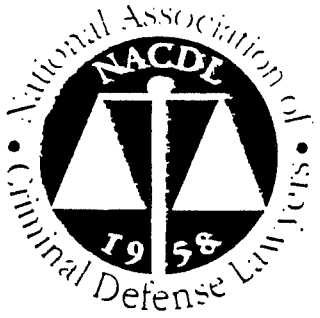

April 14, 1994

Peter G. McCabe, Secretary
Standing Committee on Rules of Practice and Procedure
Judicial Conference of the United States
Administrative Office of the U.S. Courts
Washington, D.C. 20544

Re: Proposed Amendments to Federal Rules of Appellate Procedure and Federal Rules of Criminal Procedure; Request for Comments, Issued October 15, 1993

Dear Mr. McCabe:

As Co-Chairs of the National Association of Criminal Defense Lawyers' Committee on Rules of Procedure, we are pleased to submit the following comments on behalf of the 7,500 members of our association and its 40 state affiliates with a total membership of about 22,000.

FEDERAL RULES OF CRIMINAL PROCEDURE

Rule 5. Initial Appearance Before the Magistrate Judge

Subdivision (a) of the Rule requires that a person arrested be brought to appear before the nearest available federal magistrate judge (or other appropriate judicial officer) without unnecessary delay. The proposed amendment to subdivision (a) would

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permit law enforcement officers not to comply with that requirement when the person arrested is charged only with a violation of 18 U.S.C. section 1073 and is "transferred without unnecessary delay to the custody of appropriate state of local authorities in the district of arrest and the attorney for the government moves promptly . . . to dismiss the complaint" charging the section 1073 violation.

We endorse the proposed amendment. In appropriate circumstances, it will save judicial and law enforcement resources and will also enable an arrested person to be returned more promptly to the jurisdiction in which he or she faces prosecution. We are concerned, however, that unless the amendment or Committee Note spells out more specifically what constitutes "without unnecessary delay," the proposed amendment may result in persons who are arrested being held in custody longer than is necessary. We would urge the Committee to state or suggest in the accompanying Note that "without unnecessary delay" contemplates a period of time within the 48 hour period for initial appearances articulated by the Supreme Court in County of Riverside v. McLaughlin, 500 U.S. 44 (1991). Given that there will ordinarily be no practical means of insuring enforcement of this provision by a particular defendant (because when the defendant finally appears before a judge the wrong will have ceased and usually there will be remedy), it would be especially useful for the Committee to spell out the time period that is envisioned by this amendment to the Rule.

Rule 10. Arraignment

The proposed amendment would permit the arraignment of the defendant to be conducted without the defendant being physically present in court, if the defendant participates through video teleconferencing and waives the right to be physically present.

We are opposed to the proposed amendment for a variety of reasons. Our fundamental concern with the proposed amendment is that it fails to take into account the critical importance of affording a defendant the opportunity to meet in person with his or her attorney prior to, or at least at the time of, the arraignment. We are concerned that the proposed amendment would allow, and in a sense encourage, a defendant to be arraigned without first having had an in-person meeting with his or her counsel.

We appreciate and generally endorse the apparent goal sought to be achieved by the amendment -- a savings in resources for the criminal justice system -- and realize that the provisions of the amendment may be favored by certain defendants as a means of avoiding unnecessary delay in the progress of their case and/or a prolonged trip in custody for what may be only a perfunctory proceeding. Nevertheless, we believe that those objectives do not justify the creation of a rule and resulting procedure that would allow a defendant to be arraigned with having met in person with counsel prior to arraignment. Indeed, such a procedure may be of questionable legal validity.

Under the proposed amendment, a defendant could be arraigned without ever having met in person with his or her counsel, as long as the defendant waived the right to be physically present in court during the video teleconferenced arraignment. A defendant who is first asked if he or she waives the right to appear in person when he or she appears by video teleconferencing may understandably feel pressure to agree to a waiver so as not to delay the proceeding that is underway. Moreover, the defendant may be called upon to provide such a waiver without having had an opportunity to confer with counsel about the waiver. Not only would this be possible under the proposed amendment, but, as noted above, to the extent that the proposed amendment holds out the opportunity of saving resources by speeding up the arraignment process, it may have the effect of encouraging and increasing instances of defendants being arraigned without having first met with counsel.

Viewed from the outside and in isolation, the arraignment may appear to be a perfunctory and routine proceeding in all but rare cases. In must be remembered, however, that the arraignment will often times be the first court proceeding after a defendant has been taken into custody. Prior to that appearance, it is important that the defendant be able to meet with counsel to be advised of his or her rights, the substance of the charges and the nature of the proceedings. In many cases, it will be important for the defendant to be able to discuss, at least in a preliminary fashion, relevant facts concerning the charges so as to enable the attorney to take necessary measures to preserve or gather evidence and formulate initial legal challenges. Accordingly, even if the arraignment itself might seem perfunctory and routine, it is still important for the defendant to meet with counsel in person prior to the arraignment. Moreover, the attorney may acquire information which will enable him or her to raise certain claims or issues at the arraignment (e.g., express the need for a medical or psychiatric exam, put the government on notice to preserve certain evidence, or begin plea and cooperation discussions, to mention just a few) that would otherwise be missed. Given the exchange of information which needs to occur, and the relationship that must be developed, this meeting needs to be conducted in person and not by telephone or video teleconferencing.

From a practical and policy perspective then, the amendment is undesirable to the extent that it will permit the arraignment to occur before the defendant and his or her attorney have met in person. There may also be legal issues implicated by an arraignment conducted before the defendant and counsel having met in person.

An arraignment is a "critical stage" of the criminal process, at which a defendant has a constitutional right to be represented by counsel. See Brewer v. Williams, 430 U.S. 387, 398 (1977). An attorney who has not met with his or her client may not be able to effectively fulfill the purpose of requiring counsel at the arraignment, as the attorney will not have had the opportunity to discuss the charges with the defendant or explain the nature of the proceedings.

While all of the above reasons cause us to oppose video teleconferencing arraignments as proposed by the amendment, there is a possible safeguard which would enable the intended benefits of the proposed amendment to be achieved in appropriate cases and still insure that the defendant will have met with counsel in person prior to the arraignment. As now proposed, an oral waiver obtained from the defendant at the time he or she appears through video teleconferencing would be sufficient. If the proposed amendment were modified to require that arraignment by video teleconferencing only be permitted where a written waiver is obtained from the defendant prior to the arraignment, and is joined by the defendant's attorney, the benefits of video teleconferenced arraignments could be achieved while insuring that the defendant and counsel will have met in person prior to the arraignment. Requiring that a written waiver be submitted to the court prior to the arraignment would also help insure that the waiver was truly voluntary.

The requirement of a written waiver may cause some delay if the defendant has not had an opportunity to meet with counsel prior to the scheduled arraignment. If the accused has not yet had an opportunity to meet with counsel, however, it is questionable whether the arraignment should occur in any event.

In addition, if the amendment is not modified to require a written waiver, an anomaly in the Rules will be created between misdemeanor and felony offenses. Under Rule 43 (c)(2), the arraignment of a defendant in a misdemeanor case may occur when the defendant is not physically present only "with the written consent of the defendant . . ." While this written consent provision of Rule 43 (c)(2) permits the arraignment of a misdemeanor defendant who is not present and who does not participate through video teleconferencing, it would also apply to a misdemeanor defendant who is arraigned by video teleconferencing and is thus not physically present. It would be nonsensical to require written consent of a misdemeanor defendant, but not require the same written consent of a defendant facing a more serious felony offense. To avoid this anomaly, the proposed amendment to Rule 10 should be

modified to require that a written waiver, as well as an oral waiver, be obtained from a defendant who is to be arraigned through video teleconferencing.

Rule 43. Presence of the Defendant

The proposed amendment to Rule 43 would effect changes in four respects. First, in a non-capital case, it would permit the sentencing of a defendant in absentia who, after initially being present at trial, has become voluntarily absent at the time of the sentencing. Second, it would apply the current provision of the Rule (which applies to corporate defendants) to all organizational defendants. Third, it would permit a pretrial session to occur without the defendant's physical presence, if the defendant can participate through video teleconferencing and the defendant waives the right to be present. Fourth, it would allow a proceeding to correct a sentence under Rule 35 to occur without the defendant being present.

Subdivision (b)(2) - sentencing of a defendant in absentia

We are opposed to the amendment which would allow a defendant to be sentenced in absentia. The stated justification for the amendment is that the delay in the sentencing proceeding which is caused when a defendant fails to appear "may result in difficulty later in gathering and presenting the evidence necessary to formulate a guideline sentence." Given the relaxed evidentiary standards for sentencing proceedings, it will be rare that delay will materially prejudice a party's ability to gather or present evidence necessary to formulate a guideline sentence. The unavailability of the defendant is much more likely to make it difficult to gather and present the evidence necessary for formulating a guideline sentence.

Furthermore, if a defendant is sentenced in absentia, he or she will probably lose his or her right to an appeal of the conviction or sentence, since the law provides that defendants forfeit the right to appeal when they do not subject themselves to the jurisdiction of the court.

The resulting automatic loss of the right to appeal highlights the real problem with the proposed rule -- that it applies when a defendant is "voluntarily absent" for the sentencing. Before imposing such drastic consequences on a defendant, the Rule should, at a minimum, require that the defendant's non-appearance be willful. There is no reliable method, however, for insuring a defendant has "willfully" failed to appear (or is voluntarily absent) without the defendant's later appearance. The relatively minor and probably inconsequential effect of delaying a sentencing proceeding after verdict until the defendant is present does not justify imposing such drastic consequences on the defendant, especially where the question whether the defendant's non-appearance is voluntary or willful will not be able to be reliably determined without the defendant's presence.

An entirely different problem with the proposed amendment is that, as drafted, it is unclear whether the proposed amendment allows only sentencing of a defendant in absentia who has contested his or her guilt or innocence by proceeding to trial, or whether it also permits the sentencing in absentia of a defendant who has entered a plea of guilty and then is voluntarily absent at sentencing.

The proposed amendment would insert the words "at trial" at the end of subparagraph (b), which restricts application of the sentencing in absentia provision of proposed amendment (b)(2) to defendants who proceed to trial. We believe that this may not have been the intent of the Committee, even though the Committee Note also refers to a defendant "who has been present during the entire trial . . .", because there seems to be no apparent reason to apply the provision only to defendants who proceed to trial and not to those who are convicted by a plea. Moreover, if only a defendant who contests guilt by proceeding to trial waives his or her right to be present at sentencing, and not a defendant who pleads guilty, the provision is arguably unconstitutional. Thus, even if the Committee does not agree with our reasons why the amendment should not be adopted at all, the provision should not be adopted without eliminating or clarifying this potential point of confusion.

Subsection (c)(1) -- organizational defendants

We endorse the change in language in subsection (c)(1) to apply this provision to all organizational defendants, rather than just corporate defendants.

Subsection (c)(4) -- defendant need not be present at a pretrial session

We support the amendment which would allow a pretrial session to be conducted without the defendant's physical presence, but believe two changes should be made to the amendment.

First, the reference to a pretrial session "in which the defendant can participate through video teleconferencing" is confusing. The Committee Note states that this language does not mean that defendant must participate through video teleconferencing, but only that the court may use such technology. As written, the amendment would seem to provide that video teleconferencing must be possible; that if it is not possible, the court may not conduct the proceeding in the defendant's absence; and that even if it is possible, the court is not required to utilize video teleconferencing. If video teleconferencing is not a requirement (and we agree that it should not be), then the reference to that procedure in the Rule is superfluous and is likely to be the subject of unnecessary debate and confusion. We suggest that the reference to video teleconferencing be deleted, or that the wording of the amendment be altered to substitute the word "may" for the word "can."

Second, we believe the Rule should require that a written waiver be obtained from the defendant. A written waiver is the best, and perhaps only sure method to guarantee that a defendant has knowingly waived his or her right to be present. In addition, as discussed above, the requirement of a written waiver would avoid an anomaly and potential confusion

between misdemeanor proceedings (where written consent is required) and felony proceedings (where written consent would not be required as the amendment is currently drafted).

Subsection (c)(5) - correction of sentence without defendant being present

We are opposed to the proposed amendment which would allow a proceeding to correct a sentence under Rule 35 to be conducted in the defendant's absence because the amendment does not require that the defendant consent to proceedings in his or her absence. It may often be the case that a proceeding to correct a sentence under Rule 35 will be a perfunctory appearance with nothing of substance or real consequence accomplished. On the other hand, certain proceedings to correct a sentence may have substantial consequences for a defendant. Requiring a written waiver or consent from the defendant will not impose a significant burden, since most defendants will routinely consent not to be present if the proceeding will be of no real consequence to his or her sentence. However, if the proceeding will have an effect upon the defendant's punishment, he or she should be allowed to be present and participate in the proceeding unless he or she knowingly consents to be absent.

Rule 53. Regulation of Conduct in the Courtroom

The proposed amendment would allow the broadcasting of federal criminal proceedings through camera or other media, if it the procedure is authorized under the Judicial Conference guidelines.

We support the proposed amendment and commend the Committee for taking this important step to allow the public to have greater access to federal criminal proceedings. The dangers once thought to be associated with broadcasting of judicial proceedings have been

shown by experience not to be well founded. To the contrary, substantial public benefit can be achieved by the broadcasting of judicial proceedings.

Rule 57. Rules by District Courts

The proposed amendment would effect three changes. First, the amendment would allow the Judicial Conference to impose a uniform national numbering system on local rules of procedure. Second, the amendment would prohibit any loss of a right due to the negligent failure to conform to local requirements of form. Third, the amendment would prohibit any sanction for non-compliance with an unpublished rule or procedural requirement, absent actual notice in the particular case.

We support all of the proposed amendments. The provision for imposing a uniform national numbering system is not objectionable on any grounds, and will make it much easier for attorneys practicing in more than one district to comply with the local rules of a given district. The provision prohibiting the loss of a right due to the negligent failure to comply with a local rule of form properly respects the rights of litigants without denigrating the necessity for attorneys to attempt to comply with local rules of form for a particular district. Finally, the prohibition against sanctions for non-compliance with unpublished rules or procedural requirements would allow particular judges to utilize what are commonly referred to as "local local" rules, but would insure that they not be used to unfairly punish litigants or attorneys where proper notice of the procedure or rule has not been provided.

FEDERAL RULES OF APPELLATE PROCEDURE

Rule 21. Writs of Mandamus and Prohibition and Other Extraordinary Writs

This proposal would amend and clarify the procedures in mandamus cases under 28 U.S.C. section 1651. We think the new procedures represent a helpful modernization of the mandamus process, and a useful effort to depersonalize the action by discouraging the district court judge from becoming a party.

Rule 25. Filing and Service

It is past time to clarify that what this rule means is not really "the most expeditious form of delivery by mail" but rather "first class or priority mail." (The words "or priority" should perhaps be added, to correspond to actual Post Office usage for heavier parcels, such as a box of briefs and appendices.)

The added requirement that briefs filed by mail must bear a postmark should be clarified to give assurance that it does not exclude the use of office postage meters. To require a postmark affixed by the U.S. Post Office could prove unduly burdensome for practitioners who do not have offices near Post Offices, or whose nearby Post Offices are not open late in the evening. In larger cities, a postmark can be obtained until midnight; elsewhere, that may not be possible after 5:30 or even 4:30 p.m. The Internal Revenue Service has elaborate rules on this subject; see 26 C.F.R. section 301.7502-1(c)(iii)(b), interpreting 26 U.S.C. section 7502; which provides some protection against cheaters without undue rigidity. The Committee will recall that these rules are adopted by reference in Fed.R.App.P. 13(b), which permits a notice of appeal from a decision of the Tax Court to be filed by mail, with the postmark counting as timely filing. Perhaps a similar cross-reference in proposed Fed.R.App.P. 25(a) would be the best solution to avoid confusion arising later.

Rule 32(a). Form of a Brief and an Appendix

We have no objection to a rule that prohibits manipulation of typography for the purpose of exceeding the existing 50 page limit for opening briefs, and the other existing page limits. Finding the right solution to the problem, however, depends upon understanding what the problem is. Is it that judges' eyes are strained by too much reading of small crowded type, or that too many briefs are thought to be unnecessarily verbose? If our experience, a brief of 100,000 characters (or bytes) is just under 50 pages in the standard 12 pt. nonproportional Courier font (which looks like the classic IBM Selectric typewriter); 50 pages is more like 106,000 characters. If length is the issue, that may be the best solution.

Rule 32(a) cannot be revised without regard to Rule 28(g), however, which governs page limits. Thus, we strongly oppose the requirement that the typeface used in briefs produce no more than 11 characters to the line, and an average of no more than 300 words per page, so long as the Circuits are at the same time permitted under Fed.R.App.P. 28(g) to promulgate local rules reducing the maximum page limits. In July, 1993, the Ninth Circuit established a 35 page limit for opening briefs. Coupled with the existing typeface rule, which allows 11 point type without further restriction, the new Ninth Circuit rule essentially permits what was formerly a 50 page typewritten brief to be printed on 35 pages, thus saving paper and filing space, by using common word processing fonts such as 11-pt. Swiss. That font produces about 14 characters to the inch, about 80 characters to the line, and about 390 words per page, within standard margins, without imposing any squeezing" or compression. It is quite readable. (Sample attached.) The July, 1993 revision of the Third Circuit's rules offers another approach (a reference to it should be added to the Committee Note.) See 3d Cir. LAR 32.1(c) (offering two options: 11 pt. nonproportional Courier, or 12 pt. proportional, but not sans serif (thus barring Swiss)).

If the purpose of the certification requirement is simply to remind counsel of the formatting rules, why can't that be done in the standard notice from the Clerk, rather than filling every brief with the same verbiage?

As national practitioners, we appreciate the Committee's attempt to regularize the formalities of briefs and appendices. Whether you will be successful remains to be seen. Nationalizing the Fifth Circuit's flat filing requirement, as in proposed Fed.R.Ap.P. 32(a)(7) is a fine idea.

The bottom line for us, however, is clear: the true allowable length of briefs must not be reduced from the traditional standard of 50 typed pages. Many federal criminal appeals present several serious issues, arising from a detailed trial record, which require that much space to explicate.

Rule 32(b). Form of Other Papers

Several Circuits (including at least the Third and the Eighth) now regularly disregard the federal requirement that petitions for rehearing be produced in the form of a brief. We think that the rule's requirements is often wasteful, and suggest that petitions for rehearing (whether or not also containing suggestions for rehearing en banc) be permitted to be filed in compliance with the Circuit's rule on form of motions, at least where the petition does not exceed 10 pages (maybe that would encourage shorter petitions, too). Alternatively, a local option should be allowed, as in present Rule 28(g) and others, so as to make honest circuits out of the present civil disobedients.

as erroneous as they are unsupported. For the following reasons, the lower court's unprecedented order must be reversed.

1. The lower court's order is contrary to law.

Neither Mr. Vincent nor counsel had any duty to report the receipt of the worker's compensation payment nor to pay any of it over, other than as he did. The district court had specifically ordered Mr. Vincent to pay $818,512 to the unnamed victim or victims of his offense, "in such amounts and at such times as directed by the Probation Officer." E.R. 64. His obligation was to pay the full amount within five years, unless that amount were earlier reduced; the probation officer had ordered him in the meanwhile to pay $100 per month. Likewise, he had been ordered to make a full financial report within the first three days of each month.

There was no order that Mr. Vincent pay more than $100 if his financial circumstances suddenly changed, nor to report such changed circumstances sooner than the beginning of the following month. Thus, there is nothing in this record suggesting that Mr. Vincent was ever directed by the Probation Officer to make any payment toward the restitution amount inconsistent with Mr. Vincent's disposition of the $91,744.73 net amount he received from the worker's compensation settlement. Nevertheless, the lower court's order that the Ellis firm must disgorge its fee was based on the belief that Mr. Vincent and/or counsel had a duty to disclose Mr. Vincent's receipt of the funds prior to counsel's accepting its fee. That fundamental premise of the order has no legal basis.

This Court recently has recognized, in an analogous context, that the executive branch has no general right to obtain information from private citizens with whom it deals which it would like to receive, but which the law does not require to be disclosed. In United States v. Caldwell, 989 F.2d 1056 (9th Cir. 1993), this Court reversed a conviction for conspiring to defraud the United States. The government had argued that "people have a duty 'not to conduct their business affairs in such a manner that the IRS would be impeded

Rule 47. Rules of a Court of Appeals

Our comments on the proposed amendment to Fed.R.App.P. 47 are the same as our comments to the proposed amendments to Fed.R.Cr.P. 57, which not repeated here in the interest of brevity and space.

NACDL appreciates the opportunity to offer our comments on the Standing Committee's proposals. We look forward to working with you further on these important matters.

Yours truly,

William J. Genego
Peter Goldberger

Co-Chairs, National Association
of Criminal Defense Lawyers
Committee on Rules of Procedure