Chadbourn Revision 1978) (describing corroboration requirement). However, the argument only applies to consent defense cases. There is no basis for an assumption that the rate of mistaken witness identification is lower in sexual offenses than in nonsexual offenses.

139. See Lempert & Saltzburg, supra note 32, at 217 (suggesting that value of other crimes evidence is undermined by danger that defendant was identified because he was one of the "usual suspects" for that type of crime).

140. See Susan Estrich, 95 Yale L.J. 1087, 1088: "Late that night, I sat in the Police Headquarters looking at mug shots....They had four or five to 'really show' me; being 'really shown' a mug shot means exactly what defense attorneys are afraid it means." See also Lempert & Saltzburg, supra note 32, at 172-73 (excerpt from Buckout, Eyewitness Testimony, 231 Scientific American 23-31 (1974)(describes police practices that may interfere with accurate identification).

141. See, e.g., Elizabeth Loftus, Eyewitness Testimony 142-44 (1979)(unconscious transference can cause witness to identify suspect because witness saw suspect, or photo of suspect, in context other than crime); Platz & Hosch, Cross-Racial Ethnic Eyewitness Identification: A Field Study, 18 Applied Soc. Psychol. 972, 981-83 (1988)(difficulty of cross-racial identification); Loftus & Loftus, Some Facts about "Weapon Focus," 11 L. & Hum. Behav. 55, 61-62 (1987)("weapon focus" often interferes with identification capacity). See generally Elizabeth Loftus, Eyewitness Testimony (1979)(describing these and other problems with eyewitness identification).

142.See e.g., Cutler, Penrod & Stuve, Juror Decision Making in Eyewitness Identification Cases, 12 Law & Hum. Behav. 41, 54 (1988); Wells, How Adequate is Human Intuition for Judging Eyewitness Testimony, in Eyewitness Testimony: Psychological Perspectives, 271-72 (1984).

143. See Loftus, supra note 141, at 273.

144. The distinction between this type of case and that presented by crimes that are subject to the character evidence rule rests partially upon our a priori judgments about the likelihood of false accusations. We believe that false accusations of date rape are quite rare, and therefore that multiple accusations are strongly corroborative of each other. Admittedly, this belief rests upon a generalized judgment about social fact that cannot be proven conclusively with scientific evidence. Cf. Patricia Frazier and Eugene Borgida, Juror Common Understanding and the Admissibility of Rape Trauma Syndrome Evidence in Court, 12 Law and Hum. Behavior 106-07 (1988)(assessing sparse data about false rape reports, and concluding either that the rate of false reports is the same or is less frequent than for other categories of crime). Of course, lawmakers must often make choices without waiting for social science, and we believe that we are justified in following our own inductions in the absence of contrary scientific evidence.

145.Harry Kalven and Hans Zeisel, The American Jury 253 (1966). [hereinafter Kalven and Zeisel].

146.Id.

147.Kalven and Zeisel supra note 144, at 249-54.

148.Dale A. Nance, The Best Evidence Principle, 73 Iowa L. Rev. 227 (1988).

149. Nance, supra note 147, at 294.

150. Estimates of an experienced sex-crime investigator place the cost of a semen/DNA test at $400 to $800. Telephone interview with Sergeant Martinson, Sex-Crimes Unit, Minneapolis Police Department, Minneapolis, MN (May 20, 1993). See also Comment, Trial by Certainty: Implications of Genetic "DNA Fingerprints," 39 Emory L. R. 309, 3xx n.95 (1990)($200 per sample, with samples needed from victim, suspect, and crime scene); Note, The Admissibility of DNA Typing: A New Methodology, 79 Geo. L. J. 313 (1990)(private labs charge $325-$490 for DNA tests and $750-$1000 for a day of expert testimony about tests).

151.In some cases the prosecution may be able to offer rape trauma syndrome evidence, but its utility is problematic. See generally State v. Black, 109 Wash. 2d 336, 745 P.2d 12 (1987); State v. Saldana, 324 N.W.2d 227 (Minn. 1982). First, while it tells us about differences between victims who report that they have been raped and nonvictims who report that they have not been raped, it tells us nothing about the characteristics of nonvictims who report that they were raped. A complainant who falsely reports that she was raped after a sexual act might show the same symptoms of trauma that a genuine victim shows -- we simply don't know, because such complainants have not been (and perhaps cannot be) studied. Second, receiving rape trauma syndrome testimony raises questions of fairness because, unless the defense is allowed to conduct an invasive investigation of the victim's private life, the defense normally lacks the ability to develop evidence that the victim did not suffer from rape trauma.

152. See supra note 72 and accompanying text.

153. One finds this result in opinions that reason that in consent defense cases identity is not in issue, so modus evidence is not admissible. These courts tell us that they would decide differently if the case had been a stranger rape alibi defense case. See supra note 44. In some jurisdictions there would be no difference in admissibility, because the evidence of similar modus would be admissible in consent defense cases under some rubric such as plan, common scheme, or "pattern." See supra text accompanying notes 44 and 68.

154. Lovely v. United States, 169 F.2d 386, 390 (4th Cir. 1948)(Parker, J.)(defendant accused of rape of acquaintance after driving her to remote part of federal base; rape 15 days earlier on same base excluded; court states that fact that one woman was raped had no tendency to prove that another woman did not consent); Brown v. State, 459 N.E. 2d 376, 378-379 (Ind. 1984)(defendant met victim in gas station, drove her to cornfield where he threatened, raped and beat victim; two other victims testified to rapes by defendant in secluded areas after getting or giving him rides in vehicle; held, receiving evidence was reversible error; court states that fact that one woman was raped had no tendency to prove that another woman did not consent, citing Lovely case); United States v. Gamble, 27 M.J. 298 (C.M.A. 1988), aff'd 33 M.J. 180 (C.M.A. 1991)(reversible error to admit evidence of prior sexual assault in consent-defense rape case; court states that fact that one woman was sexually assaulted has no tendency to prove another did not consent, citing Lovely case).

155. See **Estrich**, supra note 80, at 17-20.

156. See supra note 137 (describing corroboration rule applicable in some jurisdictions).

157. 3A **Wigmore**, supra note 15, at § 924a at 736.

158. **Estrich**, supra note 80, at 54.

159. **Estrich**, supra note 80, at 29-30 (describing cases such as Brown v. State, 127 Wis. 193, 106 N.W. 536 (1906), which held, in a case involving neighbors who had known each other all their lives, that screaming, pushing and saying "let me go" was not enough to satisfy the utmost resistance requirement, even if defendant grabbed victim, tripped her, covered her mouth with his hand and told her to shut up). Estrich also asserts that the "utmost resistance" requirement was applied unevenly, a view that is related to her view, supra note 80, at 25, that acquaintance rape is just as frightening as stranger rape. "[O]ne is hard pressed to find a conviction of a stranger, let alone a black stranger, who jumped from the bushes and attacked a virtuous white woman, reversed for lack of resistance, even though the woman reacted exactly as did the women in [acquaintance rape cases.]" **Estrich**, supra note 80, at 32-37. Other sources have argued that conscious or unconscious racism lies behind the strong differences in the treatment of acquaintance and stranger rape, on grounds that stranger rape more often involves a black man and white woman than does acquaintance rape; but this argument has not been accompanied by any showing that the common law of rape differed in jurisdictions, such as England, that lacked substantial racial minorities.

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SECTION V
EVID. 9-10/93

# READING GAOL REVISITED: ADMISSION OF UNCHARGED MISCONDUCT EVIDENCE IN SEX OFFENDER CASES[1]

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In Reading Gaol by Reading Town
There is a pit of shame,
And in it lies a wretched man
Eaten by teeth of flame.

Oscar Wilde, *The Ballad of Reading Gaol*

## I. INTRODUCTION.

In 1894, Oscar Wilde commenced a criminal libel prosecution against the Marquis of Queensberry. The Marquis' son, Alfred Douglas, was sexually involved with Wilde. The Marquis threatened to make a public scandal of his son's affair, unless he broke off with Wilde. When Alfred refused to give up Wilde, the Marquis left a post card in the Albermarle Club addressed to "Oscar Wilde posing as a sondomite (*sic*)."[2] Wilde's criminal prosecution blew up in his face when Sir Edward Carson, Queensberry's defense counsel, cross examined Wilde on his prior deviant sexual activities with young, handsome men such as Alfred Douglas.[3] Wilde's counsel withdrew the case during Carson's opening statement for the defense, knowing that Carson would put Wilde's former lovers on the stand.[4]

Queensberry turned the case over to the public prosecutor who indicted Wilde for sodomy. Wilde was convicted and sentenced to two years at hard labor in Reading Gaol, leading Wilde to produce *The Ballad of Reading Gaol*, a thinly disguised autobiographical poem which may have been his masterpiece.[5]

Oscar Wilde was tripped up by an exception to the character evidence rule that permitted proof of Wilde's prior sexual misconduct to prove his predisposition to engage in sodomy. The character evidence rule forbids the prosecution from proving a criminal defendant's bad character. However, exceptions exist which may be used to prove the defendant's bad moral character. One of those exceptions allows the prosecution to prove an accused sex offender's propensity for committing uncharged sexual misconduct. When the state prosecutes someone for a sex offense, the specter of the defendant's uncharged sexual misconduct haunts the trial process, as it did the Oscar Wilde trial. The person accused of a sex offense must expect that any deviant sexual history will be put into evidence by proof of similar uncharged sexual misconduct. The jury will convict the defendant on the basis of predisposition to commit sex crimes.

The American form of criminal prosecution is accusative, not inquisitorial.[6] Since the defendant is

presumed innocent, the defendant will be tried for committing a specific act, not for the defendant's general predisposition to do wrong.[7] The courts have fashioned the character evidence rule that bars the prosecution from proving the defendant's predisposition to do wrong.[8] The courts admit that the trier of fact can reason from proof that the defendant committed one or more similar acts to a conclusion that the defendant is predisposed to commit those same acts.[9] The trier of fact can then deduce from the defendant's proven general predisposition to commit a certain kind of criminal act that the defendant committed the act charged in the indictment.[10] The courts assert that even if the defendant's commission of similar acts is relevant to proving the defendant committed the act charged in the indictment, the probative value of such evidence is substantially outweighed by prejudice to the accused.[11]

The courts are apparently committed to the established method of criminal prosecutions because they perceive that the accusative system of criminal justice is part of the collective moral fabric of the United States.[12] No other type of criminal prosecution is acceptable as a model of a fair trial.

Perhaps the courts are not as committed to the accusative system of criminal justice as they think. In fact, the courts may be permitting inquisitorial

prosecutions while they speak the rhetoric of the accusative system. It may be more important to examine what the courts do with uncharged misconduct evidence than to examine the verbal formulae the courts employ to describe what they do.

This article analyzes only one type of criminal prosecution: sex offenses. The courts are willing to allow the prosecution to prove the defendant's predisposition to commit sex crimes by proof of specific acts of uncharged sexual misconduct.[13] The trier of fact is free to reason from proof of one or more similar acts committed by the defendant to the conclusion that the defendant is predisposed to commit sex crimes. Then, the defendant may be found guilty based, in part, upon prior uncharged sexual misconduct. While this system is not unique to sex crime prosecutions, all the issues surrounding admission of uncharged misconduct in criminal prosecutions are raised in the most sharply defined manner in sex offender cases.

Since 1988, the moral issues raised by proof of uncharged sexual misconduct in sex offender cases have been openly discussed by the Supreme Courts of Delaware, Indiana and Rhode Island. In each state, a sex offender was convicted in part on evidence of uncharged sexual misconduct that proved the sex offender's propensity to commit such misconduct. These defendants were in the same situation as Oscar Wilde was in 1894. Delaware and Indiana chose to

reject a specific exception that admitted uncharged sexual misconduct in sex offender cases to prove the defendant's lustful disposition or predisposition to commit sex crimes. Rhode Island chose to keep that exception. In each case, however, the court chose to set down guidelines for admission of uncharged sexual misconduct in sex offender cases. There is little practical difference in the outcome in each of the three decisions. Uncharged sexual misconduct will be admitted in sex offender cases, given the right conditions showing relevance and probative value.

II. PROFILE OF THREE SEX OFFENDER CASES.

A. DELAWARE.

Charles R. Getz was arrested for allegedly raping his eleven year old daughter. He was tried in Superior Court, Kent County, Delaware. Delaware had adopted the 1973 edition of the Uniform Rules of Evidence in 1980. The State offered two uncharged sexual misconduct incidents between Getz and his daughter to prove Getz' motive, intent, plan and as "proof of sexual interest in his daughter"[14] under Rule 404(b) Delaware Rules of Evidence. Pre-1980 Delaware case law contained no reported opinions supporting admission of similar sexual misconduct to show the defendant's predisposition to commit sex crimes.

The State called Dr. Kuhn, a physician who had examined Getz' daughter about 10 days after the incident for which he

stood trial. Kuhn's medical history notes included the child's story of the two similar episodes of sexual activity with her father. The physician was allowed to put the medical history record into evidence.[15] Next, Getz' daughter, the victim, took the stand and testified to three different episodes of incest or child molesting with her father.[16] Getz claimed he had been "set up" by his ex wife so she could obtain a divorce from him on misconduct grounds to protect her right to remain in the United States. The jury did not believe Getz and found him guilty. He drew a mandatory life sentence for first degree rape.[17] Getz appealed his conviction on the ground that the admission of uncharged sexual misconduct under Rule 404(b) was improper.

The Delaware Supreme Court wrestled with Getz' case. Getz was not charged with a crime requiring proof of specific intent. Mens rea was established by the facts of partial intercourse. Getz raised no defense based on lack of intent, such as insanity. If Getz had a plan to molest his daughter, it was irrelevant because any criminal plan to seduce his daughter proved no more than mens rea, which was already established by the fact of the assault. The State did not have to prove Getz' guilty knowledge, and Getz did not claim he touched his daughter accidentally or by mistake. If mens rea was not at issue, Getz' motive for engaging in sexual conduct with his daughter was also

irrelevant. Getz' identity as the perpetrator of whatever happened was not an issue. The two earlier child molesting incidents were too remote to be part of the same criminal act which led to his arrest. The only logical purpose for proving these two uncharged instances of misconduct was to show the jury that Getz habitually satisfied his sexual desires by molesting his daughter.

The court disposed of the State's unsupported claim that it could offer this evidence as anticipatory impeachment. After examining the commentators' views on Rule 404(b) of the Uniform Rules of Evidence, the Court determined that a majority of jurisdictions considered Rule 404(b) an inclusionary rule admitting specific instances of uncharged misconduct to prove any relevant issue other than the accused's bad character.[18] Although the Court held that Rule 404(b) was not to be used as a laundry list of exceptions to the character evidence rule, the balance of its opinion examined the State's evidence of uncharged misconduct on its "fit" with the laundry list, and found it deficient.

The court found that other states admitted uncharged sexual misconduct in sex offender cases in two ways: by matching the offer of proof to the examples listed in Rule 404(b),[19] or by using a special exception known as the "lustful disposition or sexual propensity exception".[20]

However, the court incorrectly equated the "lustful disposition" exception with the "motive" example listed in Rule 404(b), although Getz' habitual sexual misconduct with his daughter was circumstantial proof his predisposition to commit the crime charged in the indictment.

The court correctly held that Getz' motive was irrelevant to the charge at hand. Readers were assured that Delaware did not recognize a "lustful disposition" exception to the character evidence rule.[21] The court also held that the two prior episodes of fondling and incest were irrelevant to prove a plan or design to commit sexual misconduct, because the uncharged misconduct would only prove Getz' plan to satisfy his sexual desire by using his daughter, which would only establish his intent, and intent was not an issue.[22] The Supreme Court reversed Charles Getz' conviction.

The court then set forth six specific standards to be followed by trial judges in evaluating uncharged misconduct evidence, and mandated a limiting instruction which the trial court would be required to use in future cases.[23]

Getz' habitual criminal sexual behavior was the real issue. If a person who has engaged in sexual misconduct in the past is more likely to commit the same kind of prohibited act than someone who has never done so, given the same circumstances, then proof of similar sexual misconduct

tends to corroborate the victim's version of the crime charged in the indictment because it proved habitual criminal behavior or recidivism. Proof of recidivism is circumstantial proof of guilt.[24] However, the Delaware Supreme Court did not recognize this relationship, which would have been the "corroboration" version of the lustful disposition rule that it rejected.

B. INDIANA.

Until the fall of 1992, Indiana permitted proof that the defendant had committed similar sexual misconduct to show that the defendant had a "depraved sexual instinct"[25] that predisposed the defendant to commit the crime charged. Indiana admitted similar sexual misconduct evidence that occurred before[26] and after[27] the crime charged in the indictment to show depraved sexual instinct in statutory rape,[28] sodomy,[29] indecent liberties,[30] incest[31] and child molesting[32] prosecutions. The type of sexual misconduct did not have to match the incident in the indictment. For example, in *Grey v. State*,[33] the defendant gave a statement to the police confessing to a rape, an earlier child molesting incident with a small child, and an indecent exposure incident occurring several years before the date the defendant was arrested for rape. The court approved of admission of the child molesting and indecent exposure incidents in defendant's rape trial to

prove his lustful disposition.

Lapse of time between incidents of sexual misconduct did not exclude evidence of stale sexual misconduct. The court also allowed the state to prove the defendant molested three other children ten to twenty years before trial, because the court believed the prior incident showed the defendant's depraved sexual instinct at the time of the commission of the incident alleged in the indictment.[34] These situations show that sexual misconduct evidence admitted under the Indiana depraved sexual instinct exception to the character evidence rule was seldom restrained by analysis of the probative value of the uncharged sexual misconduct weighed against prejudice to the defendant.[35]

However, in two 1987 rape cases, the Indiana Supreme Court overturned convictions because the trial court erroneously admitted evidence of other rapes. In *Lehiy v. State*[36] and in *Reichard v. State*,[37] the court held that the State was not permitted to prove the defendant's depraved sexual instinct in rape cases because the elements of rape did not require proof of satisfaction of unnatural sexual desires. The court limited admission of uncharged sexual misconduct in rape cases to similar sexual activity proving plan, design, modus operandi and the like, because depraved sexual instinct is irrelevant to any issue in a

forcible rape case.[38]

In 1992, Indiana abolished the depraved sexual instinct exception to the character evidence rule. Donald Lannan of South Bend was indicted for molesting his fourteen year old female cousin, V.E. On the night of June 17, 1989, V.E. was staying at her grandmother's house. She shared a room with her female cousin, T.W. According to V.E., Lannan came into the bedroom shared by the two females and asked T.W. "to mess around with him". When T.W. refused, Lannan then removed V.E.'s pants and had conventional intercourse with her.[39]

V.E. testified to three additional incidents of sexual intercourse with Lannan after June 17.[40] V.E. also related that in the summer of 1988, she and T.W. had been riding with Lannan in his truck when Lannan stopped the truck and began fondling both of the females.[41] T.W. also testified against Lannan. After reciting the events of June 17, describing how Lannan had fondled her and tried to inveigle her into having sexual intercourse with him before attacking V.E., T.W. also described the fondling incident in the summer of 1988.[42] All four incidents of earlier and later misconduct with V.E. or T.W. were admitted to show Lannan's depraved sexual instincts. He was convicted and appealed on the ground that evidence of other child molesting incidents should have been excluded. The Indiana

Court of Appeals affirmed[43] and the Indiana Supreme granted his petition for transfer.[44]

The defendant asked the Indiana Supreme Court to do away with the depraved sexual instinct rule and to adopt Uniform or Federal Rule of Evidence 404(b) as the sole standard for admission of uncharged misconduct evidence in criminal prosecutions.[45]

The defendant argued that the depraved sexual instinct rule was based on two principles: the alleged higher recidivism rate of sex offenders and the need to bolster or corroborate the testimony of the complaining witness by showing other instances of similar conduct by the defendant.[46] The Supreme Court acknowledged that more than twenty jurisdictions followed some version of the lustful disposition rule, and others stretched the common scheme or plan exception to the character evidence rule in sex offender cases in order to admit uncharged misconduct.[47] It acknowledged that the rationale for allowing greater latitude in sex offender cases was in part based on the court's concern for the victim, not the accused, and represented an attempt to "level the playing field"in sex crime prosecutions to protect the victim and to ensure more convictions.[48] However, the court said these concerns were insufficient to justify the depraved sexual instinct exception to the character evidence rule.

The court agreed that studies of sex offender recidivism rates contradicted each other. It admitted that sex offenders may have a much higher recidivism rate than other offenders.[49] It agreed that juries might not believe child molesting victims' accusations against the defendant because the charges were incredible,[50] but stated that these policy reasons were insufficient to support a specific exception for uncharged misconduct evidence in sex crimes.[51] The court criticized the depraved sexual instinct rule because it allowed the prosecution to put in uncharged misconduct evidence without notice to the defendant, even when the uncharged misconduct occurred many years before the crime charged in the indictment. The court then held that it would adopt Rule 404(b) of the Federal Rules of Evidence as the standard for admitting uncharged misconduct evidence in Indiana.[52]

Turning to Rule 404(b), the court insisted that uncharged sexual misconduct evidence was admissible under Rule 404(b) when the evidence tended to prove a common scheme or plan to commit sex crimes,[53] or as part of the res gestae, such as the attempt to assault T.W.,[54] or to prove identity of the accused or absence of mistake or surprise.[55]

The court then held that the new rule applied to Lannan's case would have resulted in admission of T.W.'s

testimony about Lannan's improper advances on June 17, but would have excluded evidence of the 1988 incident. However, the case against Lannan was one of overwhelming guilt, and the admission of the 1988 episode was harmless error. It affirmed Lannan's conviction.[56]

The court apparently wanted to reassure the public that uncharged sexual misconduct would still be available to the prosecution when the prosecutor could concoct a theory of relevance that did not involve depraved sexual instincts. However, the court could not have rejected admission of the 1988 incident by a probative value versus prejudice analysis, since the 1988 incident did demonstrate the defendant was predisposed to sexual misconduct with V.E. and T.W.

C. RHODE ISLAND.

Rhode Island also admitted uncharged sexual misconduct to prove the defendant's lustful disposition under the lustful disposition exception to the character evidence rule.[57] In 1992, Rhode Island dealt with a challenge to its lustful disposition rule very similar to that raised in *Getz* and *Lannan*. James M. Tobin, Jr. of Providence was charged with second degree sexual assault allegedly committed against defendant's niece "Jill". In May, 1984, when "Jill" was 13, she spent a night in defendant's home while her parents were moving into a new house. The

defendant cornered her in the kitchen and placed his hand on her vagina and put her hand on his penis. "Jill" did not inform her parents nor did she notify any authorities about this incident. At trial, "Jill" testified to three earlier incidents and one later incident of uncharged sexual misconduct with the defendant. On Christmas Eve, 1981, the Tobin family was gathered at her grandmother's house in Johnston. The defendant cornered "Jill" on the staircase, pulled down her pants and placed his hand on her vagina and inserted his index finger in her. Earlier that day, her uncle fondled her while he held her on her knee. In 1976, when "Jill" was only six years old, the defendant and his son allegedly stripped her and the defendant forced his son to have conventional intercourse with her. "Jill" did not inform her parents nor did she notify any authorities about any of these incident when they occurred.

The later incident occurred on Christmas Day, 1985. The defendant and his son were visiting her family. The defendant and his son untied her dress and pinched her buttocks several times in the presence of other family members, who considered the actions "horseplay". All of these uncharged incidents were offered to prove defendant's lewd disposition towards "Jill" and were objected to at trial.[58]

Tobin was convicted on two counts of sexual assault,

and he appealed. His counsel argued that Rhode Island should follow Delaware's example, and reject the lustful disposition rule, because Rhode Island Rule of Evidence 404(b) makes no reference to any lustful disposition exception to the character evidence rule. The Rhode Island Supreme Court found, however, that there was much support for a specific exception for evidence of lustful disposition in sex offender cases in those states that had adopted the Uniform Rules. The lustful disposition exception existed outside the structure of Rule 404.[59]

Although the Rhode Island Supreme Court referred to Justice Walsh's well-crafted *Getz* opinion, it declined to follow Delaware's lead. Carefully setting out the procedural safeguards that it had applied in an earlier decision, the court declined to rule that the lustful disposition rule had been abolished by adoption of Rule 404.[60] Persons charged with sex offenses in Rhode island would have to expect that similar, deviant sexual misconduct would be openly admitted to show the defendant's lustful disposition, or propensity to commit sex offenses of that kind.

D. ANALYSIS.

None of the three decisions discussed above faced up to the moral and social implications of similar uncharged sexual misconduct evidence in sex offender cases. A

structural analysis of the character evidence rule and its policy objectives does not begin to meet the real issues raised by similar misconduct evidence.

For example, the three decisions assumed that prior criminal history was relevant to proof of a particular criminal act charged in the indictment, but did not articulate a reason why relevant evidence leading to conviction ought to be suppressed in sex offender prosecutions. The three defendants may have been habitual sex offenders. For example, Getz twice tried to commit rape on or to molest his daughter before the offense with which he was charged tended to prove that he was a pedophile.[61] Lannan's prior attempts to molest V.E. and T.W. before they reached puberty also tend to establish that Lannan was a pedophile. Tobin's sexual activities with "Jill" over a nine year period from age 6 to 13 indicates that Tobin had the same mental disorder. Police officers and social scientists may have taken action to arrest or to treat these offenders based on these uncharged episodes of pedophilia.

Pedophilia is no excuse for criminal behavior connected with the objects of the mental disorder. However, the diagnostic criteria for the disorder suggest that there is a medical and psychological basis for inferring that a person who has a history of repeated uncharged sexual misconduct

misconduct with children will commit the act again. Assuming that the prosecution can prove that the defendant in a sex offense involving children is a pedophiliac, it is rational to infer that the defendant committed the act charged in the indictment. It is also highly likely that a child's accusations that an adult committed pedophilia on the child is not made up. Such proof corroborates the accuser.

It is difficult to describe and to analyze the torturous history of the law of uncharged sexual misconduct evidence. Before the widespread adoption of the Uniform Rules of Evidence, the courts were unable to provide a convincing reason either to admit or to exclude evidence of similar uncharged misconduct in sex offender cases. Since the advent of the Uniform Rules of Evidence, the courts have no better rationale for admitting or excluding uncharged sexual misconduct evidence. Uniform Rule 404(a) was drafted to exclude proof of the defendant's character for the purpose of showing that the defendant acted in accordance with that character. Rule 404(a) provides for three specific exceptions to the general rule. Rule 404(b), which is a stand-alone rule, authorizes admission of uncharged misconduct to prove any issue other than the defendant's character. Rule 406, which authorizes proof of habit or routine practice does not define habit, nor does it detail

the conditions of admission of habitual behavior.

Recidivism, or habitual criminal conduct is the primary reason why similar uncharged misconduct evidence is relevant in sex offender prosecutions. The sex offender's propensity to commit similar sex crimes has been amply demonstrated by social science.

Proposed new Federal Rules of Evidence 413 through 415 are legislatively inspired attempts to deal with the specific problem of similar uncharged misconduct evidence in sex offender cases. These proposed rules are designed to establish a federal exception to the character evidence rule for similar uncharged misconduct in sex offender cases.[62] These legislative initiatives respond to public pressure to level the playing field for the victim of sex offenses, to increase the conviction rate for sex offenders, and to increase the honesty with which uncharged misconduct evidence is admitted in such prosecutions.[63] At the same time, these proposed amendments to the Federal Rules of Evidence will have far-reaching impact on state courts and on the nature of the criminal trial process in sex offenses.[64]

This article advocates admission of specific instances of similar criminal sexual misconduct to establish that the defendant is an habitual sex offender and guilty of the crime charged in the indictment. After review of pertinent

social scientific literature which supports the logical relevance of such evidence, and a short history of the common law roots of the character evidence and lustful disposition rules, this article will take up the current rationale for admitting uncharged sexual misconduct. Since the current rationale fails to explain why courts allow such evidence or exclude uncharged sexual misconduct, this article proposes admissions guidelines for proof of habitual criminal sexual activity. Although sex offender cases are the focus of this article, an amendment to the Uniform or Federal Rules of Evidence that would permit uncharged sexual misconduct evidence would affect the handling of uncharged misconduct evidence in other forms of criminal prosecution, now ostensibly covered by Rule 404. Habitual criminal misconduct is not confined to sex offenders.

## III. THE LOGICAL RELEVANCE OF UNCHARGED MISCONDUCT EVIDENCE IN SEX OFFENDER CASES.

### A. RECIDIVISM.

If a person's past criminal behavior is a strong predictor of future, similar criminal behavior, as some evidence commentators have conceded, then an accused's criminal history would be logically relevant to proof of guilt.[65] If an empirical relationship between prior and present criminal sexual misconduct can be established, then

the criminal history of a sex offender, limited to uncharged sexual misconduct evidence will be relevant in sex offender prosecutions.[66]

However, not all sex offenders have the same criminal histories. There is a difference between the typical criminal histories for rapists and that of pedophiles, hebrephiles and exhibitionists.[67] This difference is important to making inferences from prior criminal histories in sex offender cases.

1. Rapists.

Rape is a violent crime. In some American subcultures, violence is a socially approved way of getting what one wants, including control over other persons. One way men can control women is to assault them, to force them to submit to degrading activities, including sexual intimacy against their will.[68] This is the most plausible sociological explanation for a person's motivation to rape. It is drawn from the sex offender studies that include detailed self reported circumstances of each crime committed by the offender.[69]

Other explanations for male rape have been discredited. Criminal sexual psychopaths probably do not exist. Rapists are not usually seriously mentally ill people.[70] Rape is usually not victim precipitated by sexual frustration short of intercourse. Rape is a species of assault and battery

directed at humiliating and degrading its victims.

Rape is usually committed by a single male of the same race as the victim. Normally the assailant works alone, although multiple or gang rapes do occur. Typically, solo intraracial rape occurs between persons who live in the same neighborhood or in an adjacent neighborhood triangle.[71] In many instances the victim and the attacker are acquainted, though rarely intimate friends or former lovers.[72] The victim and the attacker both tend to be adolescents or young adults.[73] Solo rape victims are more likely to use force in resisting an assault than multiple rape victims and more likely to be sexually degraded or badly beaten by an attacker.[74] The most likely place where victim and attacker meet is usually the place where either the victim or the attacker lives.[75] The criminal history profile of those men who commit solo rapes on persons of their own race resemble those of other violent criminals.

Multiple intraracial rapes, involving two or more attackers and a single victim also tend to be neighborhood affairs in which the victim and her attackers are acquainted. The attack scene is the street. The victim seldom resists her attackers.[76]

Interracial rapes tend to be attacks by black men on older white victims in a neighborhood other than the home of

either victim or rapist.[77] The white victim is very unlikely to resist rape by force or flight.[78] The victim is more likely to be beaten or degraded sexually than the victim of an intraracial rape.[79]

A generation or two ago, some writers tried to explain rape as the act of a "sex maniac" who was motivated by unnatural sex drives, i.e., his overcharged libido, to seek out women and force sexual contact with them.[80] This was an oversimplified, incorrect application of Freud's doctrine of the libido. However, it influenced judicial thinking on the admission of uncharged sexual misconduct into relatively modern times.[81] Careful analysis of the criminal histories of rapists in recent years shows that rapists tend to commit assaults, robberies and murders more frequently than rapes.[82]

In the 1950's the recidivism rate for rapists was thought to be fairly low, based on a New Jersey statistical study which defined recidivism as conviction of the same type of crime within two years' time.[83] This over-simplified definition of recidivism ignored two forms of recidivism peculiar to sex offenders: arrests for the same type of criminal activity that did not lead to a conviction and prohibited conduct which was never reported to the police. It also ignored the relationship between rape, assault and battery, mayhem, robbery and murder. The two

recidivism. More recent long term studies of convicted sex offenders demonstrated that rapists were fairly likely to be rearrested for other violent crimes, and infrequently for another rape.[84] Rapists have a 50% recidivism for all types of violent crimes, which is about the standard rate for violent criminals as a whole. Their recidivism rate is much closer to the average recidivism rate than was once supposed.[85] A rapist with at least one prior rape conviction is much more likely to be a recidivist than a first time offender.[86] Rapists confined to penitentiaries and to sex offender treatment centers who participated in self reported recidivism studies reported five times as many uncharged, unreported cases of rape or attempted rape than their official arrest records confirmed.[87] This fact suggests that the low visibility of sex offenders in general and rapists in particular obscures a high recidivism rate for rapists.[88]

The profile data on rapists and the self reported data from sex offenders does not prove that rapists are compulsively driven to rape to satisfy their lust. It is not an indication of deep seated psychological pathology. Those data show the typical rapist to be a vicious man who uses women in a horrible exaggeration of the stereotype of the tough male, to prove his physical prowess and control over others. A rapist's criminal history, like that of any

other violent criminal, may be relevant to circumstantial proof of guilt in a rape prosecution, but relevance alone does not solve the problem of admission of a rapist's criminal history in a rape prosecution.[89]

The defendants in Getz, Lannan and Tobin did not have a rapist's profile. Getz had no prior convictions for violent crime, although he did have a history of violent behavior towards his wives.[90] Lannan also had no history of violent behavior with his two pre-teen cousins. Tobin's nine year pursuit of "Jill" was essentially non-violent.

2. Pedophiles and Incestuous Persons.

a. Pedophiles.

Pedophiles come in two types: heterosexual and homosexual. Heterosexual pedophilia is much more common than homosexual pedophilia. While pedophiliacs are generally speaking more likely to be seriously mentally ill than rapists, few pedophiliacs are anything other than mildly disturbed men.[91] Pedophiliacs have about as high a rearrest rate as exhibitionists, and thus close to the national average for all criminal recidivism.[92] Child molesters are likely to be re arrested for child molesting again and again.[93] Child molesters come in two distinct types: "bad boys" and "dirty old men". The "bad boy" is an adolescent or a man in his early 20's who is unable to handle his own sexual changes and finds sexual gratification

handle his own sexual changes and finds sexual gratification in fondling little girls.[94] The "dirty old man" is likely to be between 30 and 40 years of age. He has a bad marriage and generally has a hard time relating to women above the age of puberty.[95] Consequently, he forms attachments to small children and fondles their genitals or breasts.[96] This type of pedophilia is often associated with game-playing strategies in which the attacker's regression to pre adolescent behavior is marked.[97]

The pedophiles who participated in the inmate population studies of recidivism reported many more pedophiliac acts than their arrest and conviction records showed.[98] The recidivism rate for these individuals may be quite high, and is certainly much higher than was originally thought.[99] Pedophiliacs with prior child molesting convictions are more likely to repeat the act than a first time offender.[100]

Turning to the defendants in our trilogy, all three men had a prior history of pedophilia. Getz' background, if the two prior instances of pedophilia were to be believed, indicated that he may have been a heterosexual pedophile.[101] Lannan, according to V.E.'s and T.W.'s testimony, had attempted to fondle or to have sexual intercourse with both young females repeatedly in 1988 and 1989.[102] Tobin committed at least five separate pedophiliac

acts on "Jill" from 1976 until Christmas, 1985.[103] If these three men were habitual heterosexual pedophiles, then the probability of their commission of future pedophiliac acts on pre-pubescent children was about 50%.

b. Incestuous Men.

An adult who satisfies his sexual urges with females who have passed puberty and not yet reached the age of consent may be a hebrephile (lover of teen agers). Hebrephiles may look to family members for satisfaction, or to other young women. All forms of hebrephiliac sexual activity were once considered statutory rape, but one of the results of the sexual revolution of the 1960's was the gradual disappearance of statutory rape from the list of sex offenses. New comprehensive sexual assault statutes adopted in many jurisdictions over the past twenty years use a classification scheme for prohibited sexual conduct between adults and adolescents, usually some form of sexual assault in a lesser degree than rape.[104] The number of prosecutions of teen aged boys for voluntary sexual activity with teen aged girls under 16 is negligible. Consequently, older recidivism studies on statutory rapists cannot be followed in modern literature. The pioneer New Jersey study done in the 1950's indicated that statutory rapists were unlikely to repeat their offense within two years of conviction.[105]

However, in recent years, incest and child sexual abuse

could theoretically occur between two adults, the type of incest which the courts see at this time is hebrephiliac incest. The victim is usually a teen aged daughter or step daughter. "Child sexual abuse" includes pedophilia, forcible rape of children of both sexes and hebrephilia. The new comprehensive child sexual abuse statutes are modeled on the guidelines put forth by the American Bar Association's Resource Center for Child Advocacy and Protection.[106] These statutes prescribe a detailed, structured series of prohibited acts and corresponding punishments for sexual intercourse between persons 18 or over and adolescents under 16, as well as punishment for sexual activity with anyone who is related within the prohibited degree of consanguinity.[107]

Child sexual abuse and incest have been featured in made for television motion pictures and in Sunday supplement literature since the early 1980's.[108] These accounts describe male sexual intercourse with children, stepchildren, sisters, nieces or cousins, as well as fondling and touching incidents characteristic of pedophilia. Clinical reports on child sexual abusers recount a large number of incidents of intercourse with teen aged boys and girls which went unreported and unpunished, suggesting that child abusers of this type may have a criminal history and recidivism rate closer to that of pedophiles than to rapists.[109]

Men who have voluntary sexual relationships with adolescents generally use their children, stepchildren, younger siblings or girl friend's children as victims. The psychological data on these individuals is similar to that of pedophiles.[110] They never grew up. The incestuous hebrephiliac male is a man in mid life with a poor sexual relationship with his adult sexual partner.[111] He may be a blood relative of the victim, a step parent or a live in boy friend.[112]. The abuser who makes use of his position as a clergyman, camp counselor or school teacher to obtain access to adolescents is a statistical rarity, although such cases receive much publicity.

Getz, Lannan and Tobin committed pedophiliac acts against family members within the second degree of consanguinity. Two committed or attempted to commit sexual intercourse with a close relative. Getz' daughter fit the description of the average incest victim. Getz allegedly committed a single act of hebrephiliac incest. He was charged with first degree rape, which forbade consensual sexual activity with any minor.[113] The record does not show that Getz' daughter resisted or refused her father's advances.[114] V.E. related three instances of consensual sexual intercourse with her cousin, including one incident occurring in her grandmother's house when Lannan and his wife were living with her grandparents.[115] Although Tobin was "Jill's" uncle, he never

attempted to have sexual intercourse with "Jill". His sexual misconduct was limited to frottage[116] and voyeurism.[117]

4. Exhibitionists.

According to the record, none of the three defendants in this trilogy had a history of exhibitionism.[118] Exhibitionists have a higher recidivism rate than any other sexual offenders.[119] Exhibitionists tend to be white males in mid-life, who have had considerable trouble in establishing conventional sexual relationships with women.[120] Most are unmarried or divorced.[121] Exhibitionists tend to be rearrested for exhibitionism if they have ever been arrested in the past.[122]

B. SIMILAR SEXUAL MISCONDUCT IS RELEVANT TO PROOF OF A SEX OFFENDER'S GUILT.

Summarizing the preceding discussion, enough empirical evidence on sex offenders' recidivism rates has been compiled to show that exhibitionists, pedophiles and adolescent child abusers have a 50% recidivism rate for sex offenses, which is much higher than earlier studies indicated. A pedophiliac's probability of future criminal sexual conduct can be predicted from known prior criminal sexual conduct. Therefore, a sex offender's similar sexual misconduct before or after the incident alleged in the indictment is circumstantial proof of

charged misconduct. Therefore, the trier of fact can draw a logical inference that the defendant was an habitual sex offender if the defendant had committed a sufficient number of similar sexual misconduct before.

However, a rapist's probability of future rape is less than 50%, but at or near 50% for all violent crimes, making a rapist's criminal history the basis for predicting future violent conduct not confined to sex offenses. The number of violent criminal acts committed by the defendant in a rape case is relevant to proof of guilt because it proves habitual use of violence. Although a rapist has about a 1 in 4 chance of rearrest for rape, he has a 1 in 2 chance of rearrest for violent crimes in general.[123] Since prior rapes or attempted rapes would prove the rapist's predisposition to violent conduct to get his way, then proof of a history of violent criminal activity would be circumstantially relevant to proof of guilt in a particular case.

However, the national recidivism rate for rearrest within three years for all types of criminals hovers around 65%.[124] Recidivism rates for violent criminals runs around 50%.[125] Therefore, the statistical probabilities of recidivism for burglars, check forgers and credit card thieves is higher than that of rapists, child molesters and exhibitionists. Rapists have a 35% reported recidivism rate. The reported recidivism rates for exhibitionists, pedophiles and adolescent child

abusers is about 30%, but the literature suggests that these kinds of criminal activity are very likely not to be reported and result in an arrest. It is highly likely that the recidivism rate for exhibitionists, pedophilies and adolescent child abusers, defined in terms of commission of similar misconduct within five years of an arrest for a sexual offense is at or above the national average for all violent criminals.

Turning to our three bellwether cases, the *Getz* court had these questions in mind when it dealt with Getz' contention that he was unfairly convicted on the basis of uncharged criminal misconduct. The *Lannan* court conceded the logical relevance of adverse character evidence on the issue of guilt or innocence. The *Lannan* court was less interested in the undue prejudice aroused by admission of similar sexual misbehavior than it was in restructuring the rules guiding admission of character evidence to conform to Rule 404(b).[126] The *Tobin* court, on the other hand, wanted to continue a specific, categorical exception to the character evidence rule for similar criminal misconduct in sex offender prosecutions. It was interested in harmonizing a pre-rules line of authority with the structural limitations of Rule 404(b).[127]

If prior criminal history is relevant to proof of habitual sexual misconduct, then the trier of fact should be able to deduce from proof of habitual behavior that the defendant behaved in accordance with his habits in the case at bar. This

judgment would be derived from a probabilistic chain of logic, which would go to proof of guilt from all the evidence beyond a reasonable doubt. If this hypothesis is correct, then why do the courts erect such formidable barriers to the admission of criminal character evidence as part of the state's case in chief? If admission of criminal character evidence is so poisonous that it cannot be used to establish a prima facie case of guilt, then why do the courts let down the bars in many specific instances, admitting incidents of uncharged sexual misconduct in sex offender cases, on the flimsiest pretexts?

This inquiry must shift from social science and extended case analysis to a review of the origin and development of the rules surrounding admission of uncharged sexual misconduct in sex offender cases.

## III. THE DEVELOPMENT OF THE USE OF UNCHARGED SEXUAL MISCONDUCT EVIDENCE IN SEX OFFENDER CASES.

### A. THE CHARACTER EVIDENCE RULE.

Since the days of the Glorious Revolution of 1688, English and American courts have refused to permit the prosecution to offer evidence of the defendant's bad moral character to prove the defendant committed the crime charged in the indictment.[128] If the defendant makes an issue of his or her good moral character, the prosecution may then rebut the

defendant's evidence of good moral character with evidence of the defendant's bad moral character.[129] The defendant may not prove his or her good character by proving specific good acts. The defendant may, however, prove good moral character by the defendant's own opinion testimony, or by calling reputational character witnesses. These witnesses are limited to testifying that they are familiar with the defendant's reputation in the community in which the defendant resides, and that the defendant's reputation for moral character is good.[130] The prosecution is then allowed to cross examine the defense character witness on the basis for that testimony. The prosecution may ask the character witness if the witness ever heard of any uncharged misconduct of the defendant, since it is relevant to the basis of the character witness' opinion.[131] The prosecution is also free to call its own reputational character witnesses who will testify that the defendant's reputation for moral character is bad.[132]

If the defendant chooses to testify, the defendant puts his or her credibility at issue, and the prosecution may cross examine the defendant about prior convictions for major felonies and crimes of deception,[133] or upon prior bad actions which did not result in conviction if the prior bad act reflects adversely on the defendant's credibility.[134]

Ordinarily, the prosecution cannot prove the defendant's prior similar uncharged misconduct in its case in chief or in

rebuttal. To do so would violate the rule against proof of the defendant's bad moral character. When the defendant makes an issue of his or her moral character the prosecution can prove his or her bad moral character only through reputational witnesses.[135] However, there are exceptions to the bar against specific similar acts evidence. If the defendant testifies in his or her own behalf, the prosecution may cross examine the defendant on relevant specific instances of uncharged misconduct showing the defendant's lack of truthfulness.[136] The defendant may be cross examined about prior criminal convictions, or independent proof of the defendant's criminal convictions can be submitted by the prosecution to show lack of truthfulness.[137] If the prosecution must prove some intermediate issue such as motive, intent, knowledge, plan or design, the identity of the accused or other related sub issues, the courts allow the prosecution to use specific instances of the defendant's uncharged misconduct to do so, if the probative value of these instances of uncharged misconduct is not substantially outweighed by the inevitable prejudice to the defendant arising from proving the defendant's bad moral character to the jury.[138] The prosecution could also prove the defendant's habitual criminal activity by submitting proof of sufficient similar instances of misconduct to establish a criminal habit.[139] The ritual for admission of uncharged criminal misconduct set out above has

been codified by Rules 404, 405, 406, 608 and 609 of the 1973 edition of the Uniform Rules of Evidence.

The courts of the thirty seven jurisdictions that have adopted the Uniform Rules of Evidence[140] liberally interpret Uniform Rules 404 and 405 to permit admission of prior and later uncharged sexual misconduct with the same victim or other victims against an alleged sex offender. California and New Jersey, which follow similar evidence codes adopted before the 1973 edition of the Uniform Rules of Evidence, also permit admission of uncharged sexual misconduct.[141] The remaining twenty-two states which follow a common law version of the rules expounded in Rules 404 and 405 are likewise willing to permit the prosecution to prove uncharged sexual misconduct against a sex offender.[142] A plurality of states also use a special exception to the character evidence rule just for sex offenders called the "lustful disposition" rule.[143] The courts treat a sex offender's propensity to commit sex crimes as a significant issue in a sex crime case.

There are buried constitutional problems caused by unannounced evidence of similar sexual misconduct. The major commentators calmly accept the use of uncharged sex offenses against persons charged with rape, statutory rape, carnal knowledge, sodomy and indecent liberties as appropriate.[144] Although the notice clause of the Sixth Amendment and the Due Process Clause of the Fourteenth Amendment may be violated

every time the prosecution raises an unannounced case of uncharged misconduct, there are no shock waves of protest by constitutional scholars.[145]

A new kind of criminal trial process is evolving through manipulation of the principles of evidence. The traditional model for Anglo-American criminal trials was accusative. The prosecution was obliged to prove a specific charge under the accusative model, and the judge and jury were equally obliged to acquit the defendant if the prosecution failed to prove the defendant committed a forbidden act on the day charged in the indictment. If the prosecution proved the defendant committed a similar act on another day, the defendant was acquitted because of a fatal variance between indictment and proof. Under the new dispensation, the prosecution is still required to indict the defendant and elect a day and time for commission of the prohibited act, but the prosecution may prove that the defendant is predisposed to commit that type of crime by proving the defendant did similar bad acts on another occasion. Providing the demands of the Bill of Rights for due notice of pending charges and a fair trial can be satisfied, the new dispensation in criminal justice may be accommodated by the Constitution. In the future, criminal defense counsel will have to come to court prepared to defend their client against accusations of similar, uncharged criminal activity, as well as the charges stated in the indictment.

The men who wrote the Constitution and the Bill of Rights feared royal tyranny more than internal criminal aggression. The memories of royal abuse of judicial process through the Court of Star Chamber and the Courts of Vice Admiralty caused them to limit the growth of inquisitorial criminal justice by a constitutional strait jacket. These courts, which followed continental models of criminal justice administration, were very effective in sending criminals to the gibbet.

In the late 18th century, the thirteen original colonies did not have serious problems with criminal aggression. The colonists were troubled by royal tyranny, enforced by royal judges who held deep seated class and religious prejudices against the majority of the colonists. Two hundred years later, the United States has the highest violent crime rate of any western democracy.[146] Criminal aggression against innocent victims is one of the top ten social problems which agitate the public.[147] One in four American family units were crime victims during 1981.[148] Half of the American public is afraid to walk alone at night in their own neighborhood.[149] Americans are more likely to be victims of crime than to be injured in an auto accident.[150] Criminal aggression control absorbs a disproportionate amount of governmental time and money. The prison system is filled with an inordinate amount of repeat offenders.[151] The state is unable to protect citizens from criminal aggression.

Uncontrollable criminal aggression is a formidable threat to the constitutional liberties of all U.S. citizens. The Bill of Rights was designed to restrain executive and judicial tyranny. It made no provision to restrain criminal tyranny. The U.S. Constitution relies on the states to exercise their inherent authority to provide for the health, welfare and safety of their citizens through criminal law and procedure, vigorous police work and efficient courts. However, the states cannot provide effective police protection for their citizens. As the Indiana Supreme Court pointed out in *Lannan*, there is a universal desire to give the victim of criminal violence a greater opportunity to win in court. This desire is sustained by the need to provide freedom from criminal aggression as a condition of a stable social order. Without this freedom, the liberties set forth in the Bill of Rights are so much paper.

At the same time, the courts have to be exceptionally careful not to turn the desire to even the odds between victim and defendant into a crusade against social deviants. Americans have a tendency to launch crusades against undesirable social activity. The outcry against sex offenders from television and newspaper commentators the past decade has elements of a crusade against rapists and child molesters. The opening salvo of an American crusade is usually widespread publicity pointing out the impending end of the world if a particular vice is not immediately eradicated. The next round

consists of legislation making that kind of activity criminal. The third round consists of aggressive prosecution of offenders before tribunals which alter or suspend basic constitutional guaranties of due process in order to increase the number of convictions.

Ultimately, the public tires of the crusade and goes on to a new diversion, leaving the precedential ghost of the crusade behind in "exceptions" to the rules of evidence.

During a crusade, the historical accusatorial process of proof in criminal cases is unconsciously suspended so that inquisitorial methods of proof can be used. Usually, the first rule of evidence to be suspended is the limit on proof of the defendant's bad moral character.[152] Consequently, the courts have a duty to protect the liberty interests enumerated in the Bill of Rights against encroachment or destruction brought on by a commendable effort to stamp out a social abuse.

This double effect raises some serious questions. If inquisitorial justice is deemed expedient during a crusade against crime, why is inquisitorial justice not justified at all times? The Bill of Rights does not legislate an accusative system of criminal justice. If one component of inquisitorial justice is proof of the defendant's habitual criminal activity, then the trier of fact should receive evidence of the defendant's similar habitual criminal conduct, which is circumstantial proof of the crime charged in the

indictment. If the trier of fact does not evaluate the defendant's criminal habit, it may acquit the defendant unjustly, and turn an habitual offender loose to prey on the public. This result would impair each citizen's right to be free from criminal aggression.

In the past decade, a public outcry against rape and child molesting has produced new legislation against sex offenders, and aggressive prosecution of rapists and child molesters. The judicial treatment of evidence brought up in sex crime prosecutions shows a consistent pattern.[153] The defendant's motions in limine to exclude evidence of prior criminal convictions to permit the defendant to testify without cross examination on prior similar convictions are denied. The court relaxes the bar to proof of the defendant's bad moral character by specific bad acts to permit the prosecution to bring up the defendant's similar uncharged acts of misconduct in its case in chief. Few convictions are overturned on appeal because the court allowed the prosecution too much leeway in proving the defendant's uncharged misconduct.[154] Over the years, sex offenders have been the objects of numerous crusades of this type.

## IV. DEVELOPMENT OF USE OF UNCHARGED MISCONDUCT AGAINST SEX OFFENDERS.

### A. COMMON LAW.

The common law defined rape,[155] bigamy[156] and sodomy[157] as felonies without benefit of clergy. Adultery, fornication, incest and other sexual misconduct were matters of confession and subject to the ecclesiastical courts, not the secular courts.[158] The secular courts also had jurisdiction to try cases of abduction of an heiress[159] and after 1574, of carnal knowledge of a female under the age of ten.[160]

The English were skeptical about accusations of rape or carnal knowledge, preferring to protect the defendant from an unjust conviction for a crime which merited the death penalty, and to push some or all of the blame for the assault off on the victim.[161] The common law required that a rape victim prove she yielded to her attacker under force, either through proof of actual violence worked upon her, or through proof of duress.[162] English law allowed the defendant to prove the victim's consent to sexual intercourse as a complete defense to the crime.[163] Sir Matthew Hale described rape as an "accusation easily made, hard to prove and difficult to defend."[164] The victim's failure to make an immediate outcry and search for her attacker weighed against her and in favor of acquittal.[165]

The Continental view, however, was much different. The Roman law forbade ravishment of any woman of any age.[166] The male involved in sexual activity with a female was presumed guilty of ravishment, and punished accordingly, unless he

cleared himself. The woman's consent was immaterial. Thus, ravishment was a status offense on the Continent. Men were simply not allowed to have sexual relations with women outside of marriage, unless the women were concubines or prostitutes.[167]

The English courts placed great emphasis on corroboration. Corroboration could be had by proof of an immediate hue and cry after the sex offender,[168] by testimony of women who had examined the victim, but not by proof of other sexual assaults pressed by the defendant on the victim.

In sodomy prosecutions, the English abhorrence of buggery led to guarded discussions of the elements of proof of sodomy. Sir William Blackstone, following Sir Matthew Hale, warned the reader against accepting uncorroborated accusations of sodomy.[169]

The English prosecuted very few men for rape, carnal knowledge and sodomy. Few of these men were convicted, and even fewer still were put to death for their sexual crimes.[170] Even though convicted rapists and sodomizers were not allowed benefit of clergy, the King pardoned a great number of offenders or commuted their sentences to transportation.[171] The English attitude toward rape, carnal knowledge and sodomy simply reflected the prejudices of a male dominated society based on class structure. Eighteenth century English literature scoffed at the criminality attached to all

three crimes. Authors such as Fielding presented a favorable portrait of a lusty gentleman who forced himself upon women, particularly of a lower social class.[172] Defoe[173] and Smollett[174] portrayed women who were involved in sexual affairs with men as provocative instigators who invited men to engage in aggressive sexual romps with them.[175]

English laws and English attitudes toward male sex offenders crossed the Atlantic and became part of American colonial law. The colonies dutifully outlawed rape, carnal knowledge and sodomy.[176] In addition, because the English ecclesiastical courts had no jurisdiction in the colonies, some of the colonies passed statutes making crimes out of incest, fornication or adultery.[177] The courts of oyer and terminer and general gaol delivery had jurisdiction over all these sex offenses in most of the colonies.[178] When weighty matters of criminal law and procedure came before these courts, the justices broke out their *Blackstone's Commentaries* or Sir Matthew Hale's *Pleas of the Crown* for advice.

However, the combination of ecclesiastical and common law in the colonies imported an element of criminal procedure and evidence into colonial criminal law not present in the mother country. Under ecclesiastical law, adultery was a status offense which could consist of either an isolated coupling or a continuous liaison, e.g., living in a state of adultery.[179] When the ecclesiastical courts punished men and women for

adultery, it was relevant to prove that they had lived together for some time, and specific instances of sexual activity between the couple were admissible to show the continuing relationship.[180] The same dual status applied to incest.[181] As a result, when the American courts began to punish people for criminal adultery they looked back to ecclesiastical precedent, and allowed proof of uncharged sexual activity between the parties to show their lustful disposition toward one another, and thus prove their sexual misconduct.[182] The Treason Act of 1695 never applied to canon law offenses tried before ecclesiastical courts.

Early American incest prosecutions permitted proof of sexual misconduct between the parties to prove an ongoing relationship between them.[183] By the mid nineteenth century, the rules of evidence about proof of incest were so well settled that a Michigan court could hardly believe that a defendant in an incest case would appeal his conviction based on the admission of several acts of incest between himself and his victim not charged in the indictment.[184]

By the mid nineteenth century, societal attitudes toward women and their sexual role had moved a light year from that of the eighteenth century. Women had been placed upon a literary pedestal where they would remain until the twentieth century. Instead of dwelling on the literary picture of women as seducers and pleasure givers, the nineteenth century wallowed

in romanticism, which alternatively depicted women as weak and spineless victims of men and as creatures of unapproachable virtue, refinement and sensitivity.[185] Sir Matthew Hale's admonition on rape was lost in the popular wave of literary depiction of Victorian women being ravished by villains who deserved the worst sort of punishment. Scientific criminology was also discovered during the mid nineteenth century, generating theories about criminal character and criminal disposition which marvelously suited prosecutors in bringing sex offenders to the bar of justice.[186]

C. THE LUSTFUL DISPOSITION RULE.

At the same time as romanticism changed the literary and popular view of women, women were trying to change their legal and social status. The mid-nineteenth century feminist movement initiated widespread legislative changes in women's legal status. The feminists made allies of the temperance societies in a joint demand for legislation protecting young girls from male sexual advances which they were powerless to resist. In so doing, they reflected the cultural view of women as virtuous maidens to be protected from the grasping hands of sex fiends. Common law carnal knowledge was replaced by the new status offense of statutory rape, which was defined as engaging in sexual intercourse with any female aged 16 or under, without regard to consent.[187]

Statutory rapists were aggressively prosecuted. The

courts began to expand admission of other sexual misconduct in sex offender prosecutions from the old ecclesiastical offenses of adultery and incest to statutory rape[188] and carnal knowledge.[189] The courts also created a special exception to the character evidence rule just for sex offenders called the "lustful disposition rule".[190]

According to the lustful disposition rule, the prosecution in its case in chief could prove the defendant's lustful disposition to commit sex crimes by proof of prior or later instances of sexual misconduct with the same victim or a different victim.[191] The prosecution could do so, whether or not the defendant made an issue of his or her good moral character. The jury was free to draw an inference from proof of the defendant's other sexual misconduct, that the defendant committed the act of sexual misconduct stated in the indictment.[192] The court's own notion of relevance and fair play was the only outside limitation on the use of uncharged sexual misconduct. These specific instances of sexual misconduct did not have to be included in the indictment, and the defendant was entitled to no advance warning that he would be prosecuted by innuendo on those other uncharged acts.[193] The lustful disposition exception to the character evidence rule grew up alongside the uncharged misconduct exception to the character evidence rule. At times the courts used both rationales to admit or to exclude uncharged sexual misconduct

evidence. The confusion which led the *Getz* court to equate "lustful disposition" with "motive" is understandable. In order to untangle the knots, the use of uncharged sexual misconduct evidence in statutory rape, rape, incest, adultery and sodomy cases must be separately studied and analyzed.

B. UNCHARGED SEXUAL MISCONDUCT EVIDENCE FROM THE STANDPOINT OF PARTICULAR SEX OFFENSES.

1. Statutory Rape.

Statutory rape prosecutions in the last half of the nineteenth century resulted in two lines of cases. The first line favored strict compliance with the character evidence rule. Unless the defendant denied committing the criminal sexual act and offered good moral character evidence, the prosecution could not show that the defendant had sexual relations with the victim at other times.[194] These cases held that an accused is not to be tried on any offense other than the one stated in the indictment. Proof of other criminal sexual activity with the victim would violate that rule, and was therefore inadmissible.[195] Consequently, the prosecution could not use uncharged sexual misconduct evidence against the defendant. Alabama, Idaho and Illinois adopted this view before World War I.[196] California, the District of Columbia and New Jersey courts issued conflicting decisions which in part restricted and in part favored the use of uncharged misconduct evidence in statutory rape cases.[197]

However, the majority of jurisdictions followed ecclesiastical precedent and admitted other sexual activity between the victim and the defendant in statutory rape cases to prove the defendant's guilt by showing his predisposition to commit sex offenses.[198] The courts accomplished this result in several ways. A number of courts used the "lustful disposition" exception to the character evidence rule. These courts held that sex offenders were more likely than other criminals to repeat their sex crimes, because of their peculiar criminal personality.[199] Consequently, a criminal history of deviant sexual activities was a much stronger predictor of criminal behavior of the same type than in other kinds of crimes.[200] Therefore, the courts held that the prosecution could offer evidence of prior sexual misconduct between the defendant and the victim in its case in chief because it was highly relevant to proof of later misconduct at the time of the offense charged in the indictment.[201] The courts said that prior sexual activity between defendant and victim was relevant to show a "lustful disposition" to commit sex crimes and therefore admissible.[202]

There were variations on this theme. One jurisdiction, fearing the consequences of such a blatant acknowledgement of trial by propensity, allowed the prosecution to admit uncharged sexual misconduct to prove "a purpose to commit the offense charged."[203] Several jurisdictions decided that uncharged

sexual misconduct could be admitted to "corroborate" the victim's story.[204] To corroborate an event is to confirm the event. The defendant's uncharged sexual misconduct confirmed the defendant's guilt precisely because it proved the defendant's predisposition to satisfy his sexual desires with the victim. The courts which accepted corroboration as sufficient reason for admitting uncharged sexual misconduct evidently viewed the victim's complaint of a second sexual encounter with the defendant as corroboration through proof of the defendant's lust for the victim.[205]

By the roaring 20's, twenty-four American jurisdictions admitted evidence of prior sexual misconduct between defendant and victim in statutory rape cases to prove the defendant's lustful disposition.[206] Some states, such as Texas, were unable to make up their minds whether to adopt a lustful disposition exception to the character evidence rule. *Battles v. State*[207] ratified proof of uncharged sexual misconduct between defendant and victim to show the defendant's lustful disposition, overruling a dozen earlier cases which excluded such evidence.[208] Fourteen years later, the same court excluded evidence of prior sexual misconduct between victim and defendant without reference to *Battles*, on the ground that such evidence merely went to prove the defendant's propensity to satisfy his sexual urge with the victim, an impermissible ground for admission of such evidence.[209] Idaho and New

Jersey also had decisions going both ways on admission of uncharged sexual misconduct to prove the defendant's lustful disposition.[210]

New York's early struggle with the lustful disposition rule reflects the general development of this exception to the character evidence rule. Until the end of the nineteenth century, admission of prior sexual misconduct between victim and defendant in second degree rape (statutory rape) cases was not raised on appeal.[211] In 1887, the Court of Appeals determined that evidence of a prior attempted sexual assault upon the victim by the defendant was admissible to prove the defendant had the guilty intent to commit rape upon the victim at a later date.[212] In 1892, The Appellate Division, First Department, affirmed the conviction of a step father who had ravished his 15 year old epileptic step daughter for two years.[213] The court held that second degree rape involved the adulterous disposition of both parties, making their disposition to have sexual relations material to proof of the defendant's guilt.[214] The court found that the two year pattern of sexual relationship between the defendant and his step daughter corroborated her story about the offense for which the defendant was convicted.[215]

However, from 1890 to 1914, the courts rejected proof of later sexual relations between victim and defendant in second degree rape cases.[216] The Court of Appeals overruled these

cases in *People v. Thompson*.[217] Although the court had held later sexual relations inadmissible in *People v. Flaherty*[218], it dismissed *Flaherty* as a case of failure to elect the proper charge among several possible incidents. The Court of Appeals squarely held that both prior and subsequent sexual acts between the parties in both first and second degree rape were admissible in the trial of a single instance of rape to corroborate the victim's testimony and to show the defendant's lewd disposition.[219]

In 1926, an Asian named Hop Sing was charged with second degree rape of a 13 year old. The 13 year old went to Hop's laundry with a 12½ year old girl friend. Hop Sing also had sexual intercourse with the other child that day. At trial, evidence of both sexual encounters was admitted. The jury returned a conviction and Hop Sing appealed, claiming that any sexual activity with another female was irrelevant to the crime charged.[220] The Appellate Division disagreed and affirmed on the ground that the second sexual encounter was so interwoven with the first offense, for which he stood trial, that the two stories could not be told separately.[221]

By the 1930's New York allowed proof of prior and subsequent sexual activities between the defendant and his victim, or between the defendant and another victim, closely related in time to the time of the offense charged.

At the same time, New York was developing the general

theory of the uncharged misconduct exception to the character evidence rule. In *People v. Molineux*,[222] the Court of Appeals laid out the generally accepted structure for allowing the prosecution to prove specific instances of uncharged misconduct in its case in chief, despite the character evidence rule. If there was a substantial issue in the case as to the defendant's criminal intent, guilty knowledge, motive, criminal plan or design or identity of the perpetrator, or if the defendant's criminal activity charged in the indictment was so bound up with uncharged criminal misconduct occurring at the same time, the prosecution could offer evidence of specific instances of uncharged criminal misconduct to prove the intermediate issue, unless the probative value was counterbalanced by excessive prejudice to the defendant.[223] This rule later became the core of Rule 55 of the 1952 edition and Rule 404 of the 1973 edition of the Uniform Rules of Evidence.

Consequently, uncharged sexual misconduct evidence could be admitted under the *Molineux* rule when it was relevant to proving intent, knowledge, identity of the perpetrator or a criminal plan or design. The courts employed the *Molineux* rule to admit sexual misconduct evidence at the same time they used the lustful disposition rule for the same purpose, leading to confusion among the courts on the appropriate rationale for admitting this type of evidence.[224]

When a state court used the *Molineux* doctrine to review

admission of uncharged sexual misconduct evidence, it restricted admission of other sexual offense evidence in statutory rape cases to prior instances of forbidden sexual activity between the victim and defendant.[225] Sexual misconduct with the victim committed after the act charged in the indictment was usually,[226] but not always[227] excluded. The defendant's similar sexual activity with other victims was usually but not always excluded.[228] Intent, plan or design or identity of the accused were the *Molineux* categories most frequently used to justify admission of uncharged sexual misconduct.[229]

On the other hand, when a state court used the lustful disposition rule to review admission of uncharged sexual misconduct at trial, it tended to sustain admission of any prior[230] or later[231] sexual activity between victim and defendant. The courts rationalized this free use of uncharged sexual misconduct as "tending to shed light upon the relationship between the defendant and the complaining witness",[232] or to "corroborate the complaining witness' testimony".[233]

Since the courts frequently used both rationales to justify decisions sustaining admission of uncharged sexual misconduct in statutory rape cases, there was no consensus on the basis for admitting or excluding uncharged sexual misconduct evidence. No one could expect the cases to produce

a consistent guideline for admission or exclusion of uncharged sexual misconduct evidence.

The courts were also split on admission of other kinds of sexual activities between victim and defendant. A number of courts admitted any prior sexually oriented activities between victim and defendant, including fondling and caressing[234] and sodomy.[235] A few courts admitted evidence showing the defendant aided and abetted a third party's defiling of the same victim.[236] On the other hand, some courts excluded dissimilar sexual contact between victim and defendant on grounds of lack of relevance.[237]

However, the great division between the states had to do with admission of uncharged sexual misconduct between the defendant and other victims below the age of consent. A minority of reported decisions favored admission of any prior and later uncharged sexual misconduct with other victims, if not too remote in time, either to demonstrate the defendant's lustful disposition,[238] or to show a criminal plan or design.[239] In a few cases, such as *People v. Hop Sing*,[240] the court thought that the tale of a second victim who engaged in forbidden sexual activities with the defendant shortly after the first victim's defilement was so interwoven with the first victim's story that one could not be related without telling the other.[241] Some states, such as California, had cases going both ways, as the inferior appellate courts could not

decide on the proper way to limit admission of uncharged sexual misconduct.[242] One might expect a state using the lustful disposition rule to be more lenient on admission of similar sexual activities with different victims, but Idaho followed the lustful disposition rule when it excluded evidence of the defendant's prior sexual activities with the victim's sister below the age of consent as "too remote".[243] Missouri, a state which more or less adhered to the corroboration version of the lustful disposition rule and to the *Molineux* rule on uncharged misconduct, allowed proof of the defendant's misconduct with other victims to corroborate the victim's story, only after the defendant had testified that he did not have sex relations with the victim.[244]

2. Rape.

The courts were also busy between 1880 and 1930 fashioning a rule for admitting evidence of the defendant's uncharged sexual assaults in rape cases. The courts uniformly approved of admission of other attempted rapes or rapes of the victim perpetrated by the defendant when the defendant was charged with assault with intent to rape.[245] This represented a moderate use of the *Molineux* rule exception to the character evidence rule, since assault with attempt to rape required the prosecution to prove specific intent in its case in chief.[246]

Forcible rape was not a status offense like statutory rape. Some courts acknowledged that rape did not permit the

prosecution to prove a continuous relationship between the parties to corroborate their lustful disposition.[247] If so, then prior rapes or attempted rapes perpetrated by the defendant upon the complaining witness were irrelevant.[248]

The majority of U.S. jurisdictions admitted instances of prior rape or attempted rape between the victim and the defendant nonetheless. The courts often cited precedent derived from attempted rape and statutory rape cases to allow the prosecution to use prior rape evidence to show either lustful disposition[249] or a plan or design to rape[250] when the defendant raised no issue challenging mens rea. The elements of rape do not require proof of specific intent. Consequently, neither the defendant's motive nor any criminal plan or design to satisfy lust by sexual assault would have been relevant to proving guilt in such cases. At times, when the identity of the attacker was not at issue, and the defendant did not raise consent as an affirmative defense, the courts excluded evidence of prior rapes perpetrated on the victim by the defendant as irrelevant to proof of later guilt.[251]

However, when the attacker's identity was at issue, the courts were willing to admit evidence of prior rapes perpetrated on the victim by the defendant[252] or upon other women,[253] providing the modus operandi of the attacker was characterized as a "signature" sufficient to identify the

attacker in the case at bar as the defendant.[254] Many of these "signature" crimes were very commonplace assaults with practically no distinctive characteristics.[255]

The courts also admitted later sexual assaults on the victim if the later assault was characterized as part of the "res gestae".[256] Some courts excluded later assaults, if too remote.[257] Just about every case which authorized admission of prior sexual assaults committed by the defendant could be paired with a case from another jurisdiction on like facts which excluded the same evidence.[258]

A majority of courts continued to admit evidence of the defendant's other sexual assaults to show the defendant's lustful disposition to rape women.[259] These cases seemed to accept the theory that rape was committed by sexual psychopaths.[260] A few jurisdictions permitted proof of the defendant's other sexual assaults to corroborate the victim's account of the assault.[261] The theory behind this kind of corroboration is that the complaining witness could show lack of consent by proving the defendant had ravished her at other times, by multiplying her accusations. In some instances, the courts permitted proof of the defendant's assaults on other victims to corroborate the victim's story on the same rationale.[262]

The courts prior to World War II could not agree on a threshold rule permitting admission of uncharged sexual

misconduct. The courts had no coherent doctrine describing the foundation for admission of uncharged sexual misconduct, taking into account the time interval between the crime charged in the indictment and the uncharged incident. The courts were unable to articulate the degree of similarity required between the uncharged misconduct and the facts of the case at bar. The courts had no consistent rule on the quantum of proof necessary to establish the facts of any uncharged sexual misconduct. Most of the courts failed to note the dissimilarity between the elements of rape and those of such status crimes as adultery, fornication, incest and statutory rape. The courts frequently relied on precedent derived from status crimes such as statutory rape to admit uncharged sexual misconduct in rape cases.[263]

3. Incest, Adultery and Sodomy and the Defendant's Other Sexual Misconduct.

Incest cases generally followed the pattern of statutory rape cases. Prior incestuous acts between victim and perpetrator were admitted to show lustful disposition of the parties.[264] In most cases, incestuous acts between the defendant and other victims was excluded, unless the court felt that there was some incestuous design or plan at issue.[265] The handful of adultery prosecutions used uncharged sexual misconduct evidence in the same manner as in incest cases. Prior sexual activity between the parties was

admissible to show either lustful disposition[266] or a plan or design of adultery.[267]

Sodomy prosecutions were also treated as if sodomy was a status offense. The defendant's other sodomies committed on the same victim were held to be evidence of a lustful disposition[268] or a plan or design to commit sodomy.[269] Identity of the accused seems not to have been an issue in older sodomy cases.[270]

The widespread use of uncharged misconduct evidence in sex offender cases corresponded to deep seated public attitudes about sexual behavior. The courts followed the prevailing consensus about women's role in sexual relations. The ideal of feminine chastity had to be defended by effective prosecution of any man who took away a woman's virtue. Sodomists were depraved perverts. Rapists were depraved perverts. In 1937, the Gallup Poll asked Americans whether the whipping post should be reinstituted. Thirty nine percent of those polled favored its use principally for sex offenders.[271] This poll reflected the punitive, judgmental attitude toward antisocial sexual activity held by most Americans prior to World War II.

## V. THE MODERN RATIONALE FOR ADMISSION OF EVIDENCE OF UNCHARGED SEXUAL MISCONDUCT.

### A. THE REVOLUTIONS IN PUBLIC MORAL OPINION ABOUT SEXUAL CONDUCT.

Since the end of World War II, the United States has passed through a spiritual ordeal which altered the public attitude toward sexual activity. The great consensus about protecting women's virtue which endured for a century or more crumbled. Two books provide insight into the depth of these changes in American law and society: *Sex and the Law* and *The Closing of the American Mind*.

In 1951, when Judge Morris Ploscowe wrote *Sex and the Law*, most states forbade sodomy with any partner, male or female.[272] Most states had statutes making a crime out of fornication and adultery, although prosecutions under these statutes were exceedingly rare.[273] In 1951, a 16 year old boy could be sentenced to a long prison term for having sexual relations with a 15 year old girl.[274] Rape was a capital offense in two thirds of the states. Ploscowe's impassioned plea for decriminalization of sodomy between consenting adults caused clerics to denounce his book as immoral. His recommendations that adultery and fornication be struck from the statute books were denounced.

Almost everything Judge Ploscowe suggested in 1951 is commonplace in 1992. In many states, sodomy between consenting adults is no longer a crime.[275] Adultery and fornication have been decriminalized altogether in twenty eight states.[276] In twenty two states, a 16 year old boy cannot be imprisoned for sexual activity with a 15 year old girl.

Comprehensive sexual assault statutes have decriminalized statutory rape between partners over 12, unless there was a three or four years age differential between the partners.[277]

However, some of Judge Ploscowe's thinking seems pretty old fashioned. His easy going male chauvinist attitude toward rapists and child molesters does not abide well after public disclosure of the menace of male rape and child molesting since the mid 1970's. Ploscowe's suggestion that rape victims' stories shouldn't be accepted at face value sounds suspiciously like Sir Matthew Hale's famous denunciation of rape victims. Ploscowe almost ignored child molesting, as if it were not a serious, pervasive social problem. Ploscowe was a precursor of the 1960's student rebels who demanded greater sexual freedom on campus.

Allan Bloom's thesis in *The Closing of the American Mind* is that the nation has passed through a revolution of sexual permissiveness followed by a new sexual puritanism which was the product of feminism.[278] *The Closing of the American Mind* has been one of the most challenging social and intellectual critiques of the intellectual foundations for life in the 1980's. Bloom suggests that the two sexual revolutions of the past two decades have sabotaged the underpinnings of family life and encouraged hedonistic devotion to self expression at the expense of the common welfare of families. He believes that the double revolutions of permissiveness and

puritanism were the product of a major event in American intellectual history, the scrapping of Enlightenment rationalism and its replacement by Max Weber's sociology and Nietzche's antirational philosophy.[279] If Bloom is correct, then the underpinning upon which the old consensus about the ideal of female modesty and virtue which supported the admission of uncharged sexual misconduct in sex offender cases has been replaced by a new ideal. Bloom does not describe the shape of the new view of sexuality and women. The best one can do is to sketch the portrait of women as equals in the work place who are the rulers of their own bodies, who are also protectors of children from the invasive sexual incursions of unreconstructed males.

Public opinion polls confirm Bloom's prediction of a revolution in the American view of sexuality. In 1968, 68% of all respondents told the Gallup Poll that extramarital sex was wrong. By 1985, the number of respondents condemning extramarital sex had shrunk to 39%.[280] Despite a recent increase in those disapproving of premarital sex apparently due to the AIDS scare, the majority of Americans, classified by sex, age, race or religious affiliation no longer condemn fornication and adultery.[281] Forty four percent of all Americans favor the legalization of sodomy between consenting adults.[282] Extra marital sexual activity has become common practice among most middle class Americans. Such great changes

in public opinion on sexual conduct reflect a major shift in public morality. People are free to engage in any form of voluntary sexual activity they choose to do, so long as everyone participating in that sexual conduct does so freely, willingly, and voluntarily. The key word in this shift is voluntariness.

The feminist revolution can be verified from similar public opinion data. When women were polled regarding their ideal personal lifestyle in 1986, 43% responded that they wished to be married, have children and keep a full time job. Thirty per cent preferred marriage and children without outside work, a significant decline since 1975. Fifty eight percent of all women polled indicated that they expected to hold a full time job in their ideal life style. In 1975, 50% of all respondents wanted to be married and not to hold a full time job.[283] The Gallup Polls also indicated a heightened awareness of child abuse in the 1980's. Fifteen percent of adult Americans reported that they knew of at least one serious episode of child abuse occurring in the neighborhood or among friends in 1982.[284] It is difficult to summarize the public opinion poll results on feminist issues, because the polls have not asked all the right questions. The key to understanding these results seems to be that women want to be independent, and to be able to make voluntary choices with respect to career, marriage, family and other activities. The public

approves of such freedom of choice. The Gallup polls have not asked about women's attitude toward sexual activity. There are no available poll results on the issue of sexism in the work place or sexual harassment.

The three decisions that form the core of this article represent three approaches to the social policy behind the sexual revolutions. The *Getz* court, in an exceptionally well crafted opinion, took a conservative course. It confined admission of uncharged sexual misconduct to a limited number of situations matching the examples listed in Rule 404(b). The *Getz* court did not accept the principle of inquisitorial proof in sex offender cases. At the same time, Delaware prosecutors would be permitted to introduce uncharged misconduct evidence which would be taken as proof of predisposition to commit criminal activity by the jury, although ostensibly offered under express limitations confining the jury's use of uncharged misconduct evidence to the traditional *Molineux* list of exceptions.[285] The *Getz* court achieved a temporary truce between inquisitorial proof and traditional Anglo-Saxon accusative proof.

The *Lannan* court was much less sure of itself. The court wanted to integrate its long-standing depraved sexual instinct exception to the common law character evidence rule in sex offender cases with its own case law following the *Molineux* rule. It chose to do this by abolishing the depraved sexual

instinct exception by adopting Rule 404(b) of the Federal Rules of Evidence as the only guideline for admitting uncharged misconduct evidence. At the same time the court embraced Rule 404(b), it treated Rule 404(b) as an enumeration of exceptions to the character evidence rule, as if it were the common law *Molineux* rule. The court added to the enumerated "exceptions", a "res gestae" exception that does not appear in the text of Rule 404(b).[286] Federal Rule 404(b), however, was expressly designed to do away with a list of specific exceptions to the general character evidence rule, in order to prove a non-character reason for admitting uncharged misconduct evidence.[287]

Finally, the *Tobin* court wanted to continue its long-standing common law treatment of character evidence, even though it had adopted the Uniform Rules of Evidence, and imported wholesale the inclusionary view of Rule 404(b) favored by the commentators. It wanted to use Rule 404(b) as a laundry list of pigeonhole exceptions to a general exclusionary character evidence rule, and provide for a further special exception for uncharged misconduct evidence in sex offender cases. The *Tobin* court did not see the inconsistencies between the exclusionary and inclusionary versions of the character evidence rule and the treatment of uncharged misconduct evidence.

It is time to review the current state of the law of

uncharged misconduct evidence as applied to sex offender cases.

The United States and thirty six other jurisdictions have adopted the 1973 edition of the Uniform Rules of Evidence.[288] Uniform Rules 404, 405, 406, 608 and 609 have supplanted the common law basis for admission of other sexual misconduct evidence in sex offender cases. Two states follow their own codified rules of evidence which differ somewhat from the Uniform Rules, but contain provisions essentially similar to Rule 404 of the Uniform Rules of Evidence.[289] The remainder have adopted the *Molineux* rule as a matter of case law.[290] A plurality of jurisdictions admit uncharged sexual misconduct evidence under either the lustful disposition exception to the character evidence rule or under the *Molineux* rule, without distinguishing the basis for choice of one rule over another.[291] A few states confine admission of uncharged sexual misconduct to the *Molineux* rule list of exceptions to the character evidence rule.[292] Three states have repudiated the lustful disposition rule by decision.[293]

B. MODERN LUSTFUL DISPOSITION RULE JURISDICTIONS: GEORGIA, ARKANSAS, ARIZONA.

Georgia, Arkansas and twenty six other states[294] admit sexual misconduct evidence via the common law lustful disposition rule, although they also employ the *Molineux* rule for the same purpose. Georgia practice is representative of those states that still recognize the lustful disposition

exception to the character evidence rule. Georgia admits evidence of an offender's other sexual misconduct to show the offender's lustful disposition in statutory rape,[295] sodomy,[296] indecent liberties,[297] incest,[298] and child molesting[299] cases. The Georgia courts admit evidence of other similar sexual misconduct either to show the defendant's "bent of mind"[300] or the accused's "lustful disposition".[301] Georgia also follows the common law *Molineux* rule, and occasionally admits evidence of the defendant's other sexual misconduct to show motive, intent, plan or design as well as the defendant's bent of mind or lustful disposition.[302] Georgia courts admit evidence of prior similar sexual misconduct if the evidence is deemed relevant to showing a lustful disposition to engage in that type of criminal deviant behavior.[303] The Georgia courts have no compunction about admitting uncharged sexual misconduct occurring after the incident charged in the indictment.[304]

A few cases help explain how the lustful disposition rule works in practice in Georgia. In *Hall v. State*,[305] the court followed the "bent of mind" version of the lustful disposition rule. The defendant was charged with child molesting, attempted rape and battery committed on his 12 year old daughter. At trial, the victim's younger sister testified over objection that the defendant had sexual relations with her at age 12 or 13, some 16 years before the trial and 15 years

before the alleged sexual activity by the defendant with his daughter. The trial judge held a hearing on admissibility of the 16 year old incest outside the presence of the jury and held the former misconduct admissible to prove the defendant's lustful disposition, although the current indictment did not allege penetration, and the 16 year old offense involved a single act of conventional intercourse between defendant and his younger sister. The Court of Appeals affirmed Hall's conviction. Relying on much precedent, it found the 16 year old act of incest on the defendant' sister probative of the defendant's predisposition to commit crimes of that sort on his own daughter.[306]

*Burris v. State*[307] represents a further extension of the lustful disposition doctrine. The defendant was accused of child molesting. The State produced Cindy Sexton, who testified that the defendant's sister-in-law told her that the defendant and his wife had intercourse while the victim was in their bed. Sexton testified to the presence of pornographic literature in the Burris household. She also testified that she was in Burris' home when unnamed sexual devices were delivered by UPS.[308] The defendant argued that possession of pornography and of sexual devices was not criminal, and dissimilar to the crime with which he was charged. The court held, however, that proof that the defendant possessed pornographic literature and special devices designed for sexual

stimulation tended to show the defendant's unnatural bent of mind, which was relevant to the crime with which he was charged.[309]

Most lustful disposition jurisdictions admit uncharged sexual misconduct evidence on much the same basis as Georgia does. The courts allow uncharged similar sexual misconduct evidence to be used by the trier of fact in determining the defendant's lustful disposition by circumstantial proof of a general character trait, followed by an inference from that inductively proved general character trait that the defendant committed the crime charged in the indictment.[310]

Some jurisdictions also follow the lustful disposition rule although the jurisdiction has adopted the Uniform Rules of Evidence. Arkansas and Arizona are examples of two different approaches to amalgamating the lustful disposition rule with Rule 404(b). Both jurisdictions have done a better job than Indiana has done. Arkansas limits the use of its lustful disposition exception to incest and child abuse cases.[311] Arkansas, unlike Georgia, has adopted the Uniform Rules of Evidence. The Arkansas Supreme Court's leading decision on admission of similar instances of uncharged misconduct, *Price v. State*,[312] held that uncharged misconduct could be admitted under Rule 404(b) if the prosecution established some independent grounds of relevance other than proof of the defendant's bad character, providing that the probative value

of the uncharged misconduct outweighed any prejudice to the defendant.[313] It construed Rule 404(b)'s limitations on admission of uncharged misconduct as a series of examples, rather than a strict laundry list of exceptions to the exclusion of character evidence.[314] In incest and child abuse cases, however, the Arkansas Supreme Court has continued its earlier case law sanctioning admission of similar uncharged misconduct to prove "a proclivity toward a specific act with a person or class of persons with whom the accused has an intimate relationship".[315] Arkansas has also been known to extend its rules on admission of uncharged sexual misconduct in forcible rape cases involving family members to permit introduction of child molesting incidents preceding the forcible rape.[316]

Arkansas has taken an approach prefiguring proposed new Federal Rule of Evidence 414, which would allow similar uncharged sexual misconduct evidence to be admitted for any relevant purpose, without regard to Rule 404(b). It has established a highly specialized rule for admitting sexual misconduct in child molesting and incest cases, which it has extended to forcible rape cases whose victims are children or close relatives.

Arizona also retains the lustful disposition rule, but applies the rule in an unusual manner to sex offenses. Arizona's leading cases on uncharged misconduct happen to be a

sex offender case. In 1973, before the Arizona Supreme Court had adopted the Uniform Rules of Evidence, the court reaffirmed its earlier case law admitting uncharged sexual misconduct evidence in sex offenses where "there is sufficient basis to accept proof of similar acts near in time to the offense charged as evidence of the accused's propensity to commit such perverted acts."[317] Four years later, after Arizona had adopted the Uniform Rules of Evidence, but prior to their effective date, the Arizona Supreme Court took up uncharged sexual misconduct again in *State v. Treadaway*.[318] The defendant was charged with the sodomy and murder of a 6 year old boy. The assailant had crept into the boy's bedroom through a window and had raped and murdered him. Treadaway was arrested on fingerprint evidence. At trial, a three year old incident in which Treadaway sodomised a 13 year old boy was admitted to show his emotional propensity for sexual satisfaction with little boys.[319] The Arizona Supreme Court reversed his conviction, holding that the prior sodomy was too remote in time and too dissimilar to be relevant without a foundation from an expert medical witness which would show that a three year old sodomy of a boy demonstrated an emotional propensity to commit such crimes.[320]

The Arizona Supreme Court has a passion for reviewing social science literature to support its decisions in sex offender cases. In *State v. McDaniel*,[321] decided back in

1956, the Arizona Supreme Court relied on the obsolete criminal sexual psychopath theory to explain why it admitted uncharged misconduct evidence against the defendant, who was charged with committing anal and oral sexual acts with two 12 year old boys.[322] The court found that a person who has "given way to unnatural proclivities"[323] within a short time of the offense in the case at bar demonstrated a "specific emotional propensity for sexual aberration."[324] Twenty one years later, the court reviewed Tappan's 1951 New Jersey work in *Treadaway*, to show that it now had doubts about the recidivism of sex offenders and of the relevance and materiality of prior similar uncharged sexual misconduct evidence.[325] Since *Treadaway*, the Arizona courts have waffled on the basis for admitting uncharged sexual misconduct.

In *State v. Day*,[326] decided in 1986, the Arizona Supreme Court approved of joinder of 17 separate, distinct counts of first degree sexual assault on the ground that evidence of each assault was relevant to establish the defendant's "emotional propensity" to engage in rape.[327] The opinion is devoid of any reference to the proper psychiatric foundation for such evidence required by *Treadaway*. In *State v. Cousin*,[328] a child molesting case, the Court of Appeals approved of admitting prior episodes of child molesting involving the defendant's 18 year old daughter which occurred four to seven years before the acts charged in the indictment. The state

called a psychiatrist who testified that the earlier acts demonstrated the defendant's emotional propensity for child molesting.[329] In two recent child molesting cases, *State v. Lindsey*[330] and *State v Smith*,[331] the prosecution offered photographs of defendant's victims while engaged in different forms of perverse sexual activity with the defendant to show a common plan or scheme, without reference to the fact that the photos also proved the defendant's emotional propensity to commit depraved sexual acts on children. Apparently no psychiatric foundation evidence was put in to prove that the photographs demonstrated emotional propensity.

The practical criteria for choosing between the lustful disposition rule and the *Molineux* rule in Arizona is the availability of a psychiatrist who can lay the foundation required for proof of emotional propensity. When the State cannot find such a witness, it chooses a *Molineux* exception. In either case, the State usually succeeds in putting in evidence that shows the defendant's predisposition to commit sex offenses.[332] The Arizona approach does require the court to make an assessment of the probative value of uncharged misconduct incidents and to review the potential for unfair prejudice against the defendant arising from over-generalizing from a few instances of similar sexual misconduct to an improper guilty verdict. However, Arizona has departed from accusative criminal justice. The defendant's whole sex

life is on trial during the state's case in chief, providing that an expert witness has examined the defendant and reviewed the defendant's sexual case history.[333] This expert will help the jury interpret specific instances of sexual misconduct and apply those incidents to the general verdict of guilt or innocence. The jury, being thus advised, will be reaching a verdict on the basis of general predisposition to commit crimes of that ilk.

C. MOLINEUX RULE STATES.

The majority of U.S. jurisdictions admit uncharged sexual misconduct evidence under one or more of the traditional exceptions to the character evidence rule formulated in *Molineux*. Most of the states that have adopted the *Molineux* rule by case law, by statute or by rule view it as a specialized rule of relevance allowing admission of the defendant's specific acts of uncharged misconduct when relevant to some intermediate issue such as motive, intent, knowledge, opportunity, plan or design, identity or the like.[334] Uniform Rule 404 and its common law predecessors do not list "lustful disposition" or "corroboration of the victim's testimony" as an example of another relevant purpose for which uncharged sexual misconduct would be admissible in sex offenses. Those states that follow a judge made version of Rule 404 adhere to much the same line of reasoning as do those jurisdictions following the Uniform Rules. A surprising number

of these jurisdictions, however, retain one version or another of the lustful disposition rule alongside more modern character evidence rules.

Uncharged sexual misconduct is admitted under the *Molineux* rule to show the accused's motive, to show the accused had a plan or design to commit the sex crime charged, to prove identity of the accused through modus operandi evidence, and to rebut a claim of accidental touching. Intent is not an issue in sex offenses, unless the accused is charged with sexual assault against a non-consenting adult, and raises the defense that the victim consented to the defendant's sexual conduct, where consent would decriminalize the act. The courts generally grant the prosecution great leeway to introduce uncharged sexual misconduct when the intermediate issue, enumerated under Rule 404(b) or its common law predecessor, is not truly an issue in the case.

1. Proof of Motive Where Motive is A Non-Issue.

Proof of motive is proof of intent. Sex crimes are not crimes of specific intent. Mens rea is established by consciously committing the forbidden act against the victim. Two recent cases will illustrate the appropriate and inappropriate admission of uncharged sexual misconduct to prove motive under the *Molineux* rule.

In *State v. Yager*,[335] the defendant was indicted on a single count of sexual assault on a male child committed around

Thanksgiving, 1988. The 31 year old defendant was accused of touching the penis of C.M., an 8 year old child for whom he was babysitting. The defendant first admitted touching the victim, claiming that his hand accidentally slipped while massaging the child's stomach to cure his stomach ache. At trial, the defendant changed his story and denied touching the boy. The prosecution produced two young men, A.L. and A.G., who testified to long-term sexual relationships with Yager, beginning when they were children with fondling episodes. Yager objected to A.L.'s and A.G.'s testimony on the ground that the testimony was improper character evidence. The court permitted the men to testify in order to show the defendant's motive for touching C.M.

In short, Yager claimed an "innocent reason" for touching C.M., and the State sought to rebut that evidence by showing that Yager had long-term sexual relations with two other boys anywhere from ten to fifteen years before the date of the offense charged in the indictment.[336] Yager was convicted and appealed. The court found that Yager's original story put his intent at issue, because he first claimed to have touched C.M. innocently. Consequently, the court ruled that the State was properly permitted to prove Yager's motive for the touching by showing his prior sexual misconduct with other young boys.[337]

This case follows earlier decisions allowing proof of

similar sexual misconduct to rebut the defendant's claim of lack of mens rea due to accidental touching or touching for an innocent purpose. Once the defendant makes an issue out of mens rea, the prosecution is free to rebut a claim of lack of mens rea by proof of similar misconduct, which eliminates any claim of accident or innocent purpose by the rule of probabilities.[338] Of course, the jury will also learn that the defendant has a criminal history involving sex offenses.

However, *State v. Plymesser*[339] represents misuse of the motive category in sex offender cases. The defendant was charged with a single count of second degree sexual assault of a child. The defendant was alleged to have placed his hand over the vagina of Kelly, D., a 13 year old daughter of defendant's friends. The defendant had Kelly in his car and was driving her to his house to decorate a Christmas tree. He stopped the car, began french kissing the child and touched her breasts and vagina with his hand. He then got out of the car, urinated, re-entered the car and forced Kelly to touch his penis.[340]

The state filed a motion in limine to permit it to introduce evidence of prior sexual misconduct. After much wrangling over admitting two prior 1969 and 1977 convictions for child molesting, psychiatric testimony surrounding each of the prior offenses, and the arresting officer's testimony relating the defendant's confession to the 1977 incident, the

trial judge permitted proof of the 1977 conviction for sexual assault of a child and the arresting officer's version of defendant's confession that he put his penis in the child's mouth while intoxicated. The defendant objected on the ground that admission violated the character evidence rule.[341] The defendant was convicted and his conviction was affirmed by the Wisconsin Supreme Court. According to the court, the trial judge properly admitted the 1977 sexual assault conviction and the accompanying confession under Wisconsin's relaxed version of Rule 404(b) that permits proof of uncharged sexual misconduct to show the defendant's motive to commit the crime.[342]

However, the defendant never claimed an accidental or innocent purpose for his actions. He denied touching the victim as described in the indictment. Intent was not an issue, and the defendant's motive for his actions was not an issue. The court in fact was admitting proof of the defendant's prior misconduct to show his lustful disposition towards the 13 year old victim. Nonetheless, the jury in *Yager* and *Plymesser* considered the defendant's criminal sexual misconduct in precisely the same way: in each case a limiting instruction was given, allegedly confining the jury to consider criminal history as it related to motive, but the jury had the defendant's criminal sexual misconduct history and could do what it pleased with that history.

2. A Plan or Design Which Proves Defendant's Disposition to Commit Sex Offenses.

The *Molineux* rule contemplates use of uncharged sexual misconduct to demonstrate a continuing criminal activity, such as a conspiracy, or to demonstrate intent by showing the defendant's criminal plan or design.[343] While a continuing criminal activity such as running an illegal still[344] or a house of ill fame[345] can be proved by proving more than one overt instance of resort to such a place, sex offenders rarely show any concerted plan or design to engage in sex offenses. If the courts, following the *Molineux* rule, limited admission of uncharged sexual misconduct to those instances where the defendant has a criminal plan or design, such as the case of the physician who drugged his female patients to commit sexual assaults upon them, no abuse would occur. However, the courts have shown great willingness to admit prior and later instances of sexual assaults by rape defendants to show a design or plan to commit rape, which simply proves that the defendant had a propensity to commit rape.[346]

*People v. Ing*[347] illustrates appropriate use of the plan or design exception to admit uncharged sexual misconduct. Dr. Ing, an obstetrician, was accused of committing a sexual assault on a patient during a pelvic examination. Ing simply denied any offensive touching. The State was allowed to prove that Dr. Ing had assaulted other patients as much as 18 years

prior to the date of the crime charged in the indictment, to show that Ing had a long standing criminal plan or design to take advantage of anesthetized patients.[348] The jury was permitted to consider Dr. Ing's criminal history in reaching a verdict.

*State v. Hampton*[349] illustrates the misuse of the plan or design exception. The victim and the defendant worked at the same business. While at work, the victim testified the defendant approached her, threw her down on the floor, strangled her, pressed a sharp instrument to her throat and raped her. After copulation, the defendant allegedly offered the victim money if she would have sex with him again. Two other women who were not fellow employees, who were not attacked at the same location, testified that the defendant had approached them, thrown them down and attempted to strangle them while he tried to have sexual intercourse with them.[350] A third woman testified the defendant had strangled her, thrown her to the floor and raped her, offering her money for further sexual relations. The Kansas Supreme Court sustained Hampton's conviction on the ground that the three other victims' stories proved a plan or design of rape on Hampton's part. This evidence merely showed that Hampton committed several sexual assaults in a similar manner. The offer of money might have made the three assaults similar enough to be modus operandi evidence if the identity of the accused was an issue in the

case. However, neither specific intent nor identity of the accused was an issue, and the location of the assault and the relationship the defendant had with the other victims were not identical to those connected with the victim in the case tried. The evidence of other attacks amounted to proof of the defendant's predisposition to commit sexual assault.[351] However, the jury had Hampton's criminal history to consider in reaching verdict. Although *Ing* presented a better rationale for allowing the jury to consider the defendant's criminal history, the jury was allowed to consider the defendant's criminal history in reaching a verdict in both cases.

3. Proof of Identity of the Sex Offender When Identity is not a Bona Fide Issue.

The *Molineux* rule was formulated in a case in which the identity of the accused was the only issue. The courts have admitted uncharged sexual misconduct evidence to prove the identity of the accused. *King v. State*[352] represents an orthodox use of the identity exception. The victim was stopped by a man while she was driving home. He told her that her tail lights were out. As he engaged the victim in conversation, he pulled out a pistol and forced the victim into his car and drove her to a secluded place where the victim was raped.[353] Two weeks later, she was stopped again by a man in a similar light colored station wagon who forced her at gunpoint into his car and drove her to a secluded place where the victim was

raped again. She identified the defendant as the perpetrator of the first assault, but was unsure of her second attacker's identity. The Arkansas Supreme Court sustained King's conviction, holding that the prosecution was properly permitted to prove that the defendant committed the first sexual assault to prove the identity of the accused in the second case.[354] This particular rapist had an unusual modus operandi which warranted the inference that the same person perpetrated both rapes. Therefore, the jury could consider the defendant's criminal history with respect to the victim in reaching a verdict.

*People v. Oliphant*[355] represents an abuse of the identity exception to the character evidence rule. A Michigan State University coed was raped by a black man after a social encounter. She had agreed to accept a ride home from the campus with her new found friend. On the way home, the defendant made a detour to an out of the way place and according to the victim, importuned her for sexual intercourse. When she refused, he grabbed her. Under fear for her life, the victim did not resist further and the defendant completed intercourse with her.[356] Identity was not an issue. Oliphant claimed the victim consented to interracial sexual intercourse with him. The prosecution was allowed to bring on four other white women who identified Oliphant as the young black man who had offered them a ride home from the Michigan State campus,

made a detour to an out of the way place and importuned them for sexual intercourse. Each said they refused his advances. When they refused, all four claimed he forced them to have sex relations with him. Two of the four women had made criminal complaints against Oliphant which had resulted in Oliphant's acquittal before another jury.[357]

Oliphant was convicted. The Michigan Supreme Court affirmed his conviction, finding that the four other uncharged acts of sexual misconduct were properly admitted to prove Oliphant's identity as the rapist, to corroborate the victim's story and to disprove any consent to his amorous advances.[358] First, Oliphant had admitted sexual intercourse with the victim, eliminating identity of the accused as an element in the case. Second, the victim's story could not be corroborated by testimony by other victims that they had been raped by the defendant at other times. Third, the State could not prove that Oliphant had sexual intercourse with the victim against her will by proving that at some other time, Oliphant had sexual intercourse with another woman against her will. In reality, the court employed the identity exception to allow proof of four similar complaints of sexual assault to corroborate the victim's story by proving the defendant's propensity to commit sexual assaults on white women. This is precisely the same result reached by the House of Lords in *Dept. of Public Prosecutions v. Boardman*.[359] The effect upon

the jury is the same, whatever rationale the courts use to explain away admission of uncharged sexual misconduct. The jury will have the relevant portion of the defendant's criminal history before it for consideration in reaching a verdict.

Finally, the courts have faced one or two cases in which the alleged perpetrator committed multiple acts of rape or sodomy on more than one victim at the same time. Using the interwoven crime exception to the character evidence rule, the prosecution has been allowed to prove all of the multiple acts committed by the defendant.[360] The jury again was permitted to receive the defendant's relevant criminal history and to use that history in reaching a verdict.

The point of this analysis of the operation of the *Molineux* rule is to demonstrate that following the *Molineux* rule and Rule 404(b) does not stop the state from proving the criminal history of a sex offender. It requires the state to give some plausible intermediate issue such as motive, intent, plan, design or identity that the defendant's criminal history might also prove. If the state can prove the defendant's relevant criminal history by a preponderance, following the standard of proof established by *Huddleston v. United States*,[361] the jury will receive that history. Although the *Molineux* rule requires a limiting instruction that informs the jury that it can apply that criminal history only to an appropriate intermediate issue, the legal cure provided by a

limiting instruction is not a psychological or practical remedy for the harm done. No one can guarantee that the jury has not used the defendant's criminal history to reach a general verdict of guilty based in predisposition.

Prior to World War II, statutory rape prosecutions made most of the law relative to uncharged sexual misconduct, but statutory rape has been reclassified by many jurisdictions as sexual assault on a person under 16.[362] In the infrequent modern prosecutions for sexual assault on a non-relative under 16, prior and subsequent sexual activity with the same person under 16 is generally admitted to show plan, design, motive intent or identity.[363] Child molesting and incest decisions have made more law since the 1960's than criminal sexual assault cases involving non-relations. The same sexual assault statute which forbids genital contact with a person under 16 also forbids fondling, touching the genitals, oral sexual activity or anal sexual activity with a person under 16. Most of the recent prosecutions under the sexual assault statutes have involved child molesters. The defendant's other similar, sexual acts with the same victim are admitted to show the defendant's plan or design.[364] Dissimilar acts with the same victim are also routinely admitted.[365] Additionally, the defendant's sexual misconduct with the victim's brothers and sisters are admitted to prove a guilty plan or design, or motive.[366] The courts disregard the passage of time between

child molesting incidents for the most part, admitting former sexual misconduct with the victim's siblings occurring as long as ten years prior to the assault on the victim.[367] In short, accused child molesters must expect the state to prove other similar child molesting incidents at trial, just as the State of Delaware did in *Getz*. Many states still allow proof of uncharged sexual misconduct between defendant and victim to corroborate the victim's story or to prove the attacker's lustful disposition in those states adhering to the lustful disposition rule.[368] Whatever rationale the court may invoke to permit proof of the defendant's criminal history, the result is essentially the same. The jury will receive the defendant's history of criminal sexual misconduct and convict the defendant, in part, on propensity to commit that type of crime.

Since the *Molineux* rule fails to explain judicial behavior on admission of uncharged sexual misconduct, it is a dishonest rule to use in sex offenses. It may be a dishonest rule in other criminal prosecutions as well, when the defendant's propensity to commit similar criminal misconduct is submitted to the jury to be used to determine the defendant's guilt.

California and New York jurisprudence on uncharged sexual misconduct is intriguing and a perfect example of the confusion that the *Molineux* rule causes when the courts try to admit uncharged sexual misconduct.

C. NEW YORK AND CALIFORNIA

New York and California each claim to follow the *Molineux* rule with respect to uncharged misconduct. However, New York retains a vestigial version of the lustful disposition rule for incest cases. California's jurisprudence on uncharged misconduct evidence has been shattered by bewildering appellate decisions and Proposition 8 that restrains appellate review of evidence in criminal prosecutions. Since neither state neatly fits into the general mold of *Molineux* rule states, their version of the law on uncharged sexual misconduct has to be treated separately.

1. New York: A State in Which a Vestigial Lustful Disposition Rule Coexists with the Molineux Rule.

New York happens to be one of the twenty nine jurisdictions which recognize the *Molineux* rule for uncharged misconduct. These states also recognize some version or another of the lustful disposition rule. In recent years, New York has gradually abandoned its lustful disposition exception to the character evidence rule in sex offender cases. The Court of Appeals ruled in *People v. Johnson*,[369] in 1968 that the defendant's prior uncharged sexual assaults were irrelevant and inadmissible to prove any issue, because the defendant was charged with both forcible and statutory rape, and he had made no issue of the victim's consent.[370] In 1987, the Court of Appeals overruled *People v. Thompson*[371] in *People v.*

*Lewis*.[372] Lewis was charged with committing incest with his 14 year old illegitimate daughter, Ceceil. She testified to at least ten different sexual encounters with the defendant over a period of several months in addition to the incestuous act charged in the indictment.[373] The Court of Appeals held that none of the traditional *Molineux* rule exceptions applied to Ceceil's testimony about the ten other acts of sexual intercourse with her father. The court disposed of the "amorous design" exception derived from *Thompson* by stating that the "amorous design" rule was *dicta* and unsupported by the English and American cases cited in support of the rule.[374] It limited the *Thompson* decision to condoning proof of other uncharged sexual misconduct in those kinds of sexual misconduct cases in which a mutual decision to engage in sexual activity is relevant.[375] The court also held that a complaining witness cannot corroborate her report of one offense by making further uncorroborated charges against the accused.[376]

Later New York cases followed *Lewis* in excluding evidence of uncharged sexual misconduct merely to demonstrate the defendant's "amorous designs".[377] However, New York courts found other ways to approve admission of uncharged sexual misconduct evidence after *Lewis*. In *People v. DeLeon*,[378] the Appellate Division held that the defendant's statement to the victim that "he had just recently . . . raped a girl" made during the course of a sexual assault on the victim was

admissible to rebut any suggestion of consent in a case of overwhelming guilt.[379]

New York courts following the *Molineux* rule have already admitted uncharged sexual misconduct to prove plan or design[380] and identity of the accused.[381]

New York's experience with the *Molineux* rule in sex offender cases has been paralleled in Illinois[382] where vestiges of the lustful disposition rule may coexist with the *Molineux* rule in sex offender cases. Kentucky's lower appellate courts continue to apply the lustful disposition rule, questioning the real intent of the Supreme Court in *Pendleton*.[383] New York's vestigial amorous design exception to the character evidence rule would still apply in incest and bigamy prosecutions. New York has rejected corroboration as a reason for admitting the defendant's sexual misconduct history with the victim, but its jurisprudence has the plan or design rational at hand to permit proof of the same misconduct to demonstrate a plan or design.

Despite an attempt to reform its law on character evidence and a further attempt to limit uncharged sexual misconduct evidence, New York has really made no improvement in its law on uncharged sexual misconduct, although the courts may feel better because their approach to admission of uncharged sexual misconduct has some plausible theoretical consistency.

2. California: Failure to Harmonize The Molineux Rule or

to Develop Any Consistent Policy Towards Uncharged Sexual Misconduct Evidence.

California has an almost unintelligible position on admission of uncharged sexual misconduct in sex offender cases. Because it is so baffling, it is worthwhile to review the twists and turns of California's case law, statutes and constitutional initiatives to see how the common-law approach to the character evidence rule can absolutely fail to achieve any clarity or consistency in practice.

California's case law on proof of other sexual misconduct in sex offender cases has always been confusing. A number of pre-Evidence Code intermediate appellate court decisions seemed to have adopted the lustful disposition rule.[384] However, a significant number of pre-1967 cases followed the *Molineux* rule, admitting uncharged sexual misconduct only when relevant to prove intent, motive, design or plan or identity of the accused.[385] Section 1101 of the California Evidence Code, which restated the common law bar against admitting character evidence, did very little to ease the confusion. Section 1101(b) set out the common law exceptions to the character evidence rule for uncharged misconduct in much the same way as the Uniform Rules did. The lustful disposition rule was not clearly repealed by the Evidence Code.

Since 1967, the California courts have struggled with the application of section 1101(b) of the Evidence Code to sex

offender cases. At times the courts tend to use section 1101(b) as a series of magic words, which if uttered by the State in its offer of proof, sanctify use of the defendant's criminal history. At other times, the courts prescribe limitations and controls on use of the defendant's criminal history, derived from the Evidence Code and from its common law tradition.

The history of the development of the admission of uncharged sexual misconduct evidence under section 1101(b) of the Evidence Code really began with *People v. Covert*.[386] The defendant was charged with committing incest and lewd and lascivious acts on his 16 year old daughter. The defendant's 19 year old daughter testified to earlier, similar incest committed on her by defendant. The Court of Appeals approved of admission of these stories to show the defendant's criminal plan or design and also to corroborate the story of the 16 year old victim.[387] In the same year, in *People v. Paxton*,[388] a rape and robbery case, the state called a second victim to testify to an earlier rape committed on her by defendant in what the court thought was a strikingly similar manner. This second uncharged incident was admitted to prove identity, although identity was not a real issue in the case.[389] In *People v. Gray*,[390] which was decided the year after the Evidence Code became effective, the defendant claimed the victim consented to his advances. The defendant also proved

that he had voluntary sexual relations with the victim before the alleged assault.[391] The prosecution put on three rebuttal witnesses who stated that they had been casual acquaintances of the defendant, and were forcibly raped and beaten by the defendant when they did not consent to his advances.[392] So far, the California courts were using section 1101(b) as a vehicle to funnel uncharged sexual misconduct evidence into the prosecution's case in chief with minimal restraints.

The court did not care much about the age of prior sexual misconduct. In *People v. Ing*,[393] the California Supreme Court admitted similar episodes of uncharged sexual assaults perpetrated by an obstetrician on patients as much as 18 years before trial to show modus operandi and plan or design on the theory that Dr. Ing had a single conception or plot for ravishing his patients. Although the court's rationale was classic *Molineux* rule theory, it did not explain why the 18 year old episodes of similar misconduct were still probative.

California courts used the modus operandi rationale to admit prior sexual misconduct under section 1101(b) in *People v. Whittington*,[394] decided in 1977. The First District Court of Appeals held that a rape committed almost three years before the date of the crime charged was relevant to prove the identity of the perpetrator because the modus operandi in both instances was similar.[395] In both instances, the victim was

accosted while emptying garbage outside her apartment. The perpetrator threatened to rob the victim, but informed the victim that he was free of venereal disease and had not had any sexual relations for a long time. The sexual assault then followed.[396] It may have been the defendant's express warranty of freedom from venereal disease that the court found to be a "signature" of the accused.

In *People v. Cramer*,[397] the defendant was charged with sexual assault on a 13 year old boy. Intent and identity of the accused were not in issue. Nonetheless, the court approved admission of similar homosexual acts committed by defendant on another boy to show "common design or modus operandi".[398]

So far, this section has reviewed cases that treat section 1101(b) as "magic words". *People v. Stanley*[399] represents the other side of the coin. The defendant was charged with sexual assault of a boy. Prior similar assaults by the defendant on the same victim were admitted at trial, but admission was disapproved by the Supreme Court on the ground that the prior uncharged sexual misconduct evidence was inadmissible when the only issue was the veracity of the victim at trial.[400] *Stanley* was complicated by the fact that the victim may have been an accomplice under California law. At any rate, the Supreme Court tried to limit admission of uncharged sexual misconduct evidence to cases in which there was real issue raised under section 1101(b) requiring weighing

of probative value against prejudice to the defendant.

During the mid 1970's, the California Supreme Court continued to ease the limits on the use of uncharged sexual misconduct. *People v. Thornton*,[401] involved the identity of the perpetrator of robbery, kidnap, sodomy and rape against two different victims, Ottila J. and Eileen S. The defendant gave alibi evidence at trial. The prosecution retaliated by producing Marcia B., Edith B., and Suzanne P., who had identified the defendant as the man who robbed and sexually assaulted them. The five separate instances of sexual assault had unusual and distinctive common elements. The perpetrator used a ruse to gain access to the victim's car. The victim was driven to a remote place in her own car and ordered to completely disrobe. The victim's purse was ransacked before sexual assault was perpetrated. The victim was threatened with death if she talked. Finally, in all five cases, the victim was physically abused, kicked, beaten and foreign matter was stuffed in the victim's vagina.[402] The trial court admitted the other victim's stories. The Supreme Court, on mandatory review of a death penalty, set aside the penalty phase of the trial, but affirmed Thornton's guilt on the ground that the five similar sexual assaults amounted to signature crimes rebutting his alibi.[403]

*People v. Pendleton*[404] came up in 1979. It involved prosecutorial use of two prior instances of rape against the

defendant in a rape trial. In each case, the victim had been attacked early in the morning by an intruder who entered the victim's locked residence, threatened the victim with harm and robbery. The attacker then started discussing his family and friends, and the victim's friends while holding the victim. The victim was then struck and sexually assaulted.[405]

Identity of the accused was not an issue during Pendleton's trial on a third sexual assault charge. The victims of the two prior assaults testified, giving their stories to prove the defendant's intent. The California Supreme Court affirmed Pendleton's conviction on the theory that the stories of the other two victims proved criminal intent, although rape was not a crime of specific intent. The court also found that the two prior sexual assaults proved the defendant's plan or design, but it is difficult to see what kind of plan was carried out by these separate attacks. The court seemed to be returning to the lustful disposition rule without explicitly reaffirming its existence.[406] The Pendleton decision was not classic *Molineux* rule theory, because the intermediate issues for which the prior assaults were offered were not actually litigated at trial. The court slipped back into the magic words approach.

By the mid 1980's California's inferior appellate courts responded to the *Pendleton* opinion by letting down the bars to use of uncharged misconduct evidence in sex offender

cases.[407] In 1984, however, the Supreme Court pulled in the reins in *People v. Tassel*.[408] Tassel was charged with sexually assaulting Ann B., a waitress, whom Tassell allegedly forced to commit oral copulation with him and conventional intercourse in her Volkswagen vanagan.[409] Tassell testified in his own behalf, claiming that Ann B. willingly consented to his sexual advances. The prosecution then produced Mrs. G. and Cherie B. Mrs. G., a waitress in a bar, testified that Tassell had picked her up after work and forced her to engage in sexual intercourse. Cherie B., a hitchhiker, told a similar story. She claimed Tassell had picked her up and forced her to engage in sexual relations with him. The prosecution offered these two tales to prove that Tassell had a design or plan to pick up women and assault them.[410] The Supreme Court affirmed Tassell's conviction, but held that the two rebuttal witness' stories were irrelevant to any issue which could be proved under section 1101(b). The court found that the only issue to which these two stories related was the defendant's evil propensity to commit sexual crimes. The court reasoned that the two other victim's stories were harmless error in an overwhelming case of guilt.[411]

Shortly after the *Tassell* decision was announced, the California Legislature amended section 1101(b) of the Evidence Code to "clarify" the decision by providing that uncharged similar misconduct evidence was admissible in sexual assault

cases whenever the defendant raised the issue of consent.[412]

In 1985, the Supreme Court put further limitations on the use of uncharged sexual misconduct evidence in *People v. Ogunmulga*.[413] The defendant, a gynecologist, was charged with sexual assault on a patient during a pelvic examination. The defendant claimed that the step at the end of the examining table made it impossible for the examining physician to perform sexual acts on a patient during a pelvic exam. To rebut this contention in advance of defense evidence, the prosecution called two other victims who testified that Dr. Ogunmugla had sexually assaulted them during their pelvic exams.[414] The trial court allowed the other victim's testimony to prove Ogunmulga's plan or design, although neither identity of the accused nor criminal intent was at issue in the case. The Supreme Court reversed an Appeals Court affirmation of conviction, finding that the admission of the two other victims' stories was error, since neither identity nor intent was at issue.[415] This decision is very difficult to accept. The defendant claimed that it was physically impossible to commit rape upon his patients during a pelvic examination. The testimony of the other victims rebutted that claim squarely. While section 1101(b) does not contain an enumerated exception authorizing admission of uncharged misconduct to rebut a claim of physical impossibility, the evidence was certainly relevant under any view of the uncharged misconduct rule.

California law on uncharged sexual misconduct is too confused to generalize. California may still recognize a "lustful intent" exception to the character evidence rule in criminal sexual assault cases. On the other hand, it may limit evidence of uncharged sexual misconduct to those few cases where identity of the accused or intent are real issues. In 1982, the voters passed Proposition 8, an initiative that abolished nearly all limitations on evidence in criminal prosecutions. Section 28(d) was an attempt to deprive the appellate courts of supervision over admission or exclusion of evidence in criminal prosecutions.[416] It is extremely difficult to assess the impact of Proposition 8 on admission of uncharged sexual misconduct. If Proposition 8 is rigorously applied to the character evidence rule, the character evidence rule embodied in section 11101 of the Evidence Code no longer applies to any criminal prosecution. So far, the California courts have not followed Proposition 8's literal command to permit proof of the defendant's predisposition to commit evil.[417]

## VI. CONCLUSION.

The jury usually gets to review the criminal history of sex offenders, despite the character evidence rule that bans convicting any U.S. citizen on his or her predisposition to commit crimes. There are two popular rationales that permit

the courts to ignore the character evidence rule: the lustful disposition rule and the *Molineux* rule.

The *Molineux* rule, codified by Uniform Rule 404(b), permits introduction of criminal history when some straw man issue can be interposed to make criminal history evidence relevant to something other than character or predisposition to do evil. All U.S. jurisdictions recognize one version or another of this rule.[418] The *Molineux* rule permits the jury to consider uncharged sexual misconduct when it proves both the defendant's bad moral character and some other issue, such as criminal intent, plan or identity of the accused. The palliative offered is a limiting instruction telling the jury not to consider the defendant's criminal history on the issue of guilt or innocence, but only to prove the intermediate issue.

Twenty nine states follow some version of the lustful disposition rule. Four states have done away with their version of the lustful disposition rule in the past four years.[419] West Virginia dumped its lustful disposition rule in 1987, but returned to it in 1990.[420] Rhode Island considered rejecting the lustful disposition rule, but decided not to do so.[421] The lustful disposition rule permits proof of a sex offender's criminal history to show his or her predisposition to commit sex crimes. No intermediate issue must be at stake when prior sexual misconduct is offered under

the lustful disposition rule. The rule simply permits proof of bad character in sex crimes.

The character evidence rule was made by judges to explain why the defendant's criminal history could not be used to prove the defendant's guilt. The *Molineux* and lustful disposition exceptions to the rule permit proof of character or predisposition to act in predictable ways to prove the defendant's guilt in sex cases. The exceptions have swallowed the exclusionary rule. In truth, character evidence is inadmissible in sex crime prosecutions only when the court finds that such evidence is unreliable.

Unreliability means that the court finds that the probative value of the uncharged misconduct evidence is exceeded by prejudice to the defendant, confusion of the issues and waste of time in collateral matters. When uncharged sexual misconduct is dissimilar to the crime charged in the indictment, or committed at a time judged to be too remote to show the defendant's propensity to commit sex crimes, or the quantum of proof of uncharged misconduct fails to meet the threshold level set by the court, it is excluded.

However, the same analysis will hold true if applied to other criminal prosecutions in which uncharged misconduct evidence is frequently offered and admitted, such as drug or conspiracy cases. There is nothing particularly unique about sex offenses that requires a special rule just for sex crime

prosecutions that lets in uncharged criminal conduct more leniently than in drug sales or possession of stolen property prosecutions. Prior uncharged misconduct evidence, based on recidivism, is relevant in those prosecutions as well.

What makes sex crimes unique is the public reaction to sex offenses. The public is morally outraged by sex offenses, particularly those that involve small children or others unable to protect themselves from harm. If Oscar Wilde had been accused of writing rubber checks, there would have been no criminal libel prosecution and Wilde would not have been cross examined about his prior criminal behavior.

In short, the courts bow to public pressure to convict sex offenders and try to make it easier for the victim of a sex crime to secure retribution than the victim of a crime against property. This is done by relaxing the evidentiary safeguards that were supposed to protect U.S. citizens from Star Chamber justice.

The Sixth and Fourteenth Amendments do not require accusative criminal justice. The Sixth Amendment mandates the defendant's rights to receive due notice of the charges made against him, to legal counsel, to confrontation by the accuser, and to compulsory process. The Fourteenth Amendment incorporates these specific rights, and also guarantees the defendant a fundamentally fair trial that requires the state to prove guilt beyond a reasonable doubt.[422] Indiana gave up

the lustful disposition rule because it did not provide for due notice to be given to the defendant. It could have kept the rule by ordering the prosecution to give notice of intent to use uncharged misconduct evidence. The United States, Minnesota and a few other states have faced the notice issue by requiring notice of intent to use specific instances of uncharged misconduct.[423] This satisfies the notice clause of the Sixth Amendment by putting the defendant on guard that uncharged misconduct will come up, and allows the defendant to prepare a rebuttal case.

More than forty years ago, Justice Jackson characterized the character evidence rule as absurd in *Michelson v. United States*.[424] The foregoing analysis shows that the rule is still absurd, especially as it works out in sex crime prosecutions. The lustful disposition rule, which acknowledges the probative value of criminal history, and would admit such history in sex crime prosecutions, is more rational than the *Molineux* rule. Nothing but inertia and fear of inquisitorial proof stands in the way of a reversal of the character evidence rule in criminal prosecutions. Since the courts generally permit admission of uncharged misconduct, particularly in high profile prosecutions such as sex offender cases, the rule should be that the defendant's propensity to commit crimes of the type charged in the indictment may be proved by specific instances of uncharged misconduct or opinion evidence showing

the defendant's propensity to commit crimes of that type. Propensity evidence would be excluded if proof submitted is more prejudicial to the defendant than probative on the issue of predisposition.

If the courts cannot bring themselves to reverse the character evidence rule entirely, then the courts can do so in sex offender cases by adopting a modified lustful disposition rule. The courts would permit admission of uncharged misconduct evidence to prove habitual criminal sexual activity. Arizona has taken this course. The *Treadaway* rule that permits proof of uncharged sexual misconduct to serve as basis for an expert opinion on the defendant's habitual sexual behavior patterns is an honest rule of law fashioned for sex crime prosecutions. It does change the dynamics of the criminal prosecution. The defendant's sexual behavior in general is on trial. The jury, aided by an expert, will use evidence of the defendant's sexual behavior in general to convict or acquit the defendant. Arizona has given the victims of sex crimes an equal opportunity to obtain redress for the wrong done to them. It has recognized the needs of victims for justification and revenge as well as the need for effective punishment for sexual offenders.

The second approach is adopt court rules similar to proposed Rules 413 through 415 that establish a specialized character evidence rule for sex crime prosecutions without the

requirement that uncharged sexual misconduct evidence be the basis for an expert opinion.

However, conservative courts would be extremely uncomfortable with either of these solutions because they turn a sex crime prosecution into an inquisition. Like the Delaware Supreme Court, conservative courts will reject open acceptance of inquisitorial justice in sex offender cases. They will continue to try to limit admissibility of similar uncharged sexual misconduct to one or more of the intermediate objects of proof noted in *Molineux*. In *Getz*, the Delaware Supreme Court tried to restrict such evidence to the minimum absolutely necessary to support a criminal prosecution. The issue of habitual criminal conduct evidence offered under Rule 406 was neither briefed nor argued and was not raised at trial. However, the *Getz* decision continues to permit proof of uncharged sexual misconduct. Delaware's courts can be comforted by the formalistic instruction that tells the jury not to consider uncharged misconduct evidence on the issue of guilt or innocence. Perhaps the jury will understand the instruction and follow it, and apply the uncharged misconduct only to the allowable intermediate issue. Perhaps the jury will get the instruction wrong and convict the defendant based on predisposition, but the jury cannot be impeached for such misconduct.